August 2018: Unit 3 Marker Guidance

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.
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 provided to you along with this document); and
- ☑ the marking rubric for each of the questions which you have been asked to mark.

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

Candidates must answer **ALL** of the questions in this section.

Question 1:	Explain how a law firm may be structured to ensure responsibilities can be divided among functional divisions, so that each employee can focus on certain types of work, whilst the firm retains a core part of their organisation that exerts key influence over those divisions.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: ***Mintzberg suggests:*** there are seven ways to ideally structure an organisation. ***In the first five:*** there is a core part of the organisation that exerts key influence over its structure. ***Charles Handy:*** produced a model of business based on its organisational culture. This provides an insight into how an organisation can be structured and managed as well as an idea of the type of organisation a person might fit in to best.	Up to 2 marks
Required: ***The Entrepreneurial Organisation:*** Shaped by a strategic apex creating centralisation. It generally has few staff, minimal division of labour, little hierarchy, with power focused strongly with the chief executive and is coordinate through direct supervision. ***The Machine Organisation:*** This is shaped by its technostructure – planner, financial controllers, schedulers etc. It works on the basis of standardised routines and operating tasks. Again, it is highly centralised and controlled, with formal communications, operating units, tasks grouped under functions, elaborate administrative systems. It has centralised decision-making and a clear distinction between management and staff. ***The Diversified Organisation:*** This is a set of semi-autonomous units under a central administrative structure; it is this central *middle line* which shapes the organisation. In effect, it is a multiplicity of machine organisations in the way it functions. Here, though, there are a number of relatively self-sufficient units. The units are usually called divisions with a central administration referred to as the headquarters, which allocates capital and tracks performance.	Up to 9 marks

The Professional Organisation: This is driven by its operating core and aims towards professional autonomy. This is built around the skills and knowledge of professional staff who are employed because they know how to do the job and are relied upon to deliver. They therefore have a high degree of autonomy and power sits with the expert. Standards are set outside of the business. This is a highly democratic business and can be difficult to 'manage'. ***The Innovative Organisation:*** The core to this are the support staff and teams. These are often research based organisations which deliver through being flexible in rapidly changing environments, relying on experts, training, letting people get on with their job as they see fit in multi-disciplined teams. Unlike the professional organisation, this expertise is not bound by professional standardised routines and skills. It is an adhocracy rejecting bureaucratic controls and avoiding emphasis on planning and control. Whilst this can cause issues and a rejection of management, it is the way to achieve the innovation and flexibility required. ***The Missionary Organisation:*** At its core, it is the mission, its ideology, that counts above all else. This core is clear, focused, distinctive and inspiring. This is supported through strongly held traditions and values to which staff readily identify and who share common values. There is a strong standardisation of norms and people who join such organisations are recruited to and sign up to these, reinforcing the whole core. This is often considered in the context of religious organisations, but can equally be seen in a range of Japanese firms and some American ones such as McDonalds. ***Political:*** This doesn't really have a core, or co-ordinating mechanism, and perhaps should not be included in a list of business models. In a real sense this exists to a degree in all organisations, often characterised by conflict. It is when this becomes more pervasive and extreme that it becomes a problem and the organisation is not able to function due to continuous conflict and a lack of shared objectives or even processes.	
A discussion on any other relevant points and alternative theorists (credit any points/points of law correctly cited and described) e.g: ***The Entrepreneurial Organisation:*** Tends to be smaller and owner managed; a lot of organisations go through this stage at the start. ***The Machine Organisation:*** Typically larger, older organisations in a stable environment carrying out repetitive work.	Up to 4 marks

The Professional Organisation: Examples include hospitals, universities, public agencies and accountancy firms.	

