

June 17: 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:	Outline the formalities of a part 36 offer for settlement.	
Total Marks Attainable		5
Fail = 0-2.4 Pass = 2.5+ Merit = 3+ Distinction = 3.5+		
Indicative Content		Marks
Required explanation of the requirement to follow formalities for validity:		1 Mark
CPR 36.5 provides that, if an offer under Part 36 is to be effective, certain formalities must be observed.		
Credit any points of law cited e.g:		5 Marks
CPR 36.5(1)(a): a Part 36 offer must be in writing		
CPR 36.5(1)(b): a Part 36 offer must make clear that it is made pursuant to Part 36.		
CPR 36.5(1)(c): a Part 36 offer must specify a period of not less than 21 days within which the defendant will be liable for the claimant’s costs in accordance with rule 36.13 or 36.20 if the offer is accepted.		
CPR 36.5(1)(d): a Part 36 offer must state whether the offer relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue		
CPR 36.5(1)(e): a Part 36 offer must state whether the offer takes into account any counterclaim		
Credit any points of law cited e.g:		2 Mark
Personal injury: In personal injury cases a Part 36 offer should state whether it includes the benefits recoverable by the CRU.		
CPR 36.5(3): in appropriate cases a Part 36 offer must contain other such information as is required.		
CPR 36.7 (1): a Part 36 offer may be made at any time, including before the commencement of proceedings.		
CPR 36.7 (2): a Part 36 offer is made when it is served on the offeree.		

Question 2:	Explain what is meant by the indemnity principle.	
Total Marks Attainable Fail = 0-2.4 Pass = 2.5+ Merit = 3+ Distinction = 3.5+	5	
Indicative Content	Marks	
Required explanation of the indemnity principle: <i>Define the indemnity principle e.g:</i> The indemnity principle provides that the receiving party cannot recover more costs from the paying party than he himself would be liable to pay his own solicitors.	1 Mark A pass must include an explanation	
Any other relevant point to describe the principle e.g: <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. <i>Does not apply:</i> The indemnity principle does not apply in certain circumstances e.g legal aid <i>Certification of a bill of costs:</i> indicates that the principle has not been breached but the court can be asked to go behind it.	Up to 2 marks A merit/distinction will include some analysis of the principle	
Credit any case law/points of law cited e.g: <i>Harold v Smith (1860):</i> costs award should not be seen as a punishment; <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; <i>General of Berne Insurance v Jardine (1998):</i> look at the costs on an item by item basis, not globally; <i>Hollins v Russell (2003):</i> applies to CFA cases; <i>Bailey v IBC (1998):</i> signature of Bill is sufficient to show that indemnity principle has not been breached	Up to 4 To achieve more than a pass candidates must not simply cite cases but should show a holistic understanding of the development of the principle	

Question 3:	What are the phases included in a precedent H? Briefly set out what items are likely to be claimed within each phase.	
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10	
Indicative Content	Marks	
Required (Identify all of the phases):	2 Marks	

