

August 18: Marker Guidance: Unit 1

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 (5 QUESTIONS; ALL COMPULSORY – 40%)

Question 1:	Explain in what circumstances a precedent H would not need to be completed.	
Total Marks Attainable	5	
Fail = 0-2.4 Pass = 2.5+ Merit = 3+ Distinction = 3.5+		
Indicative Content	Marks	
Required (explanation of when costs management applies):	1 Mark	
<i>CPR 3.12 (1) and PD 3E:</i> apply to all Part 7 multi-track cases commenced on or after 1 st April 2013 unless it falls within one of the listed exceptions.		
Credit any of the exceptions cited e.g:	3 Marks	
<i>CPR 3.12 (1):</i> The claim is £10 million or more, on behalf of a person under the age of 18 (a child), proceedings are the subject of fixed costs or scale costs, the court otherwise orders	To pass, candidates must cite two or more of the relevant exceptions.	
<i>CPR 3.13(1):</i> provides that (except for litigants in person or as the court may otherwise order), all parties must file and exchange budgets; where value under £50,000 with DQs or any other case not less than 21 days before CMC.		
Credit any points of law cited e.g:	2 Marks	
<i>CIP Properties Ltd v Guilford Try Infrastructure Ltd and ors [2014]:</i> Costs management can apply to the highest value cases despite CPR 3.12 which states this wont apply to claims worth 10m or more. This is because it falls under the Court's discretion.	To achieve a distinction, candidates are likely to discuss the court's discretion with reference to case authority and/or discuss when budgets may not need to be filed.	
<i>CPR 3.13(2):</i> In the event that a party files and exchanges a budget under paragraph (1), all other parties, not being litigants in person, must file an agreed budget discussion report no later than 7 days before the first case management conference.		

Question 2:	Explain what is meant by the indemnity principle.	
Total Marks Attainable	5	
Fail = 0-2.4 Pass = 2.5+ Merit = 3+ Distinction = 3.5+		
Indicative Content	Marks	

<p>Required explanation of the indemnity principle:</p> <p><i>The indemnity principle:</i> simply provides that the receiving party cannot recover more costs from the paying party than he himself would be liable to pay his own solicitors. The indemnity principle does not apply in certain circumstances e.g. legal aid. This does not appear to be a situation where the indemnity principle will not apply.</p>	<p>1 Mark</p> <p>A pass must include an explanation</p>
<p>Any other relevant point to describe the principle e.g:</p> <p><i>Harold v Smith (1860):</i> costs award should not be seen as a punishment.</p> <p><i>Gundry v Sainsbury (1910):</i> unsuccessful party should not have to pay more to the successful party's solicitor than the individual successful party.</p> <p><i>General of Berne Insurance v Jardine (1998):</i> look at the costs on an item by item basis, not globally.</p> <p><i>Hollins v Russell (2003):</i> applies to CFA cases.</p> <p><i>Bailey v IBC (1998):</i> signature on the bill is sufficient to show that the indemnity principle has not been breached. However, if a genuine issue is raised by the paying party then the court is likely to consider this. This is a situation which could arise in this situation.</p>	<p>Up to 4 marks</p> <p>To achieve more than a pass candidates must not simply cite cases but should show a holistic understanding of the development of the principle</p>
<p>Any other relevant point to describe the principle e.g:</p> <p><i>It is very common:</i> for paying parties to dispute or at least question the terms of the receiving party's retainer agreement, and furthermore demand sight of the retainer.</p> <p><i>Does not apply:</i> the indemnity principle does not apply in certain circumstances e.g legal aid</p>	<p>Up to 2 marks</p> <p>A merit/distinction will include some analysis of the principle</p>

<p>Question 3:</p>	<p>Outline the costs lawyer's duty to the court.</p>	
<p>Total Marks Attainable</p> <p>Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+</p>	<p>10</p>	
<p>Indicative Content</p>	<p>Marks</p>	
<p>Required (explanation of the costs lawyers duty to the court):</p> <p><i>CL Code of Conduct:</i> CLSB set and publish the CL Code of Conduct (2014 amendments) x7 principles</p> <p><i>CLSB Code of Conduct Principle 2:</i> Comply with your duty to the court in the administration of justice</p>	<p>Up to 4 Marks</p>	

