

June 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:	Outline the circumstances when costs management will not apply.	
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:		2 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.
Credit any points of law cited e.g:		3 Mark
<i>CIP Properties Ltd v Guilford Trr 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(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		
<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 proportionality.	
Total Marks Attainable		5
Fail = 0-2.4 Pass = 2.5+ Merit = 3+ Distinction = 3.5+		
Indicative Content		Marks
Required explanation of proportionality:		2 Marks
<i>Section 51 of the Senior Courts Act 1981 and CPR 44.2</i> : 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).		A pass must include an explanation
<i>The tests</i> : Lownds v Home Office 2002 for old test, CPR 44.3 for new test)		
Any other relevant point to describe the principle e.g:		Up to 2 marks

<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>CPR 44.3(5): costs are proportionate if they bear a reasonable relationship to sums in issue, value of non-monetary relief, complexity of litigation, additional work generated by conduct, wider factors.</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 of weight, and sometimes no weight, to each of the factors CPR 44.3(5)(a) to (e).</p>	<p>Up to 3</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>

<p>Question 3:</p>	<p>Outline the role of the CLSB.</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 ACL and CLSB’s role):</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>2 Marks</p>	
<p>Commentary should be included regarding the setting of standards and role in monitoring compliance with those standards e.g:</p> <p>Section 1 of the LSA 07: Reference may be made to the regulatory objectives.</p> <p>S176(1) LSA 2007: Pursuant to this Costs Lawyers to adhere to CLSB code of Conduct. Breach will result in disciplinary proceedings by CLSB.</p>	<p>4 Marks</p> <p>A merit/distinction will include some discussion of the overarching objectives under the LSA 07</p>	

<p><i>CL Code of Conduct:</i> CLSB set and publish the CL Code of Conduct (2014 amendments) x7 principles</p> <p><i>Practising rules:</i> Cost lawyers are required to comply with practicing rules when they hold a practicing certificate</p> <p>CLSB Disciplinary rules/dealing with complaints.</p>	
<p>Credit reference to/a discussion of any of the following:</p> <p><i>Section 12 and Sch 2 LSA 07:</i> 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 Role, Reserved instrument activities, Probate activities, Notarial activities, Administration of oaths – relevant to Costs Lawyer’s Role.</p> <p><i>Section 18 LSA 07:</i> defines an authorised persons which can include an entity. CLSB not currently regulate entities but had funds from ACL to explore the potential although chose not to.</p> <p><i>The 7 principles from the COC:</i> 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><i>Rules from the Practising Rules:</i> 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 4:</p>	<p>Explain the circumstances when summary assessment may take place, with reference to both the timing and procedure.</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 (reference to the CPR and PD):</p> <p><i>CPR 44.6:</i> procedure for assessing costs - the court may make a summary assessment of costs.</p> <p><i>CPR PD 44, 9.1:</i> Whenever a court makes an order about costs which does not provide only for fixed costs to be paid the court should consider whether to make a summary assessment of costs.</p>	<p>Up to 2 marks</p> <p>A pass must include an explanation.</p>
<p>Any other relevant point to describe summary assessment e.g.:</p> <p><i>CPR PD 44, 9.2:</i> at conclusion of a fast track trial or any other hearing which has lasted not more than 1 day.</p> <p><i>CPR PD 44, 9.5:</i> it is the duty of the parties and their legal representatives to assist the judge in making a summary assessment of costs. Each party who intends to claim costs must prepare and file either a statement of costs (N260) or a schedule: not less than 2 days for fast track trial or not less than 24 hours before other hearings.</p> <p><i>CPR PD 44, 9.6:</i> failure to comply will be considered when looking at the costs.</p> <p><i>CPR PD 44, 9.7:</i> no time to summarily assess.</p> <p><i>CPR PD 44, 9.10:</i> disproportionate and unreasonable costs</p>	<p>Up to 5 marks</p>

