

## February 2024: Marker Guidance: Unit 2

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

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

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

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

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

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

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

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

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

## SECTION A (all compulsory – 40%)

<b>Question 1:</b>	Explain why it is important to respond to Claim Forms or other civil legal proceedings promptly, and what can be done if a default judgment is entered?
<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>
<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, 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><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>Up to 4 marks</p> <p>A pass must refer to CPR 12 and set out what a default judgment is.</p>

<p><b>Required: Candidate should explain the basis upon which the Court must/may set aside a Default Judgment:</b></p> <p><b><i>The basis upon which the Court <u>must</u> set aside a Default Judgment:</i></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><i>The basis upon which the Court <u>may</u> set aside a Default Judgment:</i></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><i>Credit reference to when a DJ may not be obtained or when permission of the court is needed:</i></b> Delivery of goods subject to Consumer Credit Act 1974 agreement; Procedure under CPR 8 is used; CPR PD 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><i>Credit reference to any authority cited on setting aside a DJ:</i></b> CPR 13.2 and CPR 13.3.</p>	<p>Up to 4 marks</p>
<p><b>Required: Candidate should explain the factors a court will consider in deciding whether to set aside DJ:</b></p> <p><b><i>Setting aside a DJ: Late compliance with CPR:</i></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><i>Setting aside a DJ: Prospects of Success:</i></b> Applicant must show 'some' reasonable prospect of success; court will assess nature of proposed defence, merits of underlying case, whether party entering judgment seeking unfair advantage, relevance of any limitation period, effect of setting judgment aside, all facts of case</p> <p><b><i>Setting aside a DJ: Promptness:</i></b> A lack of promptness is a factor for the court to consider when deciding whether to set aside a default</p>	<p>Up to 6 marks</p>

<p>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 approaches that the courts take when the recoverability of ATE premiums is challenged by the paying party
<p><b>Total Marks Attainable</b></p> <p>Fail = 0-4.9  Pass = 5+  Merit = 6+  Distinction = 7+</p>	<b>10</b>
<b>Indicative Content</b>	<b>Marks</b>
<p><b>Required: Candidates must demonstrate knowledge of what is meant by 'ATE premiums', and the legislative framework in which they operate:</b></p> <p><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 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>	Up to 2 marks

<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>	<p>Up to 4 marks</p>
<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> <p><b>Challenges to ATE premiums:</b> 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.</p>	<p>Up to 8 marks</p>

<p><b>Credit reference to authority cited on ability to challenge premiums:</b>  <i>Emily Noakes v Heart of England Foundation NHS Trust</i> [2015]</p> <p><b>Reasonableness:</b> 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.</p> <p><b>Credit reference to any authority cited on reasonableness of ATE premium:</b> <i>Allan Coleman v Medtronic Ltd</i> [2016], <i>Callery v Gray (No 1)</i> [2001], <i>Rogers v Merthyr Tydfil</i> [2007], <i>Peterborough &amp; Stamford Hospital NHS Trust v McMenemy</i> [2017].</p> <p><b>Proportionality:</b> Initial uncertainty on application of proportionality post-LASPO, but now resolved by CA. 'Old' (pre-LASPO) test of proportionality applies before April 2013; '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.</p> <p><b>Credit reference to any authority cited on proportionality and ATE premiums:</b> <i>King v Basildon &amp; Thurrock Hospital NHS Trust</i> [2016]; <i>Murrell v Cambridge University Hospital NHS Trust</i> [2017], <i>Mitchell v Gilling Smith</i> [2017], <i>BNM V MGN LTD</i> [2017]; <i>Peterborough &amp; Stamford Hospital NHS Trust v McMenemy</i> [2017]; <i>May v Wavell Group</i> [2017], <i>West and Demouilpied v Stockport NHS Foundation Trust</i> [2020].</p>	
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<b>Question 3:</b>	Explain the circumstances in which 'non-authorized persons' can legitimately carry out reserved legal activities	
<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: Candidates must explain the legislative framework governing the regulation of lawyers and reserved legal activities:</b>		Up to 3 marks