<p>CLSB Code of Conduct Principle 2.1: You must at all times act within the law.</p> <p>CLSB Code of Conduct Principle 2.2: You must not knowingly or recklessly either mislead the court or allow the court to be misled.</p> <p>CLSB Code of Conduct Principle 2.3: You must comply with any court order which places an obligation on you and you must not be in contempt of court.</p> <p>CLSB Code of Conduct Principle 2.4: You must advise clients to comply with court orders made against them.</p>	
<p>Credit discussions on the conflict of the duty to the court and client e.g:</p> <p>CLSB/SRA Code of Conduct Principle 3.1 : You must act at all times to ensure the client’s interest is paramount except where this conflicts with your duties to the court or where otherwise permitted by law. You must decline to act if it would not be in the client’s best interests or if that client’s interests conflict directly with your own or with those of another client.</p>	Up to 1 Mark
<p>Credit reference to/a discussion of any of the following:</p> <p>Ahmed v Powell [2003]: The solicitors are responsible for the conduct of the detailed assessment proceedings and cannot avoid that responsibility merely by instructing a costs draftsman. Costs draftsmen can appear on behalf of the party only as a duly authorised representative of the solicitor who has instructed him to be there.</p> <p>Crane v Canons Leisure Centre [2007]: Work undertaken by independent costs draftsmen could be treated as part of the instructing solicitor’s profit costs such as to attract a success fee.</p> <p>Waterson Hicks v Eliopoulos [1997]: The costs draftsman has the same authority as the solicitor would have had to consent to orders.</p> <p>Arthur J S Hall & Co v Simmons [2007]: Lord Hoffman (at page 691): “<i>The fact is that the advocate, like other professional men, undertaking a duty to his client to conduct his case, subject to the rules and ethics of his profession, with proper skill and care</i>”</p> <p>Buxton v Mills-Owens [2010]: If a point is not properly arguable, it should not be argued.</p> <p>Copeland v Smith [2002]: It is the duty of an advocate to draw the judge’s attention to authorities that are in point, even if they are adverse to that advocate’s case.</p>	Up to 6 Marks To achieve more than a pass candidates must not simply cite authority but should show an understanding of how the rules operate

Question 4:	Explain what a default costs certificate is, in what circumstances one may be obtained and the procedure for having a default costs certificate set aside.
<p>Total Marks Attainable</p> <p>Fail = 0-4.9 Pass = 5+</p>	10

Merit = 6+ Distinction = 7+	
Indicative Content	Marks
<p>Required (reference to the CPR and PD):</p> <p>Order for payment of costs: claimed by the RP when there has been no receipt of PODs following the expiry of the time for serving the same.</p> <p>CPR 47.9 (2): requires POD to be served 21 days after the date of service of the NOC</p> <p>CPR 47.9 (4): The RP may file a request for a DCC if the 21 days (or relevant period) has expired and the RP has not been served with any POD.</p>	<p>Up to 3 Marks</p> <p>To pass candidates must (at minimum) explain what a DCC is</p>
<p>Credit a discussion on applications for DCCs e.g.:</p> <p>CPR 47.11(1): Application for requesting a DCC is on Form N254</p> <p>CPR 47.11(2): Will include an order to pay costs to which the DCC relates</p> <p>CPR 47.11(3): Sum payable is set out in PD (£80 fixed costs plus court fee – CPR PD 47 para 10.7)</p> <p>CPR 47.9 (5): If any party serves POD before the issue of a DCC the court may not issue the DCC.</p>	<p>Up to 4 Marks</p> <p>To achieve more than a pass candidates must not simply cite law but should show a greater depth to their knowledge base</p>
<p>Cedit a discussion on applications to have a DCC set aside e.g.:</p> <p>CPR 47.12(1): Court will set aside if RP not entitled to the order.</p> <p>CPR 47.12(2): court may set aside or vary if it appears to the court that there is some good reason why the DA proceedings should continue (see also CPR PD 47 para 11.2(3))</p> <p>CPR 47.12 PD 11.2(1): Make application supported by evidence</p> <p>CPR 47 PD 11.2(2): matters to which the court must have regard include whether the party seeking the order made the application promptly</p> <p>CPR 47.12(3): in relation to pro bono orders (section 194(3) of the <u>Legal Services Act 2007</u>), the receiving party must send a copy of the order setting aside or varying the default costs certificate to the prescribed charity</p>	<p>Up to 6</p> <p>To achieve more than a pass candidates also need to explain when obtained and circumstances for setting aside</p>