Question 2:	Explain what a compliance officer is and outline their responsibilities for the management of functional areas of a firm regulated by the Solicitors Regulation Authority.	
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+		10
Indicative Content		**Marks**
Required: ***Part 2 of Schedule 11 of the Legal Services Act 2007:*** requires ABSs to appoint a Head of Legal Practice and a Head of Finance and Administration (HOFA), but there is no corresponding statutory requirement for solicitor's practices. ***Section 91(1) of the Legal Services Act 2007:*** The Head of Legal Practice of a licensed body must take all reasonable steps to ensure compliance with the terms of the licensed body's licence, and as soon as reasonably practicable, report to the licensing authority any failure to comply with the terms of the licence. ***Section 91(3) of the Legal Services Act 2007:*** The Head of Legal Practice of a licensed body must take all reasonable steps to ensure that the licensed body, and any of its employees or managers who are authorised persons in relation to an activity which is a reserved legal activity, comply with the duties imposed by section 176, and as soon as reasonably practicable, report to the licensing authority such failures by those persons to comply with those duties as may be specified in licensing rules. ***Section 92(1) of the Legal Services Act 2007:*** The Head of Finance and Administration of a licensed body must take all reasonable steps to ensure compliance with licensing rules made under paragraph 20 of Schedule 11 (accounts). ***Section 92(2) Legal Services Act 2007:*** The Head of Finance and Administration must report any breach of those rules to the licensing authority as soon as reasonably practicable. ***Rule 8.5 of the SRA Authorisation Rules 2011:*** The primary legislation and SRA Handbook differ on the title of the HOLP/COLP and HOFA/COFA role but this does not affect its substance. The SRA Authorisation Rules 2011 change the titles from 'Head of' to 'Compliance Officer'. The rules also require that all SRA regulated firms have both a COLP and COFA as opposed to just ABS, this extends the provisions set out in the legislation.		Up to 6 marks

Rule 8.5(b) of the SRA Authorisation Rules 2011: This rule requires that all SRA authorised firms have a COLP. ***Rule 8.5(d) of the SRA Authorisation Rules 2011:*** This rule requires that all SRA authorised firms have a COFA.	
Any other relevant point to describe the internal compliance function (credit any points/points of law/descriptions correctly cited and applied) e.g: ***Rule 8.5(c)(i) of the SRA Authorisation Rules 2011:*** the COLP must take all reasonable steps to ensure that the legal practice, its managers and its employees comply with any obligations under SRA Authorisation Rules 2011. The COLP must also record any failures. ***Rule 8.5(e)(i) of the SRA Authorisation Rules 2011:*** the COFA must take all reasonable steps to ensure that the legal practice, its managers and its employees comply with any obligations under SRA Accounts Rules. The COFA must also record any failures.	Up to 1 mark
Any other relevant point to describe the external reporting of failures to the SRA (credit any point/points of law/descriptions correctly cited and applied) e.g: ***Rule 8.5(c)(ii) and (iii) of the SRA Authorisation Rules 2011:*** a key part of the COLP role is the duty to report compliance failures to the SRA. ***Rule 8.5(e)(ii) and (iii) of the SRA Authorisation Rules 2011:*** a key part of the COFA role is the duty to report compliance failures to the SRA. ***Non-material compliance failures:*** do not need to be reported, apart from ABS firms which must report non-material failures as part of the annual information report; ***Material compliance failures:*** must be reported to the SRA as soon as reasonably practicable, even if the firm takes immediate steps to remedy the failure – the immediacy of the report will depend on the circumstance and seriousness of the breach. A compliance failure can be material either taken on its own, or as part of a pattern of compliance failures. ***No definition of material failure:*** but the COLP/COFA should take into account all relevant factors, including **(Guidance Note to rule 8 of the SRA Authorisation Rules 2011)**: the detriment or risk of detriment to clients; the scale of the issue; the overall impact on the firm, its clients and third parties; and the extent of any risk of loss of confidence in the firm, or the provision of legal services generally.	Up to 4 marks
Any other relevant point that describes the role and duty (credit any points/points of law correctly cited and described) e.g:	Up to 2 marks