<p><b>Regulation of lawyers:</b> Authorised persons only to undertake reserved legal activities. Authorisation by 'relevant approved regulator' or 'licensable body'. Approved regulators and/or licensable bodies identified in legislation; Regulatory arrangements under statutory powers</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; Legal Services Act 2007, section 21; Legal Services Act 2007, section 176; Legal Services Act 2007, Schedule 4, Parts 1 and 2; Legal Services Act 2007, Schedule 10 (1)</p>	<p>An explanation should be given as to what it means to be an 'authorised person'</p>
<p><b>Required – Explanation of what is meant by reserved legal activities:</b></p> <p><b>Reserved legal activities:</b> 'Reserved' legal activities something only suitably qualified and authorised professional entitled to do; 'Reserved legal activity' defined by statute; Entitlement to carry on reserved legal activity determined solely under Act; Six reserved legal activities – rights of audience, conduct of litigation, reserved instruments, probate, notarial activity and administration of oaths; Criminal offence to carry out reserved legal activities unauthorised.</p> <p><b>Credit reference to any authority cited on undertaking reserved legal activities:</b> Legal Services Act 2007, section 12 and Sch 2; section 13(1); section 13(2); section 14;</p>	<p>Up to 4 marks</p> <p>An explanation should be given as to what it means to undertake reserved legal activities</p>
<p><b>Required: Candidate should discuss circumstances in which non-authorised persons are exempt from requirements of authorisation:</b></p> <p><b>Exceptions for reserved legal activities:</b> 'Non-reserved' legal activities can be undertaken by anyone, regardless of authorisation; Exceptions to rules where person carrying out reserved legal activity is 'exempt'; Exempt persons also defined by statute – exemption depends on reserved activity undertaken; Exempt persons include those granted rights by specific court in relation to specific proceedings, where right is provided by statute, where person is a party to the proceedings or where assisting with reserved activity whilst acting under supervision of authorised person; Exemption extends to those instructed by authorised person; Lack of authority does not invalidate proceedings; Does not invalidate activity if non-authorised person involved in 'mechanics' of activity; Defence to criminal charge if did not know/could not reasonably be expected to know, was reserved legal activity</p> <p><b>Credit reference to any authority cited on exemptions on undertaking reserved activities:</b> Legal Services Act 2007, section 13(2); LSA 2007, section 14; LSA 2007, section 18; LSA 2007, section 19; LSA 2007, Sch 3;</p>	<p>Up to 7 marks</p>

Ndole Assets v Designer Services Ltd [2018]; Allen v Brethertons [2019]; Baxter v Doble [2023]; R v AUH [2023];	
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<b>Question 4:</b>	Describe the steps that lawyers and their firms need to take to avoid being caught by the legislation and regulations designed to prevent 'Money Laundering'.
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<b>Total Marks Attainable</b>  Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
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<b>Indicative Content</b>	<b>Marks</b>
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<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 reference 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>	Up to 4 marks
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<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</p>	Up to 6 marks
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<p>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 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</p>	Up to 4 marks

<p>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</i> (2006) 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>	
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**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, JCB Law LLP. You have been asked to help one of the Partners in the firm with advice to the firm's client, Quality Civil Engineering and Construction Ltd. (QCEC)</p> <p>In 2015, QCEC Ltd undertook major work to design and install new drainage systems at the factory premises of Sidebottom's plc on Merseyside.</p> <p>QCEC Ltd have consulted your firm as it has now received a Claim Form issued on behalf of Sidebottom's seeking damages for breach of contract and/or negligence arising out of the alleged failure of one of the drainage pipes installed by QCEC, which said to have caused severe flood water damage to Sidebottom's premises. Your firm has been instructed to defend the claim on its merits and/or on the basis that the primary limitation period for bringing action in contract and/or tort has now expired, and the claim is 'statute barred'.</p> <p>You notice on the file that one clause in QCEC's 'standard terms and conditions of business' states "All work is to be inspected and approved by the client upon completion. No claims relating to the work will be accepted after such inspection and approval, unless notified to the company in writing within 30 days thereof". QCEC have provided your firm with a 'certificate of inspection and approval' dated 15<sup>th</sup></p>
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September 2015 signed by Sidebottom's, and instructions that no complaints were made at the time.

QCEC is concerned about expending large sums in legal costs that might not be recoverable and has asked the partner whether there is any way of having the claim dismissed because it is so weak. The partner has been instructed to consider a summary judgment application.

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.

