

August 2018: Marker Guidance: Unit 2

The marking rubric and guidance is published as an aid to markers, to indicate the requirements of the examination. It shows the basis on which marks are to be awarded by examiners.

However, candidates may provide alternative correct answers and there may be unexpected approaches in candidates' scripts. These must be given marks that fairly reflect the relevant knowledge and skills demonstrated. Where a candidate has advanced a point that is not included within the marking rubric please do make a note of the same so that it can be raised at the standardisation meeting.

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

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

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

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

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

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

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

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

SECTION A (all compulsory – 40%)

Question 1:	Describe the provisions relating to client money found in the Costs Lawyer Code of Conduct and CLSB Practising Rules.
Total Marks Attainable Fail = 0-2.4 Pass = 2.5+ Merit = 3+ Distinction = 3.5+	5
Indicative Content	Marks
<p>Required a discussion on the contents of the CLSB Code of Conduct:</p> <p>Principle 3 of the CLSB Code of Conduct: Generally is about acting in the best interests of the client</p> <p>Principle 3.6 of the Costs Lawyer Code of Conduct: A costs lawyer must not accept client money save for disbursements and payment of your proper professional fees.</p> <p>No Definition: There is no definition of client money within any rules set by the CLSB and therefore you must look to either CILEx or SRA rules for the definition.</p>	<p>Up to 2 marks</p> <p>A pass must include reference to the CLSB code of conduct.</p>
<p>May also include a discussion as to what client money is, e.g:</p> <p>CLSB Practising Rules: There is no mention of the CLs handling client money in the CLSB Practising Rules.</p> <p>Rule 12 of the SRA Account Rules: Categories of money.</p> <p>Rule 12.1 of the SRA Account Rules: These rules do not apply to out-of-scope money, save to the limited extent specified in the rules. All other money held or received in the course of practice falls into one or other of the following categories:</p> <p>Rule 12.1(a) of the SRA Account Rules: "client money" - money held or received for a client or as trustee, and all other money which is not</p> <p>Rule 12.1 (b) of the SRA Account Rules: "office money" - money which belongs to you or your firm.</p> <p>CILEx Account Rules: define client money as money beneficially owned by anyone other than the Authorised Entity.</p>	<p>Up to 3 marks</p> <p>To achieve more than a pass candidates must not simply cite the rules but should show a deeper understanding of the rules including an appreciation (even if not explicitly stated) including the observation that to understand the costs lawyers code of conduct on client money you must look outside the code itself</p>
Credit a discussion on the purpose of the rules e.g:	

<p>Rule 1.1 of the SRA account Rules: The purpose of these rules is to keep client money safe. This aim must always be borne in mind in the application of these rules.</p> <p>Section 1 LSA 07: 8 regulatory objectives.</p> <p>Section 20 LSA 07: Approved regulators. ACL is named as the approved regulator but the CLSB have the delegated functions.</p>	
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Question 2:	Explain the nature of a lien and how a solicitor with unpaid fees may have a lien over a client's property.
Total Marks Attainable	10
<p>Fail = 0-4.9</p> <p>Pass = 5+</p> <p>Merit = 6+</p> <p>Distinction = 7+</p>	
Indicative Content	Marks
<p>Required (a description of a retainer):</p> <p>A lien is: a right to keep possession of property belonging to another person until a debt owed by that person is discharged.</p> <p>Welsh v Hole [1779]: Liens were first recognised in equity because a solicitor that has had an honest and fair dealing with their client deserve to be paid and some protection.</p> <p>A solicitor with unpaid fees has a potential lien over the client's property in one of two ways: Common law lien or a statutory lien under <u>section 73 of the Solicitors Act 1974</u></p>	<p>2 Marks</p> <p>A pass must include an explanation of what a lien is.</p>
<p>Any other relevant point to describe common law liens:</p> <p>A Retaining Lien: The right for a solicitor to retain a client's property (e.g file of papers) in their possession until they are paid their outstanding fees.</p> <p>A preserving Lien: The right to ask a court to order that personal property recovered under a judgment, he has helped to obtain, stand as security for his costs.</p> <p>Halvanon Insurance Co Ltd v Central Reinsurance Corporation and another [1988]: Application for a preserving lien the solicitors will need to show:</p> <ul style="list-style-type: none"> <input checked="" type="checkbox"/> they were instructed by the party; <input checked="" type="checkbox"/> that they have unpaid fees owing, <input checked="" type="checkbox"/> that the property in respect of which they seek an order is property recovered, or preserved, or the proceeds of a judgment; and <input checked="" type="checkbox"/> it was recovered as a result of their work. 	<p>Up to 4 Marks</p> <p>To achieve more than a pass candidates must not simply cite the examples but should show a holistic understanding of the operation of liens.</p>

<p>Any other relevant point to describe statutory liens:</p> <p>Section 73(1)(a) of the Solicitors Act 1974: any court in which a solicitor has been employed to prosecute or defend any suit, matter or proceedings may at any time:</p> <ul style="list-style-type: none"> ☑ declare the solicitor entitled to a charge on any property recovered or preserved through his instrumentality for his assessed costs in relation to that suit, matter or proceeding; and ☑ make such orders for the assessment of those costs and for raising money to pay or for the paying of them out of the property recovered or preserved as the court thinks fit. <p>To rely on this lien: the solicitor must have been instructed by the party to prosecute or defend the proceedings and have unpaid costs. This lien also extends to property recovered or preserved. This legislation applies to solicitors only.</p> <p>Section 73(1)(b) of the Solicitors Act 1974: If you make an application the court may order an assessment of costs.</p> <p>Kahn Solicitors v Secretary of State [2013]: costs belong to the client so any application under S73 must be prompt</p>	Up to 3 marks
<p>Credit a discussion on the meaning of property e.g:</p> <p>Leo Abse and Cohen v Evan G Jones Builders Limited [1984]: Where Eveleigh LJ explained that a solicitor who is discharged by clients in a case they are entitled to hold the papers until his fees are paid.</p> <p>Loescher v Dean [1950]: Sets out that as long as the property over which the lien is to be exercised comes into the solicitor's possession through their position, then they have a lien over that property until their fees are discharged.</p> <p>Withers LLP v Rybak [2011]: Case law on retaining liens. Confirms that the definition of property covers monies held in client account.</p>	Up to 3 marks

Question 3:	Explain, using recent common law developments, the difference between a CFA which has been novated from a CFA which has been assigned.
<p>Total Marks Attainable</p> <p>Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+</p>	10
Indicative Content	Marks
Required (an attempt to define both novation and assignment e.g):	Up to 4 marks