<p>Any other relevant point to describe the content of the schedule or N260:</p> <p><i>CPR PD 44, 9.5(2): The statement of costs (N260) or schedule must include: the number of hours to be claimed; the hourly rate to be claimed; the grade of fee earner; the amount and nature of any disbursement to be claimed, other than counsel's fee for appearing at the hearing; the amount of legal representative's costs to be claimed for attending or appearing at the hearing; counsel's fees; and any VAT to be claimed on these amounts.</i></p> <p><i>CPR PD 44, 9.5(3): the statement of costs should follow as closely as possible Form N260 and must be signed by the party or the party's legal representative. Where a party is: (a) an assisted person; (b) a LSC funded client; (c) a person for whom civil legal services (within the meaning of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012) are provided under arrangements made for the purposes of that Part of that Act; or (d) represented by a person in the party's employment, the statement of costs need not include the certificate appended at the end of Form N260.</i></p> <p><i>The schedule must:</i> be signed by the party or parties legal representative.</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>Credit any case law/points of law cited e.g:</p> <p><i>Williams & Gergiou v Wayne Hardy builders (SCCO) (unreported 2014):</i> highlights the importance of filing N260 on time. As no N260 was filed 24 hours prior to the hearing, no costs were allowed. A more advanced discussion of this case may make a link to the timing of the decision and the <i>Mitchell 'era'</i>.</p> <p><i>MacDonald v Taree Holdings (2000):</i> failure to file the N260 24 hours before should not deprive a party to his costs entirely.</p> <p><i>CPR PD 44, 9.8 and 9.10:</i> there are certain situations where it may not be appropriate to undertake a summary assessment of costs, for example where a party is in receipt of legal aid or where there is a child or protected party.</p>	<p>Up to 2 marks</p> <p>At least one other source of law must be cited in addition to the CPR to acquire a distinction</p>

<p>Question 5:</p>	<p>Explain, with reference to the costs consequences of a successful application, the application that may be made to conclude a matter without trial where a defendant's defence is fabricated and the claimant does not believe there is any real prospect of success.</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 to identify this question requires knowledge of summary judgments:</p> <p><i>CPR 24(2):</i> The test is whether the court is satisfied that the defendant has no real prospect of successfully defending (or the claimant has no real prospect of succeeding on) the claim or issue; AND there is no other compelling reason why the case or issue should be disposed of at a trial.</p>	<p>2 Mark</p> <p>To pass candidates must describe summary judgments with reference to the test within the CPR</p>
<p>May also raise further points on the application for a summary judgment:</p>	<p>Up to 4 Marks</p> <p>To achieve a distinction</p>

<p>CPR 23: Application for summary judgment is by notice of application with evidence in support of application in the form of witness statement and documentation.</p> <p>CPR 24.4(1): Claimant can apply for summary judgment at any time after the Defendant has either acknowledged service or served a Defence.</p> <p>CPR 24.4(3): requires applicant to give opponent at least 14 days' notice of hearing date (contrast with timings in CPR 23)</p> <p>CPR 24.5(1): If the application is to be opposed, the opposing party should reply at least 7 clear working days before the hearing together with supporting evidence.</p> <p>CPR PD24 para 4: Where the court considers that there is an arguable point but it is improbable or unlikely to succeed, the court may make a conditional order.</p>	<p>candidates should demonstrate knowledge of the procedure for applying for a summary 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)(iv): This section applies where summary judgment is given under CPR 24.</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>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 are £175 where the judgment is between £25-£5000 and £210 where the claim exceeds £5000.</p>	<p>Up to 6 Marks</p>

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

<p>Question 6:</p>	<p>You work as a costs lawyer for Bentley and Harrison LLP in Poole, Dorset. You have been instructed by Harriet Greenhall, an assistant solicitor at the firm, who is acting on behalf of Borrison's Ltd, the claimant in an intellectual property matter. The claimant successfully sued Magnolia Ltd for infringement of a patent. After succeeding on liability Borrison's Ltd elected to proceed into an</p>
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		<p>enquiry as to damages, during that enquiry they accepted a sum for damages much below that which they had been claiming.</p> <p>As a result of the settlement, Magnolia Ltd argued that Borrison's Ltd should only be entitled to 50% of their costs of the enquiry. It has been ordered that the costs of the enquiry are to be assessed on the standard basis if not agreed. The issue of proportionality is to be left to the costs judge on assessment.</p> <p>The claimant would now like you to make an application for an interim payment on account of costs. Prepare a summary of the circumstances, timing and procedure of such an application in detailed assessment proceedings.</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 presumption, power to issue interim certificate and the position in relation to PA. 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 presumption, courts power in DA proceedings, the application process) 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 an application for an interim payment, when the court has the power 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 reference to the CPR:</p> <p><i>CPR 44.2(8)</i>: 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><i>CPR 47.16</i>: power to issue an interim costs certificate where a DA hearing has been requested</p> <p><i>Para 10.2(e) SCCO guide 2013</i>: court will not generally consider applications for interim payments in PA matters.</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:</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 because of the time frame within which a PA is estimated to take place (i.e 6 weeks).</p>		Up to 2
<p>Credit any of the following:</p> <p><i>CPR 23</i>: 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>Up to 8 Marks</p> <p>To achieve more than a pass candidates</p>