Question 5:	Explain the circumstances, timing and procedure of an application for an interim payment on account of costs in detailed assessment proceedings.
<p>Total Marks Attainable</p> <p>Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+</p>	10

Indicative Content	Marks
<p>Required reference to the CPR in relation to interim payments:</p> <p>CPR 44.2(8): Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so (the presumption)</p> <p>CPR 47.16: power to issue an interim costs certificate where a DA hearing has been requested</p> <p>Para 10.2(e) SCCO guide 2013: court will not generally consider applications for interim payments in PA matters because of the time frame within which a PA is estimated to take place (i.e 6 weeks).</p>	<p>Up to 3 Marks</p> <p>A pass must include reference to some or all of these rules</p>
<p>Any other point regarding interim payments e.g:</p> <p>Voluntary, reduces interest for the paying party and assists firms with cashflow.</p>	<p>Up to 2 Marks</p>
<p>Credit any of the following:</p> <p>CPR 23: applications where a request cannot be filed and a further interim payment is required – demonstrating an understanding of the application process and the need to give good reason.</p> <p>N244: application should be made on this form.</p> <p>Applications should include: evidence, reason for request, draft order (CPR 23.6) and relevant fee</p> <p>Dyson v Hoover (2003): claim settled after trial but before inquiry into damages held - not appropriate for judge to decide on interim payment application where unaware of detailed issues covered in trial</p> <p>Mars v Teknowledge (2000): looked at the merits of making of order for interim costs. An additional point in this case was once it had been decided to make an order for payment of interim costs, how much should be ordered to be paid. This case suggests that the amount awarded as an interim payment should be two thirds of what the judge thinks will be awarded between the parties on a subsequent Detailed Assessment.</p> <p>Thomas Pink Ltd v Victoria's Secret UK Limited [2014]: The sum sought by the claimants was essentially the budgeted sum at the time they asked for the payment. The court made an award of 90% of the sum in the claimant's budget rounded up to the nearest thousand.</p> <p>MachInnes v Gross [2017]: The approved budget is the appropriate starting point for the calculation of any interim payment on account of costs. Where there is an approved or agreed costs budget, when costs are assessed on a standard basis at the end of the case, the court will not depart from it, unless satisfied that there is a good reason to do so. The judge expressed the view that 10% is the maximum deduction appropriate in a case in which there is an approved costs budget and therefore 90% could be awarded.</p>	<p>Up to 8 Marks</p> <p>To achieve more than a pass candidates must not simply cite the examples but should show a holistic understanding of interim payments; for a distinction candidates are likely to refer to the CPR 23 process</p>

Cleveland Bridge UK Ltd v Sarens (UK) Ltd [2018]: In budgeted cases, in respect of estimated costs, 90% is an appropriate figure. A reasonable sum in respect of incurred costs will often be one that is an estimate of the likely level of recovery subject to an appropriate margin to allow for error.