<p>Pre-action, Issue/statements of case, CMC, Disclosure, Witness Statements, Expert Reports, PTR, Trial Preparation, Trial and Settlement</p>	
<p>Credit any of the following:</p> <p>Pre-action: Pre-Action Protocol correspondence investigating the merits of the claim and advising client. Settlement discussions, advising on settlement and Part 36 offers. All other steps taken and advice given pre- action.</p> <p>Issue/statements of case: Preparation of Claim Form, Issue and service of proceedings. Preparation of Particulars of Claim, Defence, Reply, including taking instructions, instructing counsel and any necessary investigation. Considering opposing statements of case and advising client. Part 18 requests (request and answer). Any conferences with counsel primarily relating to statements of case. Updating schedules and counter-schedules of loss.</p> <p>CMC: Completion of DQs. Arranging a CMC. Reviewing opponent’s budget. Correspondence with opponents to agree directions and budgets, where possible. Preparation for, and attendance at, the CMC. Finalising the order.</p> <p>Disclosure: Obtaining documents from client and advising on disclosure obligations. Reviewing documents for disclosure, preparing disclosure report or questionnaire response and list. Inspection. Reviewing opponent’s list and documents, undertaking any appropriate investigations. Correspondence between parties about the scope of disclosure and queries arising. Consulting counsel, so far as appropriate, in relation to disclosure.</p> <p>Witness Statements: Identifying witnesses. Obtaining statements. Preparing witness summaries. Consulting counsel, so far as appropriate, about witness statements. Reviewing opponent’s statements and undertaking any appropriate investigations. Applications for witness summaries.</p> <p>Expert Reports: Identifying and engaging suitable expert(s). Reviewing draft and approving report(s) Dealing with follow-up questions of experts. Considering opposing experts’ reports. Any conferences with counsel. Meetings of experts (preparing agenda etc).</p> <p>PTR: Bundle. Preparation of updated costs budgets and reviewing opponent’s budget. Preparing and agreeing chronology, case summary and dramatis personae (if ordered and not already prepared earlier in case). Completing and filing pre-trial checklists Correspondence with opponent to agree directions and costs budgets, if possible Preparation for and attendance at the PTR.</p> <p>Trial Preparation: Trial bundles. Witness summonses, and arranging for witnesses to attend trial. Any final factual investigations. Supplemental disclosure and statements (if required). Agreeing brief fee. Any pre-trial conferences and advice from Counsel. Pre-trial liaison with witnesses</p> <p>Trial: Solicitors’ attendance at trial. All conferences and other activity outside court hours during the trial. Attendance on witnesses during the</p>	<p>7 Marks</p>

<p>trial Counsel's brief fee and any refreshers. Dealing with draft judgment and related applications.</p> <p>ADR/Settlement: Any conferences and advice from counsel in relation to settlement. Settlement negotiations and meetings between the parties to include Part 36 and other offers and advising the client Drafting settlement agreement or Tomlin order. Advice to the client on settlement (excluding advice included in the pre-action phase).</p>	
<p>Credit any of the following (higher end responses are likely to include):</p> <p>CPR 3.12 (1) and PD 3E: apply to all Part 7 multi-track cases commenced on or after 1st April 2013 unless it falls within one of the listed exceptions.</p> <p>PD3 para 6: The Guidance Notes on Precedent H MUST now be followed.</p> <p>Reference to what phases should not include: Pre- action should not include any work already incurred in relation to any other phase of the budget. Issue and Statements of case should not include amendments to statements of case.</p> <p>Reference to contingencies with examples: The 'contingent cost' sections of the form should be used for anticipated costs which do not fall within the main categories set out in the form. Examples might be the trial of preliminary issues, a mediation, applications to amend, applications for disclosure against third parties or (in libel cases) applications re meaning. Parties should only include costs which are more likely than not to be incurred.</p> <p>Tim Yeo MP v Times Newspapers Limited [2015] EWHC 209 (QB): guidance given on contingencies</p>	3 Marks

Question 4:	Explain the circumstances and timing when an application for an interim payment may be made in detailed assessment proceedings, with reference to the procedure.
<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</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>3 Marks</p> <p>A pass must include reference to some or all of these rules</p>

<p>Para 10.2(e) SCCO guide 2013: court will not generally consider applications for interim payments in PA matters.</p>	
<p>Any other point regarding interim payments</p> <p>Voluntary</p> <p>Reduces interest for the paying party</p> <p>Cashflow</p> <p>SCCO guidance states that on a PA the court is unlikely to make an order for the paying party to pay a sum on account of costs.</p>	<p>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</p> <p>Applications should include: evidence, reason for request, draft order (CPR 23.6) and relevant fee</p> <p>Case law:</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>Up to 8</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>

<p>Question 5:</p>	<p>Discuss when an application for a default judgment may be appropriate with reference to the costs consequences of a successful application where the claim is for a sum of money or goods.</p>
<p>Total Marks Attainable</p> <p>Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+</p>	<p>10</p>