<p><i>N244</i>: application should be made on this form.</p> <p><i>Applications should include</i>: evidence, reason for request, draft order (CPR 23.6) and relevant fee</p> <p><i>Dyson v Hoover (2003)</i>: 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><i>Mars v Teknowledge (2000)</i>: 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><i>Thomas Pink Ltd v Victoria's Secret UK Limited [2014]</i>: 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><i>MachInnes v Gross [2017]</i>: 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. A reasonable sum on account of costs would be 80%.</p>	<p>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>
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<p>Question 7:</p> <p>You are a trainee costs lawyer working for Costs Experts Ltd. You have received instructions from a paying party, Hartland and Smith LLP, in a commercial litigation matter. The receiving party has obtained a default costs certificate. The paying party is unsure why the application was made and what the implications are.</p> <p>Prepare a summary as to what a default costs certificate is, in what circumstances it may be obtained and the procedure for having a default costs certificate set 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 the 3 elements of the question 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
Required explanation of what a DCC is and when can be obtained:		Up to 3 Marks
<i>Order for payment of costs</i> : claimed by the RP when there has been no receipt of PODs following the expiry of the time for serving the same.		Answer should be in the correct format (a summary)

<p><i>CPR 47.9(2)</i>: requires POD to be served 21 days after the date of service of the NOC</p> <p><i>CPR 47.9(4)</i>: 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>and candidates must (at minimum) explain what a DCC is</p>
<p>Credit a discussion on applications for DCCs e.g.:</p> <p><i>CPR 47.11(1)</i>: Application for requesting a DCC is on Form N254</p> <p><i>CPR 47.11(2)</i>: Will include an order to pay costs to which the DCC relates</p> <p><i>CPR 47.11(3)</i>: Sum payable is set out in PD (£80 fixed costs plus court fee – CPR PD 47 para 10.7)</p> <p><i>CPR 47.9(5)</i>: 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>Credit a discussion on applications to have a DCC set aside e.g.:</p> <p><i>CPR 47.12(1)</i>: Court will set aside if RP not entitled to the order.</p> <p><i>CPR 47.12(2)</i>: 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><i>CPR 47.12 PD 11.2(1)</i>: Make application supported by evidence</p> <p><i>CPR 47 PD 11.2(2)</i>: matters to which the court must have regard include whether the party seeking the order made the application promptly</p> <p><i>CPR 47.12(3)</i>: in relation to pro bono orders (section 194(3) of the Legal Services Act 2007), 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>