SECTION B (4 QUESTIONS; ALL COMPULSORY – 60%)

Question 6:		<p>You work for a small costs firm, Harrison and Merrix Costs Associates in Northumberland. You are considering undertaking the costs lawyer qualification because you believe it will have a positive impact on your performance. In order to do the qualification you need approval from the managing partner, Jonny Justice, who is unqualified.</p> <p>You are adamant that completing the course will be beneficial to the business. You believe being regulated and demonstrating to clients that you comply with rules on professional conduct will assist you in gaining trust from prospective clients. You also believe that with the recent rise in instructions from litigants in person that being able to undertake reserved legal activities will assist you to secure more of that work for the firm. However, you believe that Mr Justice will have very different views.</p> <p>Outline the reserved legal activities a costs lawyer can undertake and the principles of the CLSB code of conduct.</p>
Total Marks Attainable		10
Fail	up to 4.9	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	5+	An answer which addresses MOST of the following points: description of the relevant reserved legal activities, a discussion on what it means to be an authorised person and the 7 principles from the CLSB code of conduct. Candidates will demonstrate a good depth of knowledge of the subject with good application and some analysis having regard to the facts, although the candidate may demonstrate some areas of weakness.
Merit	6+	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 with very good application and some analysis having regard to the facts. Most views expressed by the candidate should be supported by relevant authority including case authority.
Distinction	7+	An answer which includes ALL the requirements for a pass and merit (as set out above) PLUS the candidate's answer should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles to reach a measured conclusion. All views expressed by the candidate should be supported by relevant authority including case authority. Work should be written to an exceptionally high standard considering the response will have been drafted in examination conditions.
Indicative Content		Marks
<p>Required reference to the Legal Services Act 2007 e.g:</p> <p>Section 12 and Sch 2 of the Legal Services Act 2007: sets out the reserved legal activities which are: Exercise of rights of audience – relevant to Costs Lawyer's Role, Conduct of litigation – relevant to Costs Lawyer's</p>		<p>Up to 3 Marks</p> <p>A pass must include reference to</p>

<p>Role, Reserved instrument activities, Probate activities, Notarial activities, Administration of oaths – relevant to Costs Lawyer’s Role.</p> <p>Section 18 of the Legal Services Act 2007: defines an authorised person (which includes an entity) as being someone that is regulated by an approved regulator and may undertake reserved legal activities.</p> <p>Section 20(5) of the LSA 07 and Schedule 4: ACL is approved regulator, approved regulators under the LSA regulate those undertaking reserved legal activities who are known as authorized persons.</p> <p>Memorandum of Understanding: between ACL and the CLSB delegates the regulatory function to the CLSB.</p>	<p>some or all of these rules</p>
<p>Credit reference to/a discussion of any of the following:</p> <p>The 7 principles from the COC: Professionalism and integrity, Administration of justice and duty to court, Clients interests, Service and quality of work, Ombudsman, Respect and dignity and Confidentiality.</p> <p>Rules from the Practising Rules: e.g Rule 4: application for practising certificate , Rule 8: notification requirements, Rule 9: continuing professional development and Rule 10: insurance</p>	<p>5 Marks</p> <p>To achieve more than a pass candidates must not simply cite authority but should show an understanding of how the rules operate</p>

<p>Question 7:</p>	<p>You are a trainee costs lawyer working for Costs Experts Ltd. You have received instructions from a receiving party, Hartland and Smith LLP, in a commercial litigation matter. The paying party are contending that the costs Hartland and Smith LLP are seeking to recover are disproportionate. The receiving party would like advice on what proportionality means and when it is relevant on assessment.</p> <p>Prepare a summary as to what proportionality is and the nature of the test.</p>	
<p>Total Marks Attainable</p>		<p>10</p>
<p>Fail</p>	<p>up to 4.9</p>	<p>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.</p>
<p>Pass</p>	<p>5+</p>	<p>An answer which addresses MOST of the following points: explanation of when proportionality is relevant, what the two tests are and how the tests should be applied. Candidates will demonstrate a good depth of knowledge of the subject with good application and some analysis having regard to the facts, although the candidate may demonstrate some areas of weakness.</p>
<p>Merit</p>	<p>6+</p>	<p>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 with very good application and some analysis having regard to the facts i.e an understanding of the factors in the new test possibly providing examples of how those factors may be applied to a case. Most views expressed by the candidate should be supported by relevant authority.</p>
<p>Distinction</p>	<p>7+</p>	<p>An answer which includes ALL the requirements for a pass and merit (as set out above) PLUS the candidate’s answer should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. The candidate will provide an excellent summary setting out a response to the question including an explanation of when the principle is relevant. All views expressed by the candidate should be supported by relevant authority. Work should be written to an exceptionally high standard considering the response will have been drafted in examination conditions.</p>