<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, what legal and factual matters are considered by the court hearing the application, and what the costs implications of summary judgment applications are. 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 (e.g. 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 the court may grant summary judgment if it can be demonstrated that the client has a real prospect of successfully defending the claim, and there is no other good reason why the action should proceed to trial. 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. It will not be necessary for the candidate to demonstrate extensive knowledge of the Limitation Act 1980 or exclusion clauses (although credit should be given where it is), but the better candidates should be able to identify that the limitation point gives the client strong grounds for summary judgment, whereas the exclusion clause argument may require resolution at trial. 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</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>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 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:</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?;</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 defendant.</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>Limitation argument – possible ‘date of knowledge’ issue; Exclusion clause – validity may depend on ‘reasonableness’; how strong/realistic are prospects of success?; disputed facts?; complex expert evidence?; no ‘mini-trial’; 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; Limitation Act 1980, s2 and s 5; 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> Defendant must acknowledge service but does not need to serve defence; Application means Defendant does not need to serve defence before application heard; 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</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>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 '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(4); CPR 24.5(1) and 24.5(2); 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 costs and Legal representatives' charges:</b></p> <p>General position – costs in discretion of court; 'Normal' rule – 'loser' pays.</p> <p>If application succeeds - Fixed sum in respect of legal representatives' charges payable where judgment entered on application – in case of summary judgment, where sum ordered exceeds £5,000 = £210.</p> <p>If order for fixed costs not made, Court may order summary or detailed assessment. Will need 'exceptional circumstances' why fixed costs not appropriate in case.</p> <p>If application not successful, order for payment of opponent's (summary or detailed) assessed costs</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; CPR 45.22 (Table 6); CPR 44.6; CPR 45.9; CPR PD 44 Para 8</p>	<p>Up to 4 marks</p>

**Question 6:**

You work in the Costs department of Beales and Bindless LLP, 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 Barry Johnson.

Mr Johnson has instructed the firm to pursue a claim for damages for personal injury and loss arising out of his exposure to harmful chemicals whilst working for ChemCo plc. Mr Johnson claims that, as a result of this exposure, he now suffers from a debilitating neurological condition, is unable to work, and requires 24 hours per day nursing care, which is provided by his wife, Karen.

Liability is in issue and proceedings have now been commenced. Although ChemCo plc's solicitors have yet to serve a defence, the partner in your firm has now received an email from them. In this email, ChemCo's solicitors state that it has now emerged that Mr Johnson's employment with ChemCo was in a location far removed from where any exposure to the chemicals could have taken place. The email goes on to say that Mr Johnson is exaggerating the severity of his symptoms and sums claimed for gratuitous nursing care are excessive.

ChemCo's solicitors have invited Mr Johnson to withdraw his claim before the defence is served, otherwise they will seek to have the claim struck out as disclosing no reasonable cause of action and will seek an order for Mr Johnson to pay ChemCo's costs.

The partner in your firm has explained the protection offered to Mr Johnson by QOCS. Mr Johnson disputes the contents of the email but is concerned at the prospect of being ordered to pay ChemCo's costs.

You have been asked to write the body of an email to Mr Johnson advising him on the protection provided by the rules on QOCS and the prospects of

	being ordered to pay ChemCo's costs if he proceeds with the action.
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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. 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 protection, the extent to which the rule protects claimants and the exceptions to the general rule, including where protection can be lost with and/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 (CPR) framework and relevant case law around the protection and when it may be lost) 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 address points about QOCS being a limitation on enforcement, not award, of costs, and issues around striking out, fundamental dishonesty and/or third-party benefit. Candidates will demonstrate a very good depth of knowledge of the subject (i.e. a good understanding of the legislative framework and case law) 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 risks the client is running and the prospects of having an adverse costs order enforced against him. 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 or dismissal of claim; Court retains discretion as to costs and QOCS does not alter this.</p>	<p>Up to 3 marks</p> <p>For a pass, Candidates must demonstrate knowledge of what QOCS rules are in context of overall rules on costs in PI&amp;CN claims</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>	
<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> <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>	Up to 5 marks
<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</p>	Up to 8 marks

<p>party liable for costs; Dismissal will normally carry order for costs; Can only be enforced after proceedings concluded and costs have been assessed or agreed.</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; CPR 44.12;</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><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>Credit candidates for application of rules relating to QOCS to facts of case and providing reasoned advice:</b></p>	<p>Up to 8 marks</p>