<p>Definition of assignment: The agreement between one of the original parties and a new party. It does not create new rights, but transfers existing rights under a contract from one party to another.</p> <p>Identifying Assignment: Two parties. In writing, by deed, same agreement, client not involved but can accept/reject, benefit and burden must pass.</p> <p>Novation: Where parties to the original contract agree with a new party that the original agreement comes to an end and a new agreement comes into being between one of the original parties and the new party, in relation to the same subject matter and on the same terms.</p> <p>Identifying Novation: Tri party agreement, client involved, different agreement, only benefit passes.</p>	<p>A pass must include the demonstration that the candidate understands the difference between assignment and novation.</p>
<p>Credit a discussion on the desire for a CFA to be validly transferred and the events that may lead to the issue arising e.g:</p> <p>Key priority for transferring a CFA: Maintain the ability to collect a success fee from a losing party in relation to work done after 31 March 2013 when the client moves firms after that date.</p> <p>Conditional Fee Agreements: introduced by Courts and Legal Services Act 1990: are contingency agreements or ‘no win no fee agreements’.</p> <p>Section 58(1) of the Courts and Legal Services Act 1990: A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to subsection (5)) any other conditional fee agreement shall be unenforceable.</p> <p>Access to Justice Act 1999: amended section 58 CLSA 1990 to allow for recovery of success fee (section 27 AJA 1999), ATE insurance premiums (section 29), but <u>Legal Aid, Sentencing & Punishment of Offenders Act 2012</u> abolished recovery of success fees (section 44) and ATE premiums (section 46).</p> <p>If the CFA is dated after 1 April 2013: then the success fee will not be recoverable from the losing party unless it relates to a matter that falls under the following exceptions (CPR 48.2(1)(a)):</p> <ul style="list-style-type: none"> <input checked="" type="checkbox"/> insolvency related cases; <input checked="" type="checkbox"/> publication and privacy proceedings; and <input checked="" type="checkbox"/> mesothelioma cases. <p>If the CFA is post 1 April 2013, then the success fee can be recovered from the client if the ‘win’ under the terms of the CFA is triggered.</p>	<p>Up to 3 marks</p>

<p>Circumstances when a CFA may need to be transferred: Firm A goes into administration or closes its doors, current solicitor moves firms and client wants to retain the same agreement, Firm A is bought or merges, Firm A changes name or practice type.</p>	
<p>Credit any discussion on the common law developments e.g:</p> <p>Halsall v Brizell [1957]: The party could not take the benefit under a contract without the corresponding burden.</p> <p>Jenkins v Young Brothers Transport [2006]: Where the client was loyally following the solicitor as they changed firms a few times, there was an exception to the rule that prevented personal contracts from being assigned as the benefit and burden of the contract was allowed and CFA validly assigned.</p> <p>Davies v Jones [2009]: re-iterated that the burden of a contract cannot be assigned.</p> <p>Jones v Spire Healthcare 2015: at first instance the first CFA had deemed to be at an end and the subsequent CFA was a new retainer so a novation had taken place. The existing rights under the CFA were not transferrable.</p> <p>Budana v Leeds Teaching Hospitals [2016]: telling the client the injury department was closing and seeking no further instructions amounted to termination of the first retainer. Had the CFA not been terminated an assignment may have been permitted as the higher court decision in Jenkins showed it was possible for a burden to be assigned. In light of the first CFA being terminated, a novation had taken place.</p> <p>Webb v Bromley [2016]: the CFA did not comply with Section 58 of the <u>Courts and Legal Services Act 1990</u> and the Conditional Fee Agreements Order 2013, having more than a 25% success fee, and was therefore unenforceable.</p> <p>Jones v Spire Healthcare [2016]: on appeal, the case of Jenkins was determined to be authority that allowed the burden under a CFA to be assigned to a new firm and the CFA in this case was validly assigned. It was also suggested at the time that the decision was likely to be appealed further.</p> <p>Budana v Leeds Teaching Hospitals NHS Trust [2017]: It is possible to transfer a CFA.</p>	<p>Up to 6 marks</p> <p>To achieve a distinction, candidates will provide some commentary on the common law developments showing depth to their knowledge base.</p>

Question 4:	Describe the jurisdiction of first tier tribunals to make an order for costs.
<p>Total Marks Attainable</p> <p>Fail = 0-7.4 Pass = 7.5+ Merit = 9+ Distinction = 10.5+</p>	15

Indicative Content	Marks
<p>Required: Candidates must demonstrate knowledge of the tribunal structure and its jurisdiction to make costs orders (candidates are not required to list all chambers).</p> <p>There are seven first tier tribunals: Social Entitlement Chamber; Health, Education and Social Care Chamber; Tax Chamber; General Regulatory Chamber; Immigration and Asylum Chamber; War Pensions and Armed Forces Compensation Chamber; and Property Chamber.</p> <p>2 first tier tribunals: have no power to award costs at all (Social Entitlement Chamber and the War Pensions and Armed Forces Compensation Chamber). The other 5 may make orders in respect of wasted costs and unreasonable conduct.</p> <p>Relevant rules include: Tribunal Procedure (First Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008; Tribunal Procedure (First Tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008; Tribunal Procedure (First Tier Tribunal) (Social Entitlement Chamber) Rules 2008.</p>	<p>Up to 3 marks</p> <p>To achieve a pass, candidates must demonstrate an understanding of the make-up of the first tier tribunals and provide an outline as to which may award costs and which tribunals may not make an order for costs.</p>
<p>Candidate should refer to legislative framework to describe the jurisdiction e.g:</p> <p>Tribunals, Courts and Enforcement Act 2007: Tribunals governed by TCEA 2007, but each chamber is also governed by its own set of Procedure Rules</p> <p>Section 29 (1) of the Tribunals, Courts and Enforcement Act 2007: costs shall be in the discretion of the tribunal.</p> <p>Section 29 (2) of the Tribunals, Courts and Enforcement Act 2007: the tribunal has full power to determine by whom and to what extent costs are to be paid.</p> <p>Section 29 (3) of the Tribunals, Courts and Enforcement Act 2007: subsections (1) and (2) have effect subject to Tribunal Procedure Rules.</p> <p>Section 29(4) of the Tribunals Courts and Enforcement Act 2007: orders can be made against a representative.</p> <p>Section 29(5) of the Tribunals Courts and Enforcement Act 2007: defines wasted costs</p>	<p>Up to 5 marks</p>
<p>Any other relevant point to describe the procedure e.g:</p> <p>Section 10(1) Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008: may make orders for wasted costs (under s.29(4) TCEA 2007) or if the tribunal considers that a party has acted unreasonably in bringing, defending or conducting proceedings.</p> <p>No power to award costs in Social Entitlement Chamber and the War Pensions and Armed Forces Compensation Chamber: section 10 Tribunal Procedure (First-Tier Tribunal) (Social Entitlement</p>	<p>Up to 7 marks</p> <p>To achieve a merit or distinction candidates must state specifically which rules give the relevant tribunals the power to make an order for costs i.e. they must show</p>