Indicative Content	Marks
<p>Required an explanation of Default Judgments:</p> <p>CPR 12: If the defendant does not respond at all 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'.</p> <p>The date of service is determined by the rules set out and considered on previously.</p>	<p>1 Mark</p> <p>To pass candidates must describe default judgments with reference to the relevant provisions of the CPR</p>
<p>May also raise further points on the application for a default judgment:</p> <p>Form N225: A default judgment is requested by completing and returning to the court Form N225 - Request for judgment and reply to admission. This form is also used in cases of admissions, considered in the next section.</p> <p>CPR 12.2: default judgments may not be used in the following types of claim:</p> <ul style="list-style-type: none"> • Part 8 claims • Where the claimant cannot prove service • Part 7 claims for: delivery/return of goods; provisional damages; and admiralty, arbitration, possession of land or contentious probate actions. <p>CPR 12.10: default judgments may only be obtained by a claimant with the permission of the court (for which an application under CPR Part 23 will be required) in the following cases:</p> <ul style="list-style-type: none"> <input checked="" type="checkbox"/> Defendant was served outside the jurisdiction <input checked="" type="checkbox"/> Defendant is a child or protected party <input checked="" type="checkbox"/> Claimant seeks costs (other than fixed costs) <input checked="" type="checkbox"/> Tort claims between spouses or civil partners <input checked="" type="checkbox"/> Claimant wants delivery of goods, not simply damages 	<p>Up to 6 Marks</p> <p>To achieve a distinction candidates should demonstrate knowledge of the procedure for applying for a default judgment and circumstances where it may not be appropriate.</p>
<p>There should be a discussion on the costs consequences of such an application:</p> <p>CPR 45.1 (1): This section sets out the amounts which, unless the court orders otherwise, are to be allowed in respect of legal representatives' charges.</p> <p>CPR 45.1 (2) (a)(i): This section applies where judgment in default is obtained.</p> <p>CPR 45.1 (3): No sum in respect of legal representatives' charges will be allowed where the only claim is for a sum of money or goods not exceeding £25.</p> <p>CPR 45.1 (4): Any appropriate court fee will be allowed in addition to the costs set out in this Section.</p>	<p>Up to 6 Marks</p>

<p>CPR 45.1 (5): The claim form may include a claim for fixed commencement costs.</p> <p>45.2: Amount of fixed commencement costs in a claim for the recovery of money or goods</p> <p>45.2 (1): The amount of fixed commencement costs in a claim will be calculated by reference to Table 1; and the amount claimed, or the value of the goods claimed if specified, in the claim form is to be used for determining the band in Table 1 that applies to the claim.</p> <p>45.2 (2): The amounts shown in Table 4 are to be allowed in addition, if applicable. These are miscellaneous costs in respect of service.</p> <p>45.4: Where the claimant has claimed fixed commencement costs under rule 45.2; and judgment is entered the amount to be included in the judgment for the claimant's legal representative's charges is the total of the fixed commencement costs; and the relevant amount shown in Table 2. These range between £50-£110.</p> <p>For default judgment these will depend on whether the default was on an acknowledgment of service or default of a defence. These range between £22-£35.</p>	
<p>Any other relevant points e.g. a discussion on setting aside a default judgment:</p> <p>CPR 13: deals with how a defendant may have a judgment in default set aside. There are two general grounds for setting aside.</p> <p>CPR 13.2: The mandatory grounds, upon which the court <i>must</i> set the judgment aside – These are largely confined to where there has been some oversight either by the court or the claimant and the defendant has not in fact defaulted, e.g. where the defendant has complied with the rules, the claim was satisfied before judgment, the defendant had applied for summary judgment against the claimant, or the defendant has filed an admission with request for time to pay</p> <p>CPR 13.3: The discretionary grounds, upon which the court <i>may</i> set the judgment aside – Under this rule, the court has to be satisfied that Defendant 'has a real prospect of success' OR 'there appears to be some other good reason why' the judgment should be set aside. The court will take into account the following factors:</p> <ul style="list-style-type: none"> • Delay – but only in the conduct of the proceedings – pre-action delay is irrelevant • Any explanation offered by the defendant for failure • The prejudice suffered by claimant if set aside vs prejudice to defendant if not • Strength (or weakness) of defendant's proposed defence <p>NOTE: Under CPR 3.1(3) a court may make setting aside conditional on the defendant paying the claimant's wasted costs and/or money for the whole or part of the claim being paid into court.</p>	Up to 2 Marks