Indicative Content	Marks
<p>Required explanation of proportionality:</p> <p>Pre and Post LASPO 2012 tests : Lowndes v Home Office 2002 for old test, CPR 44.3(5) for new test.</p> <p>The Lownds test: was formulated by Lord Woolf LCJ in <i>Lowndes v Home Office</i> (2002) and it requires the court to take the following two-stage approach: Does the total costs figure appear to be proportionate? (The global approach.) If yes, apply the reasonableness test to the assessment of each item. If no, apply additionally the stricter test of necessity to the assessment of each item. (The item by item approach.)</p> <p>CPR 44.3(5): costs are proportionate if they bear a reasonable relationship to sums in issue (CPR 44.3(5)(a)), value of non-monetary relief (CPR 44.3(5)(b)), complexity of litigation (CPR 44.3(5)(c)), additional work generated by conduct (CPR 44.3(5)(d)), wider factors (CPR 44.3(5)(e)).</p>	<p>4 Marks</p> <p>A pass must include an explanation</p>
<p>Any other relevant point to describe the relevance of the principle on assessment e.g:</p> <p>Section 51 of the Senior Courts Act 1981 and CPR 44.2: 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>CPR 1: Overriding objective – “at proportionate cost” means dealing with a case, so far as is practicable, dealing with the case in ways which are proportionate to the amount of money involved; to the importance of the case; to the complexity of the issues; and to the financial position of each party.</p> <p>CPR 44.3(2): Where the amount of costs is to be assessed on the standard basis, the court will only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.</p>	<p>Up to 4 marks</p> <p>A merit/distinction will include some discussion of the factors that need to be considered and/or a discussion on the standard basis of assessment</p>
<p>Credit any of the following or any other relevant point to describe how the test of proportionality is: developing/uncertain and should or should not be applied:</p> <p>BNM v MGN Ltd [2016]: Two stage approach: Line by line reduction considering reasonableness. Line by line reduction considering proportionality.</p> <p>May v Wavell Group [2016]: Two stage approach: Line by line considering reasonableness. Broad brush deduction to reach a ‘proportionate’ figure.</p> <p>May v Wavell Group [2017]: Rules do not state that test has to be undertaken in two stages but likely that when the test is applied there would be a two-stage assessment. Whether the relationship is reasonable is a matter of judgment, rather than discretion, which requires attribution</p>	<p>Up to 3 Marks</p> <p>To achieve more than a pass candidates may have cited case authority demonstrating a holistic understanding of the development of the principle</p>

of weight, and sometimes no weight, to each of the factors CPR 44.3(5)(a) to (e).	
<p>Credit a discussion on the relevance of the principle on indemnity basis assessments e.g:</p> <p>CPR 44.3(3): Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.</p> <p>Kellie and another v Wheatley & Lloyd Architects Ltd [2014]: The court does not have to consider issues of proportionality when assessing costs on the indemnity basis.</p>	Up to 2 Marks

Question 8:	<p>You work for Killarney and Kenman Solicitors, a large, reputable firm of solicitors in Bolton. You have just qualified as a costs lawyer and hold a current practising certificate. Your firm accepts external instructions in costs matters and you have received an email from Mr Barry Boulder, a newly qualified solicitor at a small high street firm. He has contacted you having received a bill of costs from an opponent that successfully defended a boundary dispute claim. The claim was valued at £150,000. Mr Boulder has no prior experience of detailed assessment and needs you to explain the procedure and next steps.</p> <p>Prepare the body of an email in response to Mr Boulder.</p>	
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: contents of a bill of costs, details as to how detailed assessment is commenced, next procedural steps (PODs, Replies and negotiations) and the request for the hearing. Candidates will demonstrate a good depth of knowledge of the subject with good application and some analysis having regard to the facts, although the candidate may demonstrate some areas of weakness.
Merit	12+	An answer which includes ALL the requirements for a pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject. Candidates may discuss authority for assessment and may also refer to provisional assessment although they may also make the observation that they do not know what the total costs included in the bill are. Most views expressed by the candidate should be supported by relevant authority.
Distinction	14+	An answer which includes ALL the requirements for a pass and merit (as set out above) PLUS the candidate's answer should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant authority in respect of the procedure. The candidate will provide an excellent body of an email setting out the procedure in detail with excellent reference to relevant authority. Work should be written to an exceptionally high standard considering the response will have been drafted in examination conditions.
Indicative Content		Marks
<p>Required (a discussion on the commencement of assessment proceedings):</p> <p>CPR: 44.6: procedure for assessing costs.</p> <p>CPR 47.1: DA/PA takes place at conclusion of proceedings.</p>		<p>Up to 2 Marks</p> <p>Candidates must (at minimum) set</p>