<p>Chamber) Rules 2008; and section 10 of the Tribunal Procedure (First-Tier Tribunal) (War Pensions & Armed Forces Compensation Chamber) Rules 2008.</p> <p>Wasted Costs orders: <i>Harley v McDonald (2001)</i>: are discretionary. <i>Ridehalgh v Horsefield (1994)</i>: mere mistake is not sufficient. <i>Orchard v SE Electricity Board (1987)</i>: should not be used as a threat.</p> <p>Unreasonable Conduct: defined in the other chamber specific First Tier Rules where applicable e.g. rule 10 (1) of the Tribunal Procedure (First Tier Tribunal) Health, Education and Social Care Chamber) Rules 2008.</p>	<p>an ability to apply the law to the question asked rather than just cite the law.</p>
<p>Credit any other relevant law cited where comparisons are drawn to the upper tier e.g:</p> <p>4 upper chambers, 3 chambers governed by the Tribunal Procedure (Upper Tribunal) Rules 2008: Administrative Chamber, Tax and Chancery Chamber, Tax and Chancery Chamber.</p> <p>Lands Chamber governed by the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010.</p> <p>May make orders in respect of wasted costs, unreasonable conduct and appeals.</p> <p>Appeals: only the upper tribunals can make costs orders in respect of these). Rule 10 (1) of the Tribunal Procedure (Upper Tribunal) Rules 2008. Rule 10 (4) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010.</p>	<p>Up to 2 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. This may be done by drawing comparisons to the upper tribunals.</p>

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

<p>Question 5:</p>	<p>You work in-house for a small firm of solicitors. One of the solicitors in that firm, Miss Sheree Morgan, has been instructed by Mr Arshad Chowdhury. Mr Chowdhury is the proprietor of a company specialising in furniture removals. For over ten years Mr Chowdhury had instructed another firm of solicitors for his business purposes but recently he has encountered a number of issues with that firm. These difficulties include problems with one of the assistant solicitors, Mr Harrold Bishop.</p> <p>For some time, Mr Bishop hadn't returned any of Mr Chowdhury's calls or emails. Mr Chowdhury became even more concerned when Mr Bishop failed to put in a timely defence and counterclaim in one of the commercial matters being dealt with by him. This had serious implications for Mr Chowdhury and proceedings are continuing with Mr Chowdhury applying to the court for acceptance of a late served defence and counterclaim.</p> <p>Mr Chowdhury made a formal complaint to the senior partner, Mrs Nigella Heath, at Mr Bishop's firm. Mr Chowdhury met with</p>
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	<p>Mrs Heath in their office to discuss the complaint. Two days later Mr Chowdhury received a letter through the post from Mrs Heath advising him that the firm was no longer going to act on his behalf. A gross sum bill for a very large sum of money was attached to the letter, it was headed 'final bill'.</p> <p>Miss Morgan would like to accept Mr Chowdhury's instructions to continue with the current proceedings and to advise Mr Chowdhury in relation to his liability to pay the final bill rendered by Mr Bishop. Miss Morgan does not have sufficient knowledge as to whether the previous solicitors acted properly in terminating their retainer with Mr Chowdhury and is seeking your opinion. Mr Chowdhury has not been able to provide a lot of information because his own records are minimal and disorganised. For example, he is not able to advise whether there was ever a written retainer and he does not have one within his papers.</p> <p>Prepare the body of an email of advice to Miss Morgan advising:</p> <p style="padding-left: 40px;">a) when a retainer between a solicitor and client may be terminated and the potential costs implications of wrongful termination; and</p> <p style="text-align: right;">(10 marks)</p> <p style="padding-left: 40px;">b) the meaning of a final bill and any right Mr Chowdhury has to obtain a more detailed breakdown of the costs claimed by Mr Bishop.</p> <p style="text-align: right;">(10 marks)</p>
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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: the retainer is the contract for service, retainers can only be terminated by a lawyer with good cause having given reasonable notice, what may amount to good cause, categories of bills, statute bills and the right of a client to request a detailed bill. Candidates will demonstrate a good depth of knowledge of the subject (i.e. a good understanding of the Solicitors Act 1974) with good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness.
Merit	12+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the Solicitors Act 1974) with very good application and some analysis having regard to the facts. Candidates are likely to observe that IN THIS SCENARIO we are told there are two main points that need addressing (termination and final bills) and candidates will show a clear understanding as to how the common law and legislation would apply in this scenario. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a Pass and Merit (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Candidates are likely to observe that in this scenario there may not have been good cause or reasonable notice, so the retainer may have been terminated wrongly. Candidates may also observe that payment may be unlikely if the court makes such a finding. Candidates will provide an excellent advice setting out the right to request a detailed bill and the need for the bill to meet statutory requirements in order for it to be actionable. Work should be written to an exceptionally high standard taking into consideration that it is written in exam conditions.

Fail = 0-9.9 Pass = 10+ Merit = 12+ Distinction = 14+	
Indicative Content	Marks
Note: Candidates may not achieve more than 10 marks for discussing termination of retainers.	
<p>Required a discussion on when a retainer between a solicitor and client may be terminated e.g:</p> <p>IB (1.26): implies a term into a retainer that where a solicitor ceases to act for a client they must have good reason and provide reasonable notice</p> <p>Solicitors Act 1974 Section 65 (1)&(2): Client's failure to make a payment on account of costs.</p> <p>Wong v Vizards (a firm) [1997]: Solicitor declined to act at a hearing unless substantial payment made on account of a disputed bill. Amount claimed by the solicitor was unreasonable, they had wrongfully terminated the retainer on non- payment and were not entitled to any payment at all for the work done in preparing for the hearing.</p> <p>Warmingtons v McMurray [1936] 2 All ER 745: It is not reasonable that a solicitor should engage to act for an indefinite number of years, winding up estates, without receiving any payment on which he can maintain himself.</p> <p>Hilton v Barker Booth & Eastwood [2005]: Conflict of interest/Professional embarrassment.</p> <p>Re Jones [1896]: Suspected duress or undue influence. If the Solicitor is not confident the client is giving instructions freely they can cease to act.</p> <p>Richard Buxton (Solicitors) v Huw Llewelyn Paul Mills-Owens & Law Society (intervener) (Second Appeal)[2010]: Requirement to act improperly.</p>	Up to 6 Marks
<p>Discussion on the potential costs implications of wrongful termination e.g:</p> <p>Re Romer & Haslam [1893]: If a solicitor wrongfully terminates the retainer, he is not entitled to be paid.</p> <p>Wild v Simpson [1919]: Where a solicitor terminates a retainer unreasonably he may not be entitled to payment even on a quantum meruit basis.</p>	Up to 2 Marks
Credit any points on the nature of a retainer e.g:	Up to 4 Marks