**Application of QOCS rules/Case law to facts:**

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; Adverse costs only enforceable after conclusion/assessment/agreement, but order striking out claim brings proceedings to an end; Exceptions – enforcement in full with/without permission; claim 'struck out' - whether claim has 'no reasonable grounds to bring it'; 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

**Prospects of costs enforcement of ChemCo's costs:**

**Credit:** Discussion of: Client likely to be liable for ChemCo's costs on discontinuance/dismissal; amount of costs subject to assessment/agreement; no prospect of recovery of substantial damages, so nothing to enforce against without permission; high likelihood ChemCo will seek to enforce without permission if claim struck out; adverse costs will be standard basis and assessed/agreed; argument on 'fundamental dishonesty'; suggestion client may be dishonest and/or is exaggerating - may be crucial in deciding 'fundamental' dishonesty, but will depend on strength of other evidence; costs enforcement not limited to 'dishonest' element of claim

**Credit reference to any authority cited on application of QOCS rules/case law to facts:** 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; *Wall v British Canoe Union* [2015]; *Gosling v Hailo* [2014], *Zurich Insurance v Bain* [2015], *Wagett v Witold* [2015]; *Howlett v Davies* [2017];

**Credit reference to any authority cited on prospects of enforcement:** CPR 44.14; CPR 44.15, CPR 44.16(1); CPR

PD 44 Para 12.4; *Gosling v Hailo* [2014], *Zurich Insurance v Bain* [2015], *Wagett v Witold* [2015]; *Howlett v Davies* [2017]; *Michael v IE&D Hurford Ltd* (2021)

**Question 7:**

You are a qualified Costs Lawyer working for a firm of specialist Costs Lawyers, Holden & Challis Legal Costs Ltd.

You have been consulted by Ms Jackie McKenzie, who has sought your advice regarding a bill she has received for legal work carried out by her solicitors, EmployLaw UK Ltd.

Ms McKenzie tells you that she instructed EmployLaw to negotiate a settlement agreement with a former employee of hers, who was threatening to issue Employment Tribunal proceedings. Ms McKenzie tells you that she initially instructed Mr Ajaz Patel, one of the partners in EmployLaw, but thereafter dealt with a Mr Anthony Payne.

A settlement agreement was successfully negotiated, and Ms McKenzie has no concerns about that work. However, the bill Ms McKenzie has now received is substantially more than the sum of £750 + VAT agreed with Mr Patel. The reason for the increase is that the bill includes work carried out by Mr Payne in issuing and serving a County Court claim for an order requiring the former employee to return certain equipment and confidential documents. Ms McKenzie recalls mentioning these items to Mr Payne, but provision for their safe return was included in the settlement agreement. Ms McKenzie did not feel it was necessary, and certainly did not instruct Mr Payne, to issue court proceedings.

Ms McKenzie has now discovered that, although Mr Patel is a qualified solicitor, Mr Payne is not, and Mr Payne titles himself as a 'freelance employment adviser', who provides his services to EmployLaw, and other 'clients', on an *ad hoc* basis. Ms McKenzie