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

<p>Question 6:</p>	<p>You work as a costs lawyer for Top Costs Claims Ltd in Poole, Dorset. You have been instructed by the paying party on a matter which has been listed for a detailed assessment hearing before a Deputy District Judge. The receiving party has instructed a costs draftsman from Newquay, Cornwall. Throughout the detailed assessment proceedings you have encountered numerous issues as a result of having to deal with this draftsman. For example, he has sent a very large number of letters and emails about petty points and disputes which are de minimis. You are of the opinion that the manner in which he is proceeding is wrong. He has very recently threatened you with a wasted costs order if you do not respond to his communication by return. In your professional view, there is nothing of substance for you to respond to.</p> <p>Prepare a summary on what is meant by a wasted costs order, when the court may be minded to make such an order and how you would proceed in such a situation.</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 court’s discretion and jurisdiction to make a wasted costs order, duty to the court, personal liability for costs and relevant codes 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. 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 a description of the courts discretion and jurisdiction to make a wasted costs order:</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>Up to 3 Marks</p> <p>An explanation should be given as to the discretion of the court 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>May also raise points on conduct e.g:</p> <p>Duty to the Court</p> <p>Personal liability for costs</p> <p>CLSB/SRA Code of Conduct</p>	<p>Up to 1</p> <p>To achieve a distinction candidates should demonstrate knowledge of the ethical considerations raised in the problem question</p>
<p>Any other relevant point to describe wasted costs orders e.g:</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>Raised by: Applications are usually raised by the aggrieved party but can be made by the court of its own initiative.</p>	<p>Up to 2 Marks</p>
<p>Credit any case law/points of law cited 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 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. [so basically once its made your unlikely to get it appealed]</p>	<p>Up to 6 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>

Question 7:	<p>You are a costs lawyer working in-house for a firm of solicitors, Wyatt LLP. You have been handed a personal injury file from one of the solicitors in the firm who acts for the paying party. The receiving party had successfully applied for and obtained a default costs certificate. The solicitor is unsure why the default costs certificate had been granted and what the implications are. He would like to apply to have the default costs certificate set aside as his client has fully complied with everything.</p> <p>Prepare a summary explaining the following:</p> <p>a) What a default costs certificate is; b) In what circumstances it may be obtained; c) In what circumstances it may be set aside; and d) What steps need to be taken to successfully set it aside.</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: explanation of what a DCC is, when it is obtained and how it may be set aside. 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 i.e an understanding of the steps to take to have the DCC set aside. Most views expressed by the candidate should be supported by relevant 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. The candidate will provide an excellent summary setting out a response to each of the 4 required elements including a detailed understanding of the steps to take to have the DCC set aside. 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.
Indicative Content		Marks
<p>Required explanation of what a DCC is:</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 2 Marks</p> <p>Answer should be in the correct format (a summary) and candidates must (at minimum) explain what a DCC is</p>
<p>Further discussion of DCCs:</p> <p>Why obtained?: For payment of costs due in default of POD</p> <p>When obtained?: The period for serving POD must have expired with no receipt by the RP of the POD</p>		<p>Up to 6 Marks</p> <p>To achieve more than a pass candidates also need to</p>