<p>CPR 47.6 (1): Detailed assessment proceedings are commenced by the receiving party serving on the paying party notice of commencement in the relevant practice form; and a copy of the bill of costs.</p> <p>CPR 47.6 (2): The receiving party must also serve a copy of the notice of commencement and the bill on any other relevant persons specified in Practice Direction 47.</p> <p>CPR 47.7: sets out the period for commencing detailed assessment proceedings.</p>	<p>out when DA will take place</p>
<p>Credit a discussion regarding the bill of costs and the right to recover costs e.g:</p> <p>Practice Direction 47: deals with the form of a bill</p> <p>JH Milner v Percy Bilton [1966]: The retainer is fundamental to the right to recover costs. Where there is no retainer there is no entitlement to charge, there is no business relationship.</p> <p>Scott v Hull and East Yorkshire Hospitals NHS Trust [2014]: The two CFAs were not valid retainers and the Claimant’s claim for costs was struck out. A retainer must be enforceable in order to charge the client and recover costs inter partes.</p> <p>The indemnity principle: simply provides that the receiving party cannot recover more costs from the paying party than he himself would be liable to pay his own solicitors. The indemnity principle does not apply in certain circumstances e.g. legal aid. This does not appear to be a situation where the indemnity principle will not apply.</p> <p>Bailey v IBC (1998): signature on the bill is sufficient to show that the indemnity principle has not been breached. However, if a genuine issue is raised by the paying party then the court is likely to consider this. This is a situation which could arise in this situation.</p>	<p>Up to 4 Marks</p> <p>To achieve more than a pass candidates must show a greater depth to their knowledge base</p>
<p>Discussion on next procedural steps e.g:</p> <p>CPR 47.9 (1): The paying party and any other party to the detailed assessment proceedings may dispute any item in the bill of costs by serving points of dispute</p> <p>CPR 47.9 (2): The period for serving points of dispute is 21 days after the date of service of the notice of commencement.</p> <p>CPR 47.14 (6): Only items specified in the points of dispute may be raised at the hearing, unless the court gives permission.</p> <p>CPR 47.9 (4): The RP may file a request for a DCC if the 21 days (or relevant period) has expired and the RP has not been served with any POD.</p> <p>CPR 47.11(1): Application for requesting a DCC is on Form N254</p> <p>CPR 47.11(2): Will include an order to pay costs to which the DCC relates</p> <p>CPR 47.11(3): Sum payable is set out in PD (£80 fixed costs plus court fee – CPR PD 47 para 10.7)</p>	<p>Up to 12 marks</p> <p>To pass relevant CPR should be identified and the candidate should refer to the detailed assessment procedure</p>