	<p>is very concerned that Mr Payne was neither instructed, nor qualified, to carry out this work.</p> <p>Write an advisory email to Ms McKenzie explaining the legal position on solicitor's fees, the types of work that lawyers are authorised to carry out and receive payment for, and any course of action that may be open to her to resolve her complaint.</p>												
<p><b>Total Marks Attainable</b></p> <p>Fail = 0-9.9  Pass = 10+  Merit = 12+  Distinction = 14+</p>	<p>20</p>												
<table border="1"> <tr> <td data-bbox="161 824 331 958">Fail</td> <td data-bbox="331 824 427 958">up to 9.9</td> <td data-bbox="427 824 1337 958">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.</td> </tr> <tr> <td data-bbox="161 958 331 1144">Pass</td> <td data-bbox="331 958 427 1144">10+</td> <td data-bbox="427 958 1337 1144">An answer which addresses MOST of the following points: An outline of the regulation of the lawyer/client relationship through the retainer; the duties of a lawyer in relation to fees and/or advice given to client on work done and costs; what it means to be an authorised person; an explanation of what reserved legal activities are and whether this work can be undertaken by non-qualified costs professionals; complaints mechanisms. Candidates should identify the relevant issues in the case and deal with the circumstances in their advice.</td> </tr> <tr> <td data-bbox="161 1144 331 1301">Merit</td> <td data-bbox="331 1144 427 1301">12+</td> <td data-bbox="427 1144 1337 1301">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 retainers/authorised persons/reserved legal activities and/or complaints procedures) 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.</td> </tr> <tr> <td data-bbox="161 1301 331 1435">Distinction</td> <td data-bbox="331 1301 427 1435">14+</td> <td data-bbox="427 1301 1337 1435">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.</td> </tr> </table>	Fail	up to 9.9	An answer which deals with the basic requirements of the question, but in dealing with those requirements only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues. The answer will be weak in its presentation of points and its application of the law to the facts.	Pass	10+	An answer which addresses MOST of the following points: An outline of the regulation of the lawyer/client relationship through the retainer; the duties of a lawyer in relation to fees and/or advice given to client on work done and costs; what it means to be an authorised person; an explanation of what reserved legal activities are and whether this work can be undertaken by non-qualified costs professionals; complaints mechanisms. 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 retainers/authorised persons/reserved legal activities and/or complaints procedures) 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.	
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<p><b>Indicative Content</b></p>	<p><b>Marks</b></p>												
<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>Up to 4 marks</p> <p>Candidates should at least be able to demonstrate an understanding of the significance of retainers in regulating the lawyer/ client relationship and duties to clients in relation to costs.</p>												

<p><b>Required: Candidates must explain duties of lawyers in relation to fees:</b></p> <p><b>Duties in relation to fees:</b> Must give clients information on costs in way they can understand; Must give best possible information on costs of matter at outset and as matter proceeds; Full disclosure to client;</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 1.4; Para 3.1; <i>Davies v London &amp; Provincial</i> (1878); <i>Motto v Trafigura</i> (2012)</p>	
<p><b>Required: Candidates must explain the regulation of lawyers through legislative provisions:</b></p> <p><b>Regulation of lawyers:</b> Authorised persons only to undertake reserved legal activities. Authorisation by 'approved regulator'.</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; Criminal offence to carry out reserved legal activities unauthorised; Unauthorised reserved legal activities does not invalidate proceedings; '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, section 12 and Sch 2; section 13(1); section 13(2); section 14; section 19 and Sch 3; <i>R v AUH</i> [2023]</p>	Up to 5 Marks
<p><b>Required: Candidates must provide explanation of remedies for complaints:</b></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 act outside terms of retainer; not to mislead client; give appropriate advice on costs; keep client updated as case progresses; make client aware of</p>	Up to 5 Marks

<p>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>Court Assessment of Costs:</b> Non-contentious retainer set aside under common law contract rules, or challenged as unfair or unreasonable, or hours excessive;</p> <p><b>Credit reference to any authority cited on Court Assessment of Costs:</b> Solicitors Act 1974, section 57</p>	
<p><b>Credit candidates for application of rules relating to retainers, authorisation and reserved legal activities, and potential remedies to facts of case:</b></p> <p><b>Application of rules on retainers:</b>  <b>Credit:</b> Discussion of: Must have retainer in place; Retainer formed in normal way; argument on acting outside terms of retainer without authority; argument on 'misleading' advice, especially in relation to costs; argument on not keeping client informed; arguably only liable to pay fee agreed at outset</p> <p><b>Application of rules on duties in relation to fees:</b></p> <p><b>Credit:</b> Discussion of: Information on costs not given in way client can understand; not received fully 'informed consent' to incur costs or full disclosure given to client; not given 'best possible information on costs' from outset and/or as matter proceeds; breach of professional duties not necessarily breach of retainer</p> <p><b>Credit reference to any authority cited in relation to retainers and/or duties to clients on fees:</b> <i>Milner v Bilton</i> (1966) Solicitors' Code of Conduct, Para 8.6; Para 8.7; <i>Davies v London &amp; Provincial</i> (1878); <i>Motto v Trafigura</i> (2012);</p>	<p>Up to 10 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>

**Application of rules on authorisation and reserved legal activities:**

**Credit:** Discussion of: Conducting litigation – issuing and serving proceedings - reserved legal activity; Unauthorised person conducting litigation; Exempt if granted right by court (unlikely on facts) or under supervision of authorised person; Instructing solicitor authorised person, even if 'adviser' is not; whether sufficient supervision of 'independent' adviser; Unauthorised litigator does not invalidate proceedings; activity not invalid if involvement in 'mechanism' only.