<p>Question 8:</p> <p>You are an experienced costs lawyer working in-house in the costs department of a firm of solicitors, BMW Solicitors. You have extensive experience working on behalf of both paying and receiving parties.</p> <p>Mr Matthew Warrington, a senior solicitor at the firm, has contacted you having concluded a debt matter where his client successfully recovered £95,000. The matter settled after proceedings were issued, but without the need for a trial. You have been asked to draft the bill of costs in this matter and Mr Warrington has provided you with specific charging rates to use in the bill of costs.</p> <p>Draft the body of an email to Mr Warrington setting out what further information you need in order to draft the bill of costs, the relevant procedure and next steps.</p>										
<p>Total Marks Attainable</p>	<p>20</p>									
<table border="1"> <tr> <td>Fail</td> <td>up to 9.9</td> <td>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.</td> </tr> <tr> <td>Pass</td> <td>10+</td> <td>An answer which addresses MOST of the following points: documents needed to draft a bill of costs (retainer, costs estimates and revisions, evidence of interim bills, client's files and evidence of disbs) 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.</td> </tr> <tr> <td>Merit</td> <td>12+</td> <td>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.</td> </tr> </table>	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: documents needed to draft a bill of costs (retainer, costs estimates and revisions, evidence of interim bills, client's files and evidence of disbs) 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.	
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: documents needed to draft a bill of costs (retainer, costs estimates and revisions, evidence of interim bills, client's files and evidence of disbs) 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 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 (what is needed to draft a bill of costs and consideration of the procedure for DA/PA):</p> <p><i>Practice Direction 47:</i> deals with the form of a bill</p> <p><i>CPR: 44.6:</i> procedure for assessing costs.</p> <p><i>CPR 47.1:</i> DA/PA takes place at conclusion of proceedings.</p>		<p>Up to 2 Marks</p> <p>Candidates must (at minimum) set out when a bill of costs is needed</p>
<p>Credit a discussion of the need to see a copy of the retainer (and any costs estimates) with reference to the indemnity principle:</p> <p><i>JH Milner v Percy Bilton [1966]:</i> 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><i>Scott v Hull and East Yorkshire Hospitals NHS Trust [2014]:</i> 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><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><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 6 marks</p> <p>Question requires candidates to consider the ethical implications of such a request</p>
<p>Discussion on next procedural steps e.g:</p> <p><i>CPR 47.6 (1):</i> 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><i>CPR 47.6 (2):</i> 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><i>CPR 47.7:</i> sets out the period for commencing detailed assessment proceedings.</p> <p><i>CPR 47.9 (1):</i> 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><i>CPR 47.9 (2):</i> The period for serving points of dispute is 21 days after the date of service of the notice of commencement.</p> <p><i>CPR 47.14 (6):</i> Only items specified in the points of dispute may be raised at the hearing, unless the court gives permission.</p> <p><i>CPR 47.9 (4):</i> 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><i>CPR 47.11(1):</i> Application for requesting a DCC is on Form N254</p> <p><i>CPR 47.11(2):</i> Will include an order to pay costs to which the DCC relates</p>		<p>Up to 10 marks</p> <p>To pass relevant CPR should be identified and the candidate should refer to the detailed assessment procedure</p>

<p><i>CPR 47.11(3)</i>: Sum payable is set out in PD (£80 fixed costs plus court fee – CPR PD 47 para 10.7)</p> <p><i>CPR 47.13 (1)</i>: 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><i>CPR 47.13(2)</i>: RP may do so within 21 days after being served with the POD to which the reply relates.</p> <p><i>CPR PD 44, 12.1</i>: Replies must be limited to points of principle and concessions only, must not contain general denials, specific denials or standard form responses.</p> <p><i>CPR PD 47, 12.2</i>: When practicable replies must be set in the form of Precedent G.</p>	
<p>Discussion on Request for a Hearing e.g:</p> <p><i>CPR 47.14 and CPR PD 47, 13</i>: governs detailed assessment hearings.</p> <p><i>CPR 47.14</i>: RP must file request for DA Hearing within 3 months of expiry of period for commencing DA proceedings.</p> <p><i>CPR PD 47, PD 13.1</i>: Reiterates the above position.</p> <p>Because of value DA not PA appropriate (oral hearing)</p> <p><i>CPR PD 47, 13.2</i>: 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 5 marks</p> <p>To achieve more than a pass candidates must show a greater depth to their knowledge base</p>

<p>Question 9:</p>	<p>You are a trainee costs lawyer working for a firm dealing with legal costs in Birmingham, Brum Costs Ltd. Your firm often receives instructions from a local firm, Coventry LLP. The head of costs has passed you the file of Mr Talbot who was the claimant in a clinical negligence matter that Coventry LLP had dealt with on his behalf. Brum Costs Ltd had been working on the file for some time but the costs lawyer with conduct, Sara Collis, has now gone on maternity leave. You can see from the file that it is now listed for detailed assessment before a deputy district judge.</p> <p>The receiving party has instructed a costs draftsman from Merriden. From the file notes it appears that Sara had been finding it difficult to deal with the costs draftsman. Upon perusal of the papers you consider that he has sent an unreasonable and unnecessary amount of correspondence with the majority of communications being protracted. On a number of occasions, he has also raised petty points and you are of the opinion that he is dealing with the matter in a way which you believe to be wrong. Yesterday, he sent an email (which was also sent by fax and received by hard copy this morning) threatening to apply for a wasted costs order if he does not receive a response by the end of the week.</p> <p>Prepare a summary on what is meant by a wasted costs order and when the court may be minded to make such an order.</p>	
<p>Total Marks Attainable</p>		<p>10</p>
<p>Fail</p>	<p>up to 9.9</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>