<p>CPR 47.13 (1): Where any party to the detailed assessment proceedings serves POD, the RP may serve a reply on the other parties to the assessment proceedings.</p> <p>CPR 47.13(2): RP may do so within 21 days after being served with the POD to which the reply relates.</p> <p>CPR PD 44, 12.1: Replies must be limited to points of principle and concessions only, must not contain general denials, specific denials or standard form responses.</p> <p>CPR PD 47, 12.2: When practicable replies must be set in the form of Precedent G.</p>	
<p>Discussion on Request for a Hearing e.g:</p> <p>CPR 47.14 and CPR PD 47, 13: governs detailed assessment hearings.</p> <p>CPR 47.14: RP must file request for DA Hearing within 3 months of expiry of period for commencing DA proceedings.</p> <p>CPR PD 47, PD 13.1: Reiterates the above position.</p> <p>Because of value DA not PA appropriate (oral hearing)</p> <p>CPR PD 47, 13.2: N258 needs to be filed plus NOC, Bill, Order/Judgment/Doc giving right to DA, Precedent G PODS and Replies, Any other orders, Fee notes and written evidence of disbursements (over £500 as per CPR PD 47, 5.2)</p> <p>Statement signed by legal representative and estimate of the length of time the DA hearing will take.</p> <p>Court fee will also need to be paid.</p>	Up to 5 marks

<p>Question 9:</p>	<p>You are a trainee costs lawyer working for a firm dealing with legal costs in Shrewsbury, Shrew Costs Ltd. The head of costs knows that the area of ethics and professional standards is one which you have studied as part of the costs lawyer training course and considers that you are the best person to prepare a memo to all fee earning staff (including costs lawyers and trainee costs lawyers) covering the areas of professional standards and ethics when preparing bills of costs and during negotiations. He also wishes for you to include some information on when fee earners may be personally liable for costs.</p> <p>Prepare the body of a memo on the relevant professional conduct rules.</p>	
<p>Total Marks Attainable</p>		<p>20</p>
<p>Fail</p>	<p>up to 4.9</p>	<p>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.</p>
<p>Pass</p>	<p>5+</p>	<p>An answer which addresses MOST of the following points: description of the right to recover costs and the indemnity principle, description of the professional client/costs lawyer relationship, description of the court's discretion and jurisdiction to make a wasted costs order and duty to the court. Candidates will demonstrate a good depth of knowledge of the subject</p>

		with good application and some analysis having regard to the facts, although the candidate may demonstrate some areas of weakness. Candidates will have considered some authority including case authority.
Merit	6+	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 courts' discretion, when a wasted costs order may be made, against whom and timings of applying for/making such an order) with very good application and some analysis having regard to the facts. Most views expressed by the candidate should be supported by relevant authority including case authority.
Distinction	7+	An answer which includes ALL the requirements for a pass and merit (as set out above) PLUS the candidate's answer should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles to reach a measured conclusion. The candidate will provide an excellent summary setting out what is meant by a wasted costs order, when the court may be minded to make such an order and how to proceed in such a situation. All views expressed by the candidate should be supported by relevant authority including case authority. Work should be written to an exceptionally high standard considering the response will have been drafted in examination conditions.
Indicative Content		Marks
<p>Required (what is needed to draft a bill of costs and consideration of the procedure for DA/PA):</p> <p>Practice Direction 47: deals with the form of a bill</p> <p>CPR: 44.6: procedure for assessing costs.</p> <p>CPR 47.1: DA/PA takes place at conclusion of proceedings.</p> <p>JH Milner v Percy Bilton [1966]: The retainer is fundamental to the right to recover costs. Where there is no retainer there is no entitlement to charge, there is no business relationship.</p> <p>Scott v Hull and East Yorkshire Hospitals NHS Trust [2014]: The two CFAs were not valid retainers and the Claimant's claim for costs was struck out. A retainer must be enforceable in order to charge the client and recover costs inter partes.</p> <p>The indemnity principle: simply provides that the receiving party cannot recover more costs from the paying party than he himself would be liable to pay his own solicitors. The indemnity principle does not apply in certain circumstances e.g. legal aid. This does not appear to be a situation where the indemnity principle will not apply.</p> <p>Bailey v IBC (1998): signature on the bill is sufficient to show that the indemnity principle has not been breached. However, if a genuine issue is raised by the paying party then the court is likely to consider this. This is a situation which could arise in this situation.</p>		<p>Up to 6 Marks</p> <p>An explanation should be given as to the discretion of the court when making an order for costs</p>
<p>Credit any discussion on the agency principle (responsibility for the assessment proceedings during negotiations) e.g:</p> <p>Ahmed v Powell [2003] EWHC 9011: The solicitors are responsible for the conduct of the detailed assessment proceedings and cannot avoid that responsibility merely by instructing a costs draftsman. Costs draftsmen can appear on behalf of the party only as a duly authorised representative of the solicitor who has instructed him to be there.</p>		<p>Up to 4 Marks</p> <p>To achieve a distinction candidates should demonstrate knowledge of the ethical considerations raised in the</p>