<p>Underwood, Son v Piper Lewis [1894]: The law must imply that the contract of the solicitor upon a retainer in the action is an entire contract to conduct the action till the end.</p> <p>J H Milner & Son v Percy Bilton Ltd [1966]: A retainer serves as the right to payment & is fundamental to the recovery of costs where no retainer, no entitlement to charge.</p> <p>Groom v Crocker [1939]: Can be in writing, made orally, or implied by conduct</p> <p>Parrott v Etchells [1839]: Leaving files at a solicitor's office may be sufficient to establish a retainer</p> <p>Section 58(3) of the Courts and Legal Services Act 1990: Some agreements must follow specific formalities, such as a CFA which needs to be in writing.</p> <p>Section 13 of the Supply of Goods and Services Act 1982: A retainer is a contract for legal service between a lawyer and client and there is an implied term that the service will be carried out with satisfactory care and skill</p> <p>The SRA Code of Conduct: has the effect of implying terms into the retainer between solicitor and client (O(1.1) clients will be treated fairly, O(1.3) in deciding to terminate instructions solicitors will comply with the law and code and O(1.5) solicitors will provide competent and timely service.</p>	
<p>Note: Candidates may not achieve more than 10 marks for discussing bills.</p>	
<p>Required a discussion on the meaning of a final bill e.g:</p> <p>At the conclusion of a matter: the solicitor should render a FINAL INVOICE, containing the required statutory information and taking into account the payments made to that date.</p> <p>Contents of a statute bill: a statute bill will specify the period of work covered and will describe the work done, as well as complying with section 69(2) of the <u>Solicitors Act 1974</u>.</p> <p>Section 69(2) of the Solicitor's Act 1974: is an invoice which is fully compliant with the requirements of s 69(2) of the <u>Solicitor's Act 1974</u> (signed and delivered) is a statute bill. A solicitor can enforce them and a client can request an assessment of them. They are full and final for the work which they cover (i.e. no additional sums/adjustment for further work can be requested from the client later).</p> <p>Section 69(1) of the Solicitor's Act 1974: no action shall be brought to recover any costs due to a solicitor before the expiration of one month from the date on which a statute bill is delivered; a solicitor may also issue proceedings to recover the sums owed in that bill.</p>	<p>Up to 8 marks</p>

<p>Kingstons Solicitors v Reiss Solicitors [2014]: this was held not to amount to a statute bill. A bill must be drafted in such a way as to be regarded as a demand for payment.</p> <p>Carter-Ruck v Mireskandari [2011]: a statute bill with insufficient information may not be considered a statute bill, but may be deemed to be a request for payment on account.</p> <p>Davidsons v Jones-Fenleigh [1980]: lawyers are entitled to require a bill to be treated as a completely self-contained bill of costs to date; they must make it clear to their clients, either expressly or by implication, that this is the purpose of sending the bill for that amount at that time. Where a client pays a bill in its entirety without question, it is not difficult to infer that the bill is to be treated as a complete self-contained bill of costs to date.</p> <p>Bari v Rosen (trading as RA Rosen & Co Solicitors) [2012]: statute bills are final bills in respect of the work they cover in that there can be no subsequent adjustment in the light of the outcome of the business.</p> <p>Richard Slade and Company v Boodia and Boodia [2017]: The QBD, in an appeal from the SCCO, upheld Master James’ finding that statute bills must include disbursements.</p>	
<p>Credit a discussion on the meaning of any right a client has to obtain a more detailed breakdown of the costs claimed:</p> <p>Section 64 (1) of the Solicitors Act 1974: in respect of contentious business provides that a bill may be, at the option of the solicitor, either a bill containing detailed items or a gross sum bill.</p> <p>A gross sum bill: will simply contain the total to be paid to the lawyer, without any breakdown of the figure.</p> <p>Section 64(2) of the Solicitors Act 1974: if a gross sum bill is delivered then, within 3 months, the party charged with the bill may require the solicitor to deliver a detailed bill. This must be done before the solicitor issues proceedings to recover costs.</p> <p>Detailed bill following gross sum: the gross sum bill is no longer effective and the detailed bill can therefore be for a different sum than the original bill.</p>	<p>Up to 3 marks</p> <p>To achieve more than a pass candidates must discuss the option to obtain a detailed bill as well as what would make a bill ‘final’.</p>
<p>Credit a discussion on the different types of invoices e.g:</p> <p>Interim invoices on account: are merely requests for money on account of work undertaken. They must be for a reasonable sum. If these have been rendered, a solicitor will be able to seek a different amount from the client at the end of the case for the period that the interim bill covers. A solicitor cannot enforce them and a client cannot request an assessment of them.</p> <p>Section 65(2) of the Solicitors Act 1974: a solicitor may seek a payment on account in respect of any contentious business. If the request is for</p>	<p>Up to 2 Marks</p>

<p>a reasonable amount and the client does not pay then there is good cause to terminate.</p> <p>Turner & Co v O Palomo SA [2000]: if the client refuses to pay an interim invoice on account then the solicitor’s remedy is to terminate the contract of retainer and render a final statute bill. 5 bills rendered during the course of the litigation had been headed ‘on account of charges and disbursements incurred or to be incurred’ could not be construed as final or statute bills. The time for assessment would not begin to run until a final bill had been rendered and served.</p>	
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<p>Question 6:</p>	<p>You work in-house for a city firm of solicitors. Mr George Beachy, one of the solicitors in that firm, has been instructed by Westend Ltd. Westend LTD had contracted with a Malaysian company (Awang Construction), in respect of a project in Iraq. A dispute arose and, as per the agreement between the parties, the matter is proceeding to arbitration.</p> <p>A sole arbitrator has been appointed by the London Court of International Arbitration pursuant to a request made in April 2018. The arbitrator is an American lawyer who is a partner of an American law firm.</p> <p>Mr Beachy has approached you to assist him in drafting his initial letter of advice to Westend Ltd. He has asked that you provide him with information in relation to the assessment of costs in arbitration proceedings.</p> <p>Prepare the body of a memo to your solicitor colleague. Describe the procedure for the assessment of costs in arbitration, in what circumstances an assessment must go to court and how an award may be enforced.</p>
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<p>Total Marks Attainable</p>	<p>20</p>
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<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>
<p>Pass</p>	<p>10+</p>	<p>An answer which addresses MOST of the following points: Costs should be determined by agreement or by the arbitrator, assessment as arbitrator ‘sees fit’, 3 categories of costs, matter may be referred to the court where costs of the arbitrator cannot be agreed, enforcement would be through the usual methods under the CPR. Candidates will demonstrate a good depth of knowledge of the subject (i.e. a good understanding of the framework for assessment of costs and the relationship between arbitration proceedings and the courts) with good application and some analysis having regard to the facts, although candidate may demonstrate some areas of weakness.</p>
<p>Merit</p>	<p>12+</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 (i.e. a very good understanding of the framework for assessment) with very good application and some analysis having regard to the facts. Candidates are likely to observe that IN THIS SCENARIO we are told there are three main points that need addressing (assessment, court and enforcement) and candidates will demonstrate a sound knowledge base as to how the particular sections of the Arbitration Act relate to those points. Candidates may discuss and critically analyse why, for example, the assessment of costs by the court is very unlikely i.e that the starting point will be the parties agreement followed by the potential assessment by the arbitrator. Most views expressed by candidates should be supported by relevant authority and/or case law.</p>