**Credit reference to any authority cited on authorisation and reserved legal activities:** Legal Services Act 2007, section 12, section 13, section 18 and section 19; *Ndole Assets v Designer Services Ltd* [2018]; *Gempride Ltd v Bamrah* [2018]; *Allen v Brethertons* [2019]; *R v AUH* [2023];

**Application of rules on remedies:**

**Credit:** Client will have to show common law grounds to set aside agreement (whole or in part) if court action pursued; Breach of professional duty not necessarily breach of contract; Retainer likely to be set aside, in part, or varied; Alternative argument that fee 'unfair or unreasonable' in circumstances; Pursue internal complaints procedures – not limited to where agreement could be set aside; Internal complaints quicker, cheaper and more productive than court action; Good prospects of remedy – Reduction/ further reduction to agreed fee - for breach of retainer and/or professional duties on internal complaint; Legal Ombudsman once internal procedures exhausted if no remedy

**Credit reference to any authority cited on application of rules on remedies:** Solicitors Act 1974, section 57; *Milner v Bilton* (1966); *Davies v London & Provincial* (1878); Solicitors' Code of Conduct, Para 1.4; Para 3.1; Paras 8.2-8.5; Para 8.6; Para 8.7



**Question 8:**

You are a trainee Costs Lawyer working for Smith, Jones and Atkinson LLP, Legal Costs Consultants. One of the senior partners in the firm has asked you to review a file for a new client, Mr Harold Gregson.

Mr Gregson was the Defendant in a lengthy and complex civil claim involving his former accountants. The proceedings were resolved mostly in Mr Gregson's favour, with Mr Gregson being awarded most of the costs of both defending the claim and pursuing his counterclaim. However, because of the amount of costs in question and the complexity of some of the costs issues, the court directed a detailed assessment in the absence of agreement.

Mr Gregson attended the detailed assessment hearing last week with his solicitor. The claimants have now instructed a firm of costs lawyers. Mr Gregson's instructions are that the claimant's costs lawyer appeared to be unfamiliar with the case and underprepared for the hearing. The claimant's costs lawyer spent the whole of the hearing presenting arguments on points that were not, or no longer, in dispute, and going through authorities which had been overruled by higher courts. He persisted with these arguments despite interventions by the judge and Mr Gregson's solicitor.

There was insufficient court time to address the real issues on the assessment, and the hearing has now been adjourned to another day. When Mr Gregson and his solicitor tried to discuss settlement with the costs lawyer outside the hearing room, the costs lawyer called them a 'pair of wankers'.

On the advice of his solicitor, Mr Gregson has approached your firm for advice and representation on the resumed assessment hearing. Mr Gregson is particularly concerned about the claimant's costs lawyer's 'unprofessional' behaviour and the additional fees Mr Gregson has incurred for his own solicitor's services.

You have been asked to review Mr Gregson's file of papers and draft a memo of advice on the position

	overall and the options open to him to remedy the position.	
<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 a cost lawyer's duty to clients, an explanation of the costs lawyer's duties to the court, an explanation of the professional conduct rules, an explanation of the rules and procedures on wasted costs, an explanation of complaints procedures. 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 professional duties and/or wasted costs) with very good application and some analysis having regard to the facts. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc.
<b>Indicative Content</b>		<b>Marks</b>
<p><b>Required: Candidates must explain the professional duties of costs lawyers:</b></p> <p><b>Duties to Client:</b> Act in the best interests of the client at all times; To conduct case with proper skill and care; Standard acceptable to responsible body of profession;</p> <p><b>Credit reference to any relevant authority cited on duties to client:</b> CLSB Code of Conduct, Principle 3, <i>Bolam v Friern Barnet Hospital</i> [1957]; <i>Rondel v Worsley</i> [1967];</p> <p><b>Professional duties to others:</b> Duty to act professionally and with integrity, not give false or misleading information to anyone, act in a way that does not diminish public trust in profession; Duty to treat everyone with dignity and respect.</p>		<p>Up to 4 marks</p> <p>An explanation should be given as to the main professional duties of costs lawyers to both clients and others</p>