<p>How obtained?: CPR 47.11(1) Application for requesting a DCC is on Form N254</p> <p>Circumstances for setting aside?: 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>Steps to set aside?: Make application supported by evidence (CPR 47.12 PD 11.2(1))</p>	<p>explain when obtained and circumstances for setting aside. For a distinction candidates must include all of the above and explain the steps required to set aside.</p>
<p>Credit any other points made e.g.:</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>Implications of a DCC?: Order made for payment of the costs as claimed.</p> <p>CPR 47.12(1): Court will set aside if RP not entitled to the order</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 47.11(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 47.12(1): The court will set aside a default costs certificate if the receiving party was not entitled to it</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 4</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>Question 8:</p>	<p>You are an experienced costs lawyer working in-house in the costs department of City of London Solicitors. The firm occasionally takes on instructions from other firms of solicitors. You have recently been handed a file from Mr Aaron Butcher, a sole practitioner working in rural Lincolnshire. Mr Butcher has received a bill of costs totaling £115,000 from an opponent who successfully defended a contract dispute valued at £100,000. Mr Butcher usually only deals with low value personal injury and conveyancing matters and has no prior experience of detailed assessment.</p> <p>Mr Butcher has asked you to write him a letter setting out the procedure and explaining the next steps.</p> <p>Prepare the body of a letter in response to Mr Butcher.</p>
<p>Total Marks Attainable</p>	<p>20</p>

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: procedure for detailed assessment including how it is commenced, next procedural steps 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 not being appropriate in this situation. 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 a letter 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 consideration of the procedure for DA/PA:</p> <p>CPR: 44.6: procedure for assessing costs:</p> <p>CPR PD 44, para 8.1: where the court does not order fixed costs (or no fixed costs are provided for) the amount of costs payable will be assessed by the court. Rule 44.6 allows the court making an order about costs either (a) to make a summary assessment of the amount of the costs; or (b) to order the amount to be decided in accordance with Part 47 (a detailed assessment).</p> <p>CPR 47.1: Takes place at conclusion of proceedings</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>Practice Direction 47: deals with the form of a bill</p> <p>CPR 47.7: sets out the period for commencing detailed assessment proceedings.</p>		<p>Up to 6 marks</p> <p>To pass relevant CPR should be identified.</p> <p>Question requires candidates to draft the body of an email directed to a solicitor. A pass may not be achieved if appropriate language is not used.</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>Up to 6 marks</p> <p>To pass relevant CPR should be identified.</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 47.13 (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>	<p>Up to 6 marks</p> <p>To achieve more than a pass candidates must show a greater depth to their knowledge base</p>
<p>Credit any case law/points of law cited e.g:</p> <p>CPR PD 47, 13.4: On receipt of request for DA, Court will fix a date for hearing</p> <p>CPR PD 47, 13.6: Court will give at least 14 days' notice of time and place of hearing.</p>	<p>Up to 3 marks</p> <p>To achieve more than a pass candidates must show a greater depth to their knowledge base</p>
<p>Credit any discussion of the powers of an authorised court officer at DA e.g:</p> <p>CPR 47.3(1)(a): Can make wasted costs orders</p> <p>CPR 47.3(1)(b): can make an order in relation to conduct and for the delay in commencing DA proceedings</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>CPR 47.8: Sanction for delay in commencing detailed assessment proceedings</p> <p>CPR 47.20 (1): The receiving party is entitled to the costs of the detailed assessment proceedings. There are exceptions to this.</p>	
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<p>Question 9:</p>	<p>You are a trainee costs lawyer working for a firm dealing with legal costs in Newcastle, New Costs Ltd. Your firm has been instructed by a local firm, Castle LLP. The head of costs has passed you the file of Mr Singh who was the claimant in a clinical negligence matter. Mr Singh instructed Mr Castle of Castle LLP who successfully settled the claim for damages for him after proceedings were issued, but without the need for a trial. The head of costs believes this is a very good matter for you to deal with having regard to the letter of instructions which give you specific charging rates to use in the bill of costs which you have been instructed to draft. You have been asked to pay particular attention to this and ensure that you consider the rates included in the client care letter and CFA.</p> <p>Upon considering those documents, you become aware that the rates given to you in the letter of instructions are significantly higher than those contained in the client care letter and CFA.</p> <p>Draft the body of an email to the head of costs setting out what you think you should advise Mr Castle. Provide justifications for your views.</p>
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Total Marks Attainable	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: duties of a costs lawyer, effects of regulation v no regulation, wasted costs orders and the indemnity principle. Candidates will demonstrate a good depth of knowledge of the subject and a good depth of understanding of what advice to give in such a situation. There will be 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 (i.e. the effect that breaching the indemnity principle could have and the need to adhere to relevant codes of conduct). Most views expressed by the candidate 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 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 advice with, for example, reference to wasted costs. All views expressed by the candidate should be supported by relevant authority and/or case law. Work should be written to an exceptionally high standard considering the response will have been drafted in examination conditions.