Distinction	14+	An answer which includes ALL the requirements for a Pass and Merit (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Candidates will provide an excellent advice setting out the right to refer the matter to the court and the difficulties faced with enforcing an order. All views expressed by candidates should be supported by relevant authority and/or case law. Work should be written to an exceptionally high standard taking into consideration that it is written in exam conditions.	
<p>Fail = 0-9.9 Pass = 10+ Merit = 12+ Distinction = 14+</p>			
Indicative Content:			Marks
<p>Required:</p> <p>Section 59(1) of the Arbitration Act 1996: costs in arbitration proceedings fall into three categories - the arbitrator's fees and expenses, the fees and expenses of any arbitral institution concerned and the legal or other costs of the parties.</p> <p>Section 59(2) of the Arbitration Act 1996: costs will also include the costs of or incidental to any proceedings when determining the amount of the recoverable costs of the arbitration in accordance with section 63 of the Act.</p> <p>Section 63(3) of the Arbitration Act 1996: the arbitrator must assess costs as he 'sees fit'.</p> <p>Section 63(4) and section 63(1) of the Arbitration Act 1996: if costs are not determined by agreement or by the arbitrator, the parties can apply to the court (the application should be on-notice) and the court may then determine the recoverable costs. Challenges to an award are possible, which would also go to the court. Section 67 (as to jurisdiction), section 68 (serious irregularity), and section 69 (point of law).</p> <p>An award: is effectively a final order and, under s 66(1) of the Arbitration Act 1996, can therefore be enforced with the leave of the court if a party fails to comply with it.</p>			<p>Up to 5 marks</p> <p>To pass candidates must refer to the Arbitration Act 1996 and show an ability to apply sections of the Act to the problem question set.</p>
<p>Credit any points advanced on the framework of the assessment procedure under the Arbitration Act 1996 e.g:</p> <p>Section 60 of the Arbitration Act 1996: concerns the agreement to pay costs in any event. Such an agreement, for a party to pay the whole or part of the arbitration, can only be valid in the arbitration if made after the dispute arose.</p> <p>Section 61(1) of the Arbitration Act 1996: the arbitrator can allocate the costs of the arbitration between the parties.</p> <p>Section 61(2) of the Arbitration Act 1996: for any award of costs, unless the parties have agreed otherwise, the arbitrator shall award costs on the general principle that costs should follow the event.</p>			<p>Up to 8 marks</p>

<p>Section 62 of the Arbitration Act 1996: the effect of an agreement or award about costs and stipulates any such agreement extends only to such costs as are recoverable, unless the parties decide otherwise.</p> <p>Sections 63(4) and (5) of the Arbitration Act 1996: mean that, where costs are determined by the arbitrator they are assessed on the standard basis as it was defined before the introduction of the CPR, unless the arbitrator or the court orders otherwise.</p> <p>Section 65 (1) of the Arbitration Act 1996: empowers the arbitrator, unless the parties have agreed otherwise, to limit the recoverable costs of the arbitration, or of any part of the arbitral proceedings, to a specified amount.</p> <p>Section 65 (2) of the Arbitration Act 1996: allows for the arbitrator to do this at any stage, but requires that it must be done sufficiently in advance of the incurring of costs to which it relates, or the taking of any steps in the proceedings which may be affected by it, for the limit to be taken into account.</p>	
<p>Credit any points advanced on when the matter may go to court e.g:</p> <p>Section 28 (2) of the Arbitration Act 1996: if a party applies to the court to consider the fees, the court may make any adjustments it sees fit.</p> <p>Section 70(2) of the Arbitration Act 1996: an application or appeal may not be brought if the applicant or appellant has not first exhausted any available arbitral process of appeal or review and any available recourse under section 57 of the <u>Arbitration Act 1996</u> (correction of award or additional award).</p> <p>Section 70(5) of the Arbitration Act 1996: where, on an application or appeal, the court feels that the award does not contain the tribunal’s reasons, or does not set out the tribunal’s reasons in sufficient detail to enable the court properly to consider the application or appeal, the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.</p> <p>Section 70(3) of the Arbitration Act 1996: any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.</p> <p>Sections 67-69 of the Arbitration Act 1996: cover the situations where an award may be challenged:</p> <p>Section 67 of the Arbitration Act 1996: a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging any award of the arbitral tribunal as to its substantive jurisdiction; or for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.</p>	Up to 6 marks

<p>Section 68 of the Arbitration Act 1996: a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.</p> <p>Section 69 of the Arbitration Act 1996: unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.</p>	
<p>Any other relevant points cited on enforcement e.g:</p> <p>Section 66(2) and (3) of the Arbitration Act 1996: where the court gives leave, judgment can be entered in the terms of the award except where the person against whom the order is sought can show that the arbitrator lacked jurisdiction to make the award.</p> <p>Refusal of Leave: if the court finds that the award is not legally valid, it may refuse leave (<i>Re Stone and Hastie Arb.</i> [1903] 2 K.B. 463, CA and <i>Middlemiss & Gould v Hartlepool Corp</i> [1972] 1 W.L.R. 1643; [1973] 1 All E.R. 172).</p> <p>CPR 62.18: sets out the procedure to enforce an award - the application should include the costs to be included in the order giving permission and, if judgment is to be obtained, for the costs of any judgment to be entered.</p>	Up to 3 marks

<p>Question 7:</p>	<p>You have been instructed by Martin Tinder who is a solicitor who works for a large solicitor's firm in Durham. He has just inherited an ex colleague's case load and discovered the file of Hannah Newman. The firm had acted on behalf of Ms Newman in proceedings against Durham Children's Home, a children's home where Ms Newman had resided since she was 5.</p> <p>Whilst residing at the home Ms Newman had suffered sexual abuse at the hands of the care workers. The firm took initial instructions during an attendance at Ms Newman's property on the 14 June 2015 when she instructed that she had suffered many emotional and psychological problems as a result of rape and the sexual abuse. Ms Newman further disclosed that, as a result of her feelings, she has a long history of criminal convictions; she had been involved in petty offences since the age of 12 and has a history of drug and alcohol misuse.</p> <p>The matter concluded with an apology with "no order as to costs". The matter was funded by the LAA (Certificate Number LSP193079A-B2) and the certificate was issued on the 1 July 2015. There is a notice to show cause on the file covering a period of two weeks in relation to a reassessment of means. The profit costs recorded on the file total £9,300 exclusive of VAT. The funding certificate was discharged on the 19 June 2016.</p> <p>You have been asked to provide advice on the next steps, how the costs in the claim should be assessed, the impact of the notice to show cause and the impact of the delay in dealing with the matter. Prepare the body of an advice to Mr Tinder.</p>
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Total Marks Attainable		20
Fail = 0-9.9 Pass = 10+ Merit = 12+ Distinction = 14+		
Fail	up to 9.9	An answer which deals with the basic requirements of the question, but in dealing with those requirements only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues. The answer will be weak in its presentation of points and its application of the law to the facts.
Pass	10+	An answer which addresses MOST of the following points: Legal Representation, certificates, discharge of certificates, notice to show cause and the assessment process. Candidates should identify the relevant issues in each case and deal with the circumstances in their advice.
Merit	12+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the operation of legal aid funding) with very good application and some analysis having regard to the facts. Candidates should note the position with 'at risk' work. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc.
Indicative Content		Marks
<p>Required: to pass candidates are required to demonstrate general knowledge of public funding certificates e.g</p> <p><i>Legal Representation:</i> Differentiated from controlled work (work under a legal help). This is work undertaken under a public funding certificate.</p> <p><i>Certificates will:</i> have a costs limit and detail the scope of the work that may be undertaken.</p> <p><i>Certificates that are current are described as live:</i> but certificates may be "discharged" or "revoked" because for example, clients are no longer eligible or have failed to respond to a Legal Aid Agency request for further information or the legal representative has recommended that the certificate should be discharged or revoked.</p> <p><i>The relationship between the Provider and the client ceases upon notice of Discharge:</i> upon receipt of this notification it might be reasonable to write a closing letter to the client advising them of this fact. The content should be minimal and paid as a routine letter.</p>		Up to 4 Marks An explanation should be given as to the nature of a funding certificate that has been discharged
<p>Credit discussion of the notice to show cause e.g:</p> <p><i>Notice to Show Cause:</i> Work should not be claimed for when a "show cause" notice is in place. A "show cause" notice puts an</p>		Up to 6 Marks