<p><b>Credit reference to any authority cited on professional duties to others:</b> CLSB Code of Conduct, Principle 1; CLSB Code of Conduct, Principle 6</p>	
<p><b>Required: Candidates must explain rules on costs lawyers' duties to the court:</b></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>	Up to 4 marks
<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 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</i></p>	Up to 6 marks

<p>McDonald [2001]; Wates Construction Ltd v HGP Greentree Alchurch Evans Ltd [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 professional duties, remedies for breach, and wasted costs orders to facts of case and providing reasoned advice:</b></p> <p><b>Duties to Client:</b>  <b>Credit:</b> Discussion that duties to act in best interests etc. are duties owed <u>to client</u>: Liability for loss caused is to own client, not third parties</p> <p><b>Duties to others:</b>  <b>Credit:</b> Discussion that duties owed to others with whom costs lawyer has dealings part of professional duty; Breach of professional duty does not breach legal duty; Remedies lie with internal complaints procedures and/or CLSB and/or Legal Ombudsman</p> <p><b>Application of rules on duties to court:</b>  <b>Credit:</b> Discussion of whether actions of costs lawyer met standard acceptable to responsible body of costs lawyers' profession, whether 'knowingly or recklessly' misled the court; whether there was failure to advance relevant authorities; whether arguing unarguable or irrelevant points.</p> <p><b>Application of rules on wasted costs orders:</b>  <b>Credit:</b> Discussion of: Whether actions of costs lawyer amounted to 'unreasonable, improper or negligent' conduct or 'merely mistake or error of judgment';</p>	<p>Up to 10 Marks</p>

Discretionary nature of remedy, depend on view judge takes on facts of case; Not designed to 'penalise' representative; Not designed to remedy 'frustration' at not being able to recover costs elsewhere; Needs 'high level' of misconduct to justify order; Need to make application on notice for WCO, although court could initiate WCO hearing on own initiative

**Prospects of favourable outcome:**

**Credit:** Discussion of: Duties owed to client, so no liability to firm's client for 'negligent' performance of duties; 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; Whether 'negligent' or other 'improper' conduct was sufficiently 'high level' to justify award of Wasted Costs against costs lawyer; Discretionary remedy, relief not guaranteed even in strong case; Better remedies in 'normal' costs of assessment proceedings (costs in any event) and/or complaints procedures.

**Credit reference to any authority cited on application of rules to facts and/or prospects of success:** *Bolam v Friern Barnet Hospital* [1957]; *Arthur J S Hall & Co v Simmons* [2007]; Senior Courts Act 1981, Section 51; CPR 23; CPR 44.2; CPR 46.8-46.10; *Copeland v Smith* [2002]; *Buxton v Mills-Owens* [2010]; *Ridehalgh v Horsefield* [1994]; CLSB Code of Conduct Principle 2, Principle 3, Principle 6

**Question 9:**

You have just taken over as Head of Costs at Mills & Webb LLP, a small high street firm of solicitors. One of the Senior Partners in the firm, who is also the firm's COFA, has asked for your advice about the activities of one of the firm's associate solicitors, Mark Howard, who left the firm suddenly and without warning last week.

Following Mr Howard's departure, the Senior

Partner has reviewed all his files. The Senior Partner is particularly concerned about a number of files in which Mr Howard acted for a Ms Veronica Sweet. All the files appear to relate to property transactions involving Ms Sweet in her personal capacity or companies (some of them registered outside the UK) of which Ms Sweet appears to be the sole or major shareholder.

The transactions all involve the buying and selling of properties, often outright without the assistance of a mortgage. Where mortgage lenders have been involved, the mortgage advances have often been repaid within a few months of completion.

The files show most of the payments on these transactions being made to Ms Sweet or one of her companies, but there are some regular payments made to overseas bank accounts held in the name of a 'Mr Gee'. These payments all involve conversion of the sums from Pounds Sterling to local currency – mostly US Dollars or Euros.

Write a memo to the Senior Partner/COFA setting out the position of the firm under the rules on money laundering and handling of clients' funds in relation to these transactions. Your memo should include advice on what steps the firm needs to take to ensure compliance with the legal and regulatory requirements.