Indicative Content	Marks
<p>Required format and content:</p> <p>Candidates are required to prepare the body of an email to their colleague in appropriate business language. The content is their</p>	<p>Question requires candidates to draft the body of</p>

<p>views on what they have been asked to do by their instructing solicitor, with justification for these views.</p>	<p>an email directed to a senior colleague. A pass may not be achieved if appropriate language is not used.</p>
<p>Regulated v unregulated: regulated in the scenario as costs lawyer working in-house for an SRA regulated firm of solicitors. Therefore bound by the SRA and CLSB Codes of Conduct.</p> <p>Legal Services Act 2007: approved regulators of the legal service market are listed in paragraph 1 of Schedule 4, or designated as an approved regulator by an order under paragraph 17 of that Schedule.</p> <p>CL Code of Conduct: 7 principles that guide conduct under the CLSB COC which have the effect of transferring the values and principles enshrined in S.3 LSA 2007 into the code. The principles are: act with integrity and professionalism, comply with your duty to the court in the administration of justice, act in the best interests of your client, provide a good quality of work and service to each client, deal with the regulators and Legal Ombudsman in an open and co-operative way, treat everyone with dignity and respect and keep your work on behalf of your clients confidential.</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>To achieve more than a pass candidates must show a greater depth to their knowledge base.</p>
<p>Any relevant point on the certification and responsibility for the detailed assessment proceedings e.g:</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 Cannon Leisure Centre [2007]: Work undertaken by a costs draftsman forms part of the solicitors profit costs.</p> <p>However, this does not mean that a costs lawyer should follow the instructions given to them.</p>	<p>Up to 3 marks</p>

<p>Waterson Hicks v Eliopulous [1997]: The costs draftsman has the same authority as the solicitor would have to consent to orders.</p>	
<p>Any relevant point on duty to the court (should include discussion of both CL and Fee Earner) e.g:</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. By including costs at a higher rate there is likely to be a breach of this principle.</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. Carrying out the instructions could amount to contempt of court.</p> <p>Rondel v Worsley [1967]: Hall v Simmons [2007] overruled this case. This case said an advocate would not be held liable for negligent advocacy.</p> <p>Said Ali v Sydney Mitchell [1978]: Advocates immunity (and, now, therefore duty) extends to pre proceedings work.</p> <p>Arthur J S Hall & Co v Simmons [2007] 1 AC 615: 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>Consideration may also have been given to the SRA Code of Conduct and the implications for the solicitor personally and the firm as a whole should the instructions be carried out.</p>	<p>Up to 5 marks</p>
<p>Any relevant discussion on wasted costs e.g:</p> <p>Conduct and wasted costs: instructions from solicitor or lay clients require a detailed understanding of the regulations that govern solicitors because the right to recover costs may be dependent on conduct.</p> <p>S.51(6) Senior Courts Act 1981: the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court.</p> <p>CPR 46.8: sets out the procedure for the court to make an order that a legal representative is personally liable for costs when the court makes a wasted costs order. The court must be satisfied that there has been an improper, unreasonable or negligent act or omission and that, as a result, costs have been incurred by a party. A mere mistake is not sufficient to justify an order; there must be a more serious error (<i>Ridehalgh v Horsefield</i> [1994] Ch 205 CA). Wasted costs orders are discretionary and should be reserved for those cases where the unjustifiable conduct can be demonstrated without recourse to disproportionate procedures (<i>Harley v McDonald</i> [2001] 2 AC 678). Such orders should not be used as a</p>	<p>Up to 4 marks</p>

<p>threat to intimidate the lawyers on the other side (<i>Orchard v SE Electricity Board</i> [1987] QB 565).</p>	
<p>Credit any case law/points of law cited on the indemnity 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>Up to 4 marks</p>