embargo on legal aid certificates until clients are able to “show cause” why it should not be revoked or discharged.

Show Cause Under Funding Code: Embargo placed on certificate and no work can be claimed for date that show cause is in place even if show cause is subsequently removed

Show Cause under LASPO (intention to withdraw a determination): If show cause is removed then funding will be continuous (as though show cause was never placed on the certificate). If certificate is withdrawn (discharged/revoked) then no work can be claimed from the date the show cause was placed on the certificate. Provider can undertake work “at risk”.

Funding code procedures C55.3: Rule C55.3 of the procedures states that no further work can be carried out following a show cause being placed on a certificate and, there is no provision that it will be covered if the show cause is subsequently lifted. Work undertaken post show is not claimable subject to the following exceptions:

- Work pending appeal, where permission granted to protect clients interests and arising out of the proceedings
- Successful appeal and rescinding Discharge/revocation
- Closing letters

Show Cause Process under LASPO: For certificates issued after April 2013, Regulation 42(3) of the Civil Legal Aid (Procedures) Regulations 2012 provides for an equivalent of the show cause procedure under the funding code procedures through notification of an intention to withdraw a determination (see also section 8.36 of the Lord Chancellor’s Guidance). The scheme is different in that, if the determination is withdrawn as a result of this procedure, the withdrawal takes place with effect from the initial notification of intention (42(3)). That represents a difference from the position under the funding code in that:

1. The client will not have cost protection, under the Civil Legal Aid (Costs) Regulations 2013, in the period from when the Director first notified an intention to withdraw the determination;
2. The provider can carry out work at risk in relation to whether the withdrawal does occur, whereas no work could be carried out within the show cause period under the funding code without express permission irrespective of the ultimate outcome of the show cause.

This means that if the show cause/notification of an intention to withdraw a determination is removed we can allow work to be claimed as though there has been no gap in cover. If the determination is subsequently withdrawn (the certificate is discharged) the withdrawal will be effective from the date of the show cause – providers will not be able paid for any work following the date of show cause/intention to withdraw a determination.

<p>These provisions are not retrospective and only apply to certificates issued under LASPO</p> <p>No Instructions from Client: If the client has failed to provide instructions to their solicitors a show cause should be placed on the certificate giving the client the opportunity to contact their solicitors, failing which the certificate will be discharged. If the certificate is still live and there has been no show cause then a referral should be sent to the legal team for them to place a show cause on the certificate. The claim should be returned to the solicitors pending resolution of the show cause.</p> <p>Means Reassessment: Where there is an outstanding means assessment on a live certificate, this must be resolved prior to payment of the claim. In accordance with the billing checklist caseworkers should reject any claim submitted</p>	
<p>Candidates were asked to explain how the costs would be assessed e.g:</p> <p>CCMS: Before any bill can be submitted for payment, the case must be discharged and the outcome codes completed on CCMS. The outcome codes are very similar to the codes used on page 2 of the paper Claim 1/1As. Once the case has been discharged and the outcome codes completed, the final bill option is made available on CCMS.</p> <p>All licensed work (work under a certificate): is assessed unless a family fixed fee applies. Assessable costs under £2500 excluding VAT are assessed by the LAA on a Claim 1 form, or where a family fixed fee is included this is on Claim 1A form.</p> <p>Assessable costs over £2500 excluding VAT: are assessed by the court under Part 47 of the Civil Procedure Rules (detailed assessment). This is under provisional assessment, which is separate to inter partes provisional assessment (CPR 47.15) and is provided under separate procedure (CPR 47.18). This provisional assessment process for legal aid costs has existed since before the introduction of the Civil Procedure Rules in 1999.</p> <p>The bill of costs is lodged: for provisional assessment with a Form N258A (or D258A for family work). The primary document in assessing costs is the bill of costs or the claim form submitted, which sets out the items and amounts being claimed. Items not appearing in the bill or claim form will not be paid.</p> <p>The original assessed bill is returned with N253: "Notice of Amount Allowed on Provisional Assessment"</p> <p>The solicitor must notify: counsel of any reduction</p> <p>If the provider objects: they can request a hearing within 14 days of receiving notice of provisional assessment. Although it is common for written objections to be sent.</p>	<p>Up to 8 Marks</p> <p>To achieve a distinction candidates should demonstrate a sound ability to apply the law to the facts of the scenarios presented together with knowledge of how funding certificates operate generally.</p>

<p><i>If the provider objects to the outcome of a hearing/response to written objections:</i> they must then follow the same route as other costs under Part 47, and appeal under Part 52.</p> <p><i>If the provider consents:</i> to the assessment or after outcome of a hearing and/or appeal, they must return the bill of costs with a completed Legal Aid Assessment Certificate EX80a or EX80b (where costs are subject to family fixed fees).</p> <p><i>The EX80a/b is approved by the court and returned:</i> the bill of costs is kept on the court file.</p> <p><i>A claim for payment of the bill of costs is sent to the LAA using a Claim 1 or Claim 1A form:</i> This must be sent with:</p> <ul style="list-style-type: none"> <input checked="" type="checkbox"/> A copy the bill of costs <input checked="" type="checkbox"/> Counsel's fee notes <input checked="" type="checkbox"/> Expert's invoices and disbursement vouchers <p>Any other supporting evidence required (e.g. copies of court orders made for DNA and Drug testing)</p>	
<p>Candidates should have considered the work claimable following Discharge of the certificate e.g</p> <p><i>Where the costs are to be assessed by the LAA:</i> only the reasonable costs in preparing the claim and the checking and signing the Claim form will be recoverable. Putting the file in order, instructing a Costs Draftsman to prepare the claim and any correspondence arising in this respect would not be recoverable. Please note the comments on bill preparation and escape case where the costs are subject to fixed fee see 13.4.</p> <p>Where the costs have been subject to Detailed Assessment by the Court, what can legitimately be claimed as fee earner case specific functions may include:</p> <ol style="list-style-type: none"> 1. Completing N258A (Request for a Detailed Assessment), 2. Letter out to Court, 3. Diarising, 4. Considering provisional assessment, 5. Casting up Bill of Costs 6. Completing EX80A 7. Letter to Court <p><i>Where the court allows these costs on assessment they will not usually be queried:</i> The exceptions are items 4 and 5 which are dependent on whether there has been a reduction on provisional assessment.</p>	Up to 4 Marks