<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 principal 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 and an explanation of the relevant local governance measures 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 what Money Laundering is and the regulatory framework in which it operates:</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>Money Laundering Legislation and Regulations:</b>  Criminal offences under Proceeds of Crime Act 2002: 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>Up to 6 marks</p> <p>To achieve a pass, an explanation should be given about the Money Laundering Regulations and principal criminal offences under the 2002 Act</p>

<p><b>Credit reference 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><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>Treatment of Client Money:</b> Client money paid 'promptly' into client/customer account and returned 'promptly' when no longer proper reason to hold funds; Exceptions include where payment would conflict with other rules or regulations; transfers/withdrawals only for 'regulated services'; prohibition on use of client account as 'banking facility; Client's money 'sacrosanct'.</p> <p><b>Credit reference to any authority cited on financial management of firms:</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 Code of Conduct for Firms, Para 2.1; Para 5 and Para 9.1 and 9.2; <i>SRA v Ahmed</i> (2019); Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, Regs 27-30</p>	<p>Up to 6 marks</p>



<p><b>Required: Candidates must explain the rules on compliance with Solicitors Accounts Rules and Money Laundering Regulations:</b></p> <p><b>Systems and controls:</b> Firms must comply with requirements of SAR and SRA; Duty to report serious breaches of regulatory requirements and/or SARs; May inform of any facts or matters that 'reasonably' ought to be brought to SRA's attention; Firms to apply 'due diligence' measures on new business relationship; proof of identity of customer and/or others that may be involved in transactions; nature of business relationship; due diligence can be 'enhanced' or 'simplified' - credit more expansive explanation; Duty on MLRO to consider internally and/or report on 'suspicious activity'; Firms required to make Suspicious Activity Reports (SARs) only if 'appropriate'; Firms to provide staff with appropriate training on SARs and Money Laundering; Customer due diligence (CDD) measures for new clients; Duty to maintain CDD records, even if not suspicious; Duty to avoid 'tipping off' clients</p> <p><b>Credit reference to any authority cited on Systems and Controls:</b> SRA Code of Conduct for Solicitors, Rule 7.7, 7.8; 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 4 marks</p>
<p><b>Credit Candidates for discussion of application of rules to factual scenario and provision of advice:</b></p> <p><b>Possible Commission of Criminal Offences:</b></p> <p><b>Credit:</b> Discussion of: Suspicion that files may disclose evidence of converting, transferring or removing criminal property, becoming concerned in arrangement to facilitate the acquisition, retention, use or control of criminal property, and possibly being involved in fundraising. State of 'knowledge or suspicion' of managers not evident from facts.</p> <p><b>Regulatory framework:</b></p> <p><b>Credit:</b> Discussion of: COFA appointed and has specific duty to ensure compliance with SRA Accounts Rules; Does COFA also act as MLRO or is there separate officer?; Does firm have systems in</p>	<p>Up to 8 marks</p>

place for reporting breaches of SARs and/or MLRs?  
Request to transfer to third party and convert foreign  
currency may be use as banking facilities

**Management systems and controls:**

**Credit:** Discussion of: Checks on identity of client  
carried out of new business relationship; Checks on  
identities of other parties involved; Record keeping  
systems of firm; Enquiries about sources of cash;  
Evidence that client's position requires 'enhanced'  
due diligence; Records of enquiries and documents  
retained; What arrangements in place for training of  
staff?

**Next Steps:**

**Credit:** Discussion of: Consider internally whether  
activity 'suspicious'; Whether there is 'reasonable  
explanation'; Whether checks carried out at all  
and/or recorded; Whether adequacy or veracity of  
documents provided (if any) in question; Report  
'suspicious' activity to National Crime Agency; Do  
not inform client – tipping off; Report breach of SARs  
– mandatory or discretionary?

**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;  
SRA Code of Conduct for Solicitors, Rule 7.7, 7.8;  
Money Laundering, Terrorist Financing and Transfer of  
Funds (Information on the Payer) Regulations 2017,  
Regs 27-30, Reg 33, Reg 37; *R v da Silva* (2006); *SRA v  
Ahmed* (2019); CLSB Guidance Note Handling Client  
Money (Principle 3.6)