Pass	10+	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	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 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	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 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><i>Section 51 of the Senior Courts Act 1981 and CPR 44.2:</i> costs payable by one party to another are the discretion of the court.</p> <p><i>CPR 44.2(4):</i> Court may consider a number of factors when determining what type of order to make</p> <p><i>CPR 44.2(5):</i> Court can consider conduct when making an order for costs</p> <p><i>CPR 46.8:</i> 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>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>Credit any discussion on regulated v unregulated costs professionals e.g:</p> <p><i>Section 12 of the Legal Services Act 2007:</i> Defines reserved legal activities</p> <p><i>Section 18 of the Legal Services Act 2007:</i> Defines authorized persons (to include an entity)</p> <p><i>Section 20 of the Legal Services Act 2007:</i> Defines approved regulators</p> <p><i>ACL/CLSB:</i> ACL is the approved regulator of costs lawyers and the authority to regulate s delegated to the CLSB</p>		<p>Up to 3 Marks</p> <p>An explanation should be given as to the difference between a regulated costs professional and a regulated one</p>
<p>Any other relevant point to describe wasted costs orders e.g:</p> <p><i>CPR 46 PD 5.4:</i> 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><i>Wasted costs applications:</i> should be left until the end of the trial.</p> <p><i>Raised by:</i> 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><i>Buxton v Mills-Owen [2010]:</i> lawyers shouldn't plead matters that are meritless.</p> <p><i>Ridehalgh v Horsefield (1994) CA:</i> 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>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</p>

<p><i>Harley v McDonald [2001] AC</i>: Wasted Costs Orders are discretionary and should be reserved for unjustifiable conduct</p> <p><i>Orchard v SE Electricity Board [1987] QB</i>: Wasted Costs Orders should not be used as a threat to intimidate the other party -</p> <p><i>Symphony v Hodgson [1994] QB</i>: Wasted Costs Orders should not be motivated by a resentment or inability to obtain an effective costs order against an impecunious litigant</p> <p><i>Harrison v Harrison [2009]</i>: wasted costs were neither a punitive nor a regulatory jurisdiction, but rather a compensatory one.</p> <p><i>Persaud v Persaud [2003]</i>: Court of Appeal held that it was not right to interfere with the judge's discretion to overturn a wasted cost order.</p>	<p>knowledge base</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><i>CLSB Code of Conduct Principle 2.1</i>: You must at all times act within the law.</p> <p><i>CLSB Code of Conduct Principle 2.2</i>: You must not knowingly or recklessly either mislead the court or allow the court to be misled.</p> <p><i>CLSB Code of Conduct Principle 2.3</i>: You must comply with any court order which places an obligation on you and you must not be in contempt of court.</p> <p><i>CLSB Code of Conduct Principle 3.1</i>: 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>Candidates may have referred also to the relevant provisions in the SRA code of conduct.</p>	<p>Up to 6</p> <p>To achieve a distinction candidates should demonstrate knowledge of the ethical considerations raised in the problem question</p>
<p>Credit any discussion on the agency principle and responsibility for the assessment proceedings e.g:</p> <p><i>Ahmed v Powell [2003] EWHC 9011</i>: 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><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>Arthur J S Hall & Co v Simmons [2007] 1 AC 615</i>: Lord Hoffman (at page 691): "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"</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><i>Rondel v Worsley [1967] 3 WLR 1666</i>: A claimant's civil action for negligence could not be sustained: a barrister's immunity was justified by public policy.</p>	<p>Up to 5</p> <p>To achieve a distinction candidates should demonstrate knowledge of the ethical considerations raised in the problem question</p>

<p><i>Saif Ali v Sydney Mitchell</i> [1978] 3 All ER 1033: The immunity conferred by <i>Rondel v Worsley</i> extends to pre-trial work if and only if it is so intimately connected with the conduct of the case in court as to amount to a preliminary decision about it.</p>	
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