Question 8:	You work for Commercial Costs Ltd, a firm dealing in legal costs. You have been instructed on a regular basis by Mr Alfred Hitch who is a solicitor. He has recently taken on a new job with a local firm where he is responsible for running the commercial litigation department. He has contacted you in respect of one of his clients.
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Mr Hitch is acting on behalf of Mr Patel. Mr Gregson, a former Member of Parliament, has brought proceedings for libel against Mr Patel over allegations broadcast on television that he took cash in return for asking questions in the House of Commons. Mr Gregson has been able to issue his libel action because of a fighting fund to which a number of individuals are contributing.

Whilst funding of matters in this way is now a regular occurrence in substantial commercial litigation and international arbitration Mr Hitch is aware of the theory but has little experience of the practice of third party funded actions.

Prepare a **summary of advice** for Mr Hitch of the circumstances in which a litigant might wish to use third party funding, the ethical issues that might arise, the type of proceedings for which funding might be available and what that funding might cover.

Total Marks Attainable	20
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Fail	up to 9.9	An answer which deals with the basic requirements of the question, but in dealing with this only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues. The answer will be weak in its presentation of points and its application of the law to the facts. There will be little evidence that candidates have any understanding of the framework governing third party funding, or any view expressed will be unsupported by evidence or authority.
Pass	10+	An answer which addresses MOST of the following points: Candidates must provide an explanation of what third party funding is; the concept of maintenance and champerty; and what third party funding may cover. Candidates should refer to the developments in the common law to describe the change in attitude towards this type of funding. Candidates MAY have commented on the lack of legislative framework of this form of funding. Some key case law may be included, but this may not be specifically applied or only superficially.
Merit	12+	An answer which includes ALL the requirements for a pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of third party funding) with very good application and some analysis having regard to the facts. Candidates should identify that, in this scenario, the party may be considered to be commercially alert and therefore there is likelihood that he will understand the implications of such a funding arrangements. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a pass and merit (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. All views expressed by candidates should be supported by relevant authority and/or case law throughout. Candidates should be able to show critical assessment and capacity for independent thought on the topics. Work should be written to an exceptionally high standard taking into consideration that it is written in exam conditions.

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

Indicative Content	Marks
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<p>Required:</p> <p>Definition: Third party funding is an alternative method of litigation funding where a commercial funder with no connection to the proceedings will pay some or all of the costs of your case in return for a share of any sum of money awarded in damages if you win your case.</p>	<p>Up to 2 marks</p> <p>In order to achieve a pass, candidates must (albeit not explicitly) describe what is meant by third party funding.</p>
<p>Credit a discussion on the ethical issues that might arise e.g:</p> <p>Control and free decision making: historically such funding arrangements have been unlawful because of the influence that a funder may have on the decisions of the litigator. Today, agreements tend to be structured so that the client retains full control over the way in which they conduct their action.</p> <p>British Cash & Parcel Conveyors v Lamson. Store Service Co [1908]: maintenance is said to be the procurement, by direct or indirect financial assistance, of another person to institute, or carry on or defend the civil proceedings without lawful justification.</p> <p>Chitty 28 Ed Vol 1 17 – 054: Champerty ‘occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit’.</p> <p>Section 13 The Criminal Law Act 1967: Abolished the criminal offences and torts of champerty and maintenance.</p> <p>Section 14 The Criminal Law Act 1967: Agreements may still be unenforceable on the grounds of public policy.</p>	<p>Up to 6 marks</p> <p>To achieve a merit or distinction, candidates should not simply cite the relevant rules and principles but must show an ability to apply the rules to the scenario.</p>
<p>Credit discussion on the type of proceedings for which funding might be available and what that funding might cover e.g:</p> <p>Success fees and premiums have now ceased to be recoverable: so litigation funding by a third party may be a more attractive option in some cases.</p> <p>Claimants will have the resources: to be represented by highly experienced solicitors and counsel.</p> <p>The minimum size of claim: most litigation funders will fund is approximately £350,000. There needs to be sufficient damages available to make the time and effort invested worth it.</p> <p>The minimum eligibility criteria: for considering funding of a claim are a defendant who can pay the amount claimed and good legal merits both in relation to liability and quantum.</p> <p>Seear v Lawson (1880): Third Party funding is permitted in matters arising out of insolvencies.</p> <p>Factortame 2002: Arrangement for third party funders to cover the costs of forensic accountants was held to be lawful. The Claimant's remained in control of the conduct of the litigation.</p>	<p>Up to 6 marks</p> <p>To achieve a merit or distinction, candidates should not simply cite the relevant rules and principles but must show an ability to apply the rules to the scenario.</p>