<p><i>Crane v Canons Leisure Centre [2007] EWCA Civ 1352</i>: Work undertaken by independent costs draftsmen could be treated as part of the instructing solicitor's profit costs such as to attract a success fee.</p> <p><i>Waterson Hicks v Eliopoulos [1997] Costs L.R.</i>: The costs draftsman has the same authority as the solicitor would have had to consent to orders.</p> <p><i>Buxton v Mills-Owens [2010] 1 WLR 1997</i>: If a point is not properly arguable, it should not be argued.</p>	<p>problem question</p>
<p>Credit discussion on duty to the court v duty to client e.g:</p> <p>CL Code of Conduct: CLSB set and publish the CL Code of Conduct (2014 amendments) x7 principles</p> <p>CLSB Code of Conduct Principle 2: Comply with your duty to the court in the administration of justice</p> <p>CLSB Code of Conduct Principle 2.1: You must at all times act within the law.</p> <p>CLSB Code of Conduct Principle 2.2: You must not knowingly or recklessly either mislead the court or allow the court to be misled.</p> <p>CLSB Code of Conduct Principle 2.3: You must comply with any court order which places an obligation on you and you must not be in contempt of court.</p> <p>CLSB Code of Conduct Principle 2.4: You must advise clients to comply with court orders made against them.</p> <p>CLSB/SRA Code of Conduct Principle 3.1: You must act at all times to ensure the client's interest is paramount except where this conflicts with your duties to the court or where otherwise permitted by law. You must decline to act if it would not be in the client's best interests or if that client's interests conflict directly with your own or with those of another client.</p>	<p>Up to 4 Marks</p>
<p>Credit a discussion on wasted costs orders e.g:</p> <p>Section 51 of the Senior Courts Act 1981 and CPR 44.2: costs payable by one party to another are the discretion of the court.</p> <p>CPR 44.2(4): Court may consider a number of factors when determining what type of order to make</p> <p>CPR 44.2(5): Court can consider conduct when making an order for costs</p> <p>CPR 46.8: The court can order a party or legal representative to pay a specified sum (or can disallow a specific sum) where costs have been wasted.</p> <p>CPR 46 PD 5.4: A party may apply for a wasted costs order – (a) by filing an application notice in accordance with Part 23; or (b) by making an application orally in the course of any hearing.</p> <p>Wasted costs applications: should be left until the end of the trial.</p>	<p>Up to 4 Marks</p>

<p>Raised by: Applications are usually raised by the aggrieved party but can be made by the court of its own initiative.</p>	
<p>Credit any case law/points of law cited on wasted costs e.g:</p> <p>Buxton v Mills-Owen [2010]: lawyers shouldn't plead matters that are meritless.</p> <p>Ridehalgh v Horsefield (1994) CA: The Court should only make a Wasted Costs Order where the legal representative has acted improperly, negligently or unreasonably - a mere mistake is not enough</p> <p>Harley v McDonald [2001] AC: Wasted Costs Orders are discretionary and should be reserved for unjustifiable conduct</p> <p>Orchard v S E Electricity Board [1987] QB: Wasted Costs Orders should not be used as a threat to intimidate the other party -</p> <p>Symphony v Hodgson [1994] QB: Wasted Costs Orders should not be motivated by a resentment or inability to obtain an effective costs order against an impecunious litigant</p> <p>Harrison v Harrison [2009]: wasted costs were neither a punitive nor a regulatory jurisdiction, but rather a compensatory one.</p> <p>Persaud v Persaud [2003]: Court of Appeal held that it was not right to interfere with the judge's discretion to overturn a wasted cost order.</p>	<p>Up to 4 Marks</p> <p>To achieve more than a pass candidates must not simply cite law but should show a greater depth to their knowledge base</p>