<p>Credit any other relevant law cited to illustrate the change of attitude towards this type of funding e.g:</p> <p><i>The Legal Aid and Advice Act 1949:</i> The availability of government funding for litigation suggested a shift in attitude towards the use of funding from outside parties for litigation.</p> <p><i>Section 58 CLSA 1990:</i> Contingency Fee Agreements (CFAs) expressly permitted by statute. These agreements would have historically been deemed champertous.</p> <p><i>Section 45 LASPO 2012:</i> A new form of contingency fee agreement was permitted by statute.</p> <p><i>Akin v Borchard Lines Ltd & Ors [2005]:</i> The court gave tacit approval to this type of litigation funding</p> <p><i>Merchant bridge & Co Ltd & Another v Safron General Partner 1 Ltd [2011]:</i> Third party funders could be liable to the full extent of the claimant's costs.</p> <p><i>Association of Litigation Funders:</i> Established in 2011, they have a voluntary code of conduct.</p> <p><i>JEB Recoveries LLP v Linstock [2015]:</i> The judge held that given the current climate and changing attitudes to litigation funding, the agreement did not offend public policy.</p> <p><i>Restrictions:</i> on champerty and maintenance still remain.</p> <p><i>Courts decide on the facts:</i> of each litigation funding agreement whether the contract is unenforceable on the grounds of public policy.</p>	<p>Up to 8 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>
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<p>Question 9:</p>	<p>You are a costs lawyer working in-house for a firm of solicitors, Hoggarts LLP, in the South East of England. Your role has recently diversified, you now work as a legal cashier within the firm's accounts department two days a week. The role requires you to work closely with the COFA and principals at the firm.</p> <p>You are currently working on the file of Teresa Harrison. Ms Harrison's matter was a claim for personal injuries arising from an accident at work. Ms Harrison is a privately paying client. On 1 July 2018 a negotiated settlement was achieved in the sum of £25,000 plus costs in respect of the claim.</p> <p>On 9 July 2018 your firm received a cheque from the other side's solicitors payable to the firm. The cheque was in the sum of £32,000. The accompanying letter confirmed that £32,000 was in full and final settlement of Ms Harrison's claim. The costs on the file are estimated to be £8,500.</p> <p>On receipt of your final invoice Ms Harrison has been in touch with your firm and asked for an invoice for VAT purposes. She has also asked for your firm to set out the law governing both input and output tax.</p> <p>Provide the body of a letter of advice to Ms Harrison setting out how the firm has dealt with the cheque received and setting out the law governing both input and output tax. Your advice should cite any relevant rules.</p>
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Total Marks Attainable		20
Fail	up to 9.9	An answer which deals with the basic requirements of the question, but in dealing with only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues. The answer will be weak in its presentation of points and its application of the law to the facts. There will be little evidence that candidates have any understanding of the framework governing the payment of mixed monies to firms and the rules in relation to client accounts.
Pass	10+	An answer which addresses MOST of the following points: A definition of the types of money; the solicitors account rules, in particular those governing the client money; the rules on input and output VAT.
Merit	12+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the operation of the SRA account rules). Answers may show an ability to apply the law to the facts, i.e by identifying that the money laundering regulations may be relevant in this scenario because the client is a private paying client. There should be very good application and some analysis having regard to the facts. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. All views expressed by candidates should be supported by relevant authority and/or case law throughout. Candidates should be able to show critical assessment and capacity for independent thought on the topics. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc.
<p>Fail = 0-9.9 Pass = 10+ Merit = 12+ Distinction = 14+</p>		
Indicative Content		Marks
<p>Required:</p> <p>Rule 12 of the SRA Account Rules: Categories of money.</p> <p>Rule 12.1 of the SRA Account Rules: These rules do not apply to out-of-scope money, save to the limited extent specified in the rules.</p> <p>Distinguish between office and client: Rule 12 divides money into two categories, namely: Client money and Office money.</p> <p>All other money held or received in the course of practice falls into one or other of the following categories:</p> <p>Rule 12.1(a) of the SRA Account Rules: "client money" - money held or received for a client or as trustee, and all other money which is not</p> <p>Rule 12.1 (b) of the SRA Account Rules: "office money" - money which belongs to you or your firm.</p>		<p>Up to 4 marks</p> <p>To achieve a pass, an explanation should be given as to what is client money and the need for firms to comply with the rules.</p>
Candidates should set out advice in relation to mixed payments e.g:		Up to 7 Marks

<p>Rule 1.1 of the SRA Account Rules: The purpose of these rules is to keep client money safe. This aim must always be borne in mind in the application of these rules</p> <p>Rule 14.1 of the SRA Accounts Rules 2017: Client money must without delay be paid into a client account, and must be held in a client account, except when the rules provide to the contrary.</p> <p>Rule 14.5 of the SRA Accounts Rules 2017: Only using the client account to hold client funds for a legal transaction.</p> <p>Mixed payments: A lawyer will often receive a cheque which is made up of partly office and partly client money. Rule 18.1 of the SRA Account Rules 2017 defines a "mixed payment" is one which includes client money as well as office money and/or out-of-scope money. It is possible to split the cheque under rule 18.2(a) of the SRA Account Rules 2017.</p> <p>Splitting Cheques: Depending on who regulates the firm within which a lawyer works and depending on how that individual is qualified and regulated, it is possible to split mixed payments.</p> <p>Rule 18.3 of the SRA Account Rules 2017 : if you do not split a cheque you must pay it all into the client bank account and transfer to the office account within 14 days of receipt.</p> <p>Transferring from Client to Office: involves the bank moving money from one bank account to another. It occurs when the solicitor instructs the bank to transfer money from the client bank account to the office bank account, or from the office bank account to the client bank account. The solicitor must make entries on the firm's internal cash accounts and client ledger to reflect the fact that the money has actually moved between bank accounts.</p> <p>Rule 17.2 of the SRA Accounts Rules 2017: Firms must first send a bill before money is transferred from client to office.</p>	
<p>Candidates should also discuss VAT e.g:</p> <p>Output tax: charged by a business to its customers.</p> <p>Input tax: charged to the business by its suppliers.</p> <p>A business registered for VAT: charges its customers output tax and then accounts to HM Customs and Excise for tax. In other words, it acts as an unpaid tax collector. It will normally be possible for such a business to deduct input tax charged to the business from the amount accounted for to HM Customs and Excise, thus reducing or absolving their liability.</p> <p>Section 4(1) of the Value Added Tax Act 1994: VAT is chargeable on the supply of goods or services where the supply is a taxable supply and is made by a taxable person in the course or furtherance of a business carried on by him.</p>	Up to 8 Marks

<p>Supply of Goods: This comprises all forms of supply whereby the whole property in goods is transferred, including a gift of goods.</p> <p>Taxable Supply: This means any supply of goods or services other than exempt supply.</p> <p>Value Added Tax Act 1994, Schedule 9: lists exempt supplies.</p> <p>Taxable Person: A person is a taxable person if he is or is required to be registered under the Act. A person must register if, broadly the value of his taxable supplies (not his profit) in the preceding 12 months exceeded a figure specified in each year's budget. A firm of solicitors will almost always have to be registered. Voluntary registration is permitted. A person may register voluntarily in order to recover input tax charged to him.</p> <p>Business: VAT is chargeable by a taxable person only on taxable supplies made in the course of furtherance of a business carried on by him. Business includes any trade, profession or vocation, but the term is not limited to these activities since it also covers certain clubs and associations. Although the services of an employee are not generally taxable, Value Added Tax Act 1994 provides that where a person in the course of a business.</p>	
<p>Candidates may discuss money laundering e.g:</p> <p>Due Diligence and Money Laundering: The Money Laundering Regulations 2007 (the 'Regulations') require you to: carry out client due diligence, so that you know who you are dealing with, conduct ongoing monitoring, so that you know what you are being asked to do and can spot warning signs of money laundering.</p> <p>The Proceeds of Crime Act 2002 (POCA): contains the principal money laundering offences and defences.</p> <p>Section 327 of the Proceeds of Crime Act 2002: a person will be liable if he conceals, disguise, converts, transfers or removes criminal property. Concealing or disguising criminal property includes concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it.</p> <p>Section 328 of the Proceeds of Crime Act 2002: states that a person commits an offence if he enters into, or becomes concerned in, an arrangement which he knows or suspects facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person.</p> <p>Section 329 of the Proceeds of Crime Act 2002: if a person acquires, uses or possesses property for which he has not given adequate consideration, he may be liable of an offence.</p>	Up to 3 marks