The COLP/COFA is not responsible for general regulatory compliance: this falls within the remit of the COLP, but is required to comply with the SRA Principles and the outcomes in Chapter 7 of the SRA Code of Conduct in relation to the effective financial management of the firm. ***Chapter 7 of the SRA Handbook 2011:*** Management and supervision of a firm. Everyone has a role to play in the efficient running of a business, although of course that role will depend on the individual's position within the organisation. ***Outcome 7.4 of the SRA Handbook 2011:*** firms must have in place systems and controls for monitoring the financial stability of the firm and risks to money and assets that the firm holds entrusted by clients and others. Again, there is also an obligation to take steps to deal with any issues that may be identified.	

Question 3:	Explain how firms regulated by the Solicitors Regulation Authority may demonstrate they are taking a risk-based approach to compliance and managing their business.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required (a discussion on the SRA regulatory framework to manage and supervise firm): ***Chapter 7 of the SRA Handbook 2011:*** Management and supervision of a firm. Everyone has a role to play in the efficient running of a business, although of course that role will depend on the individual's position within the organisation. ***No strict regulatory requirement to develop a risk management policy:*** but devising and maintaining one will allow firms to identify, monitor and manage risks and will provide evidence to the SRA that they are running the business in accordance with sound risk management principles; and managing risks to comply with the SRA Handbook. ***The SRA does not define the risk management principles:*** that it expects firms and individuals to employ when running a business. Instead, it describes outcomes that must be achieved in order to comply with the SRA principles.	Up to 2 marks
Any relevant point on the regulatory framework (credit any point raised and applied) e.g: ***Outcome 7.1:*** firms must have a clear and effective governance structure and reporting lines.	Up to 4 marks

Outcome 7.2: They must also have effective systems and controls in place to achieve and comply with all the SRA Handbook principles, rules and outcomes and other requirements of the Handbook. ***Outcome 7.3:*** requires firms to identify, monitor and manage risks to comply with all the principles, rules and outcomes and other requirements of the Handbook, if applicable, and to take steps to address and identified issues. ***Outcome 7.4:*** firms must have in place systems and controls for monitoring the financial stability of the firm and risks to money and assets that the firm holds entrusted by clients and others. Again, there is also an obligation to take steps to deal with any issues that may be identified.	
Any relevant point to describe the risk management policy and/or process (credit any point raised and applied) e.g: ***A risk management policy should contain:*** details of risk management responsibilities; your definition of risk; your process for identifying and/or reporting risk; your system for evaluating risk; details of the risks you have identified; and responses to those risks, i.e. your process for managing them. ***Risk Management Process:*** initiate, identify, assess, plan responses and implement response. ***Initiate:*** this defines the scope and objectives of risk management. A key output is the risk management plan. ***Identify:*** anyone can raise risk. These should be documented on risk log. ***Assess:*** this requires some form of quantitative risk analysis. ***Plan Responses:*** generally, these fall into 1 of 4 categories - avoid, reduce, transfer or accept. ***Implement Responses:*** and recorded on the log, carry through any action and monitor the risk if it has not been removed. ***Risk Evaluation:*** consider how likely is it that the risk will come to pass and have an impact on the project; and if it does come to pass and how severe will the consequences be. These aspects can be given a score and one multiplied by the other in order to produce an overall severity rating for the risk. This then gives you an indicator of which risks require your most attention and resources. ***Consider focus needed (can be divided into four categories):*** avoid: in this type of response you change	Up to 6 marks

some element in the project so the risk is no longer there; reducing: is taking some action to make its likelihood less likely or impact less severe; transfer: means making someone else responsible for the risk; or you could just accept it: and deal with it when it arises or see it as so severe there is no point in worrying. ***Risk Log or Register:*** Risks are normally recorded and tracked using a risk log or register. The log is usually managed by the project manager and will often also have review and diary dates in order to help keep track.	

Question 4:	Explain the legal considerations for a law firm when implementing strategies to manage individuals to enable them to achieve their goals whilst aligning these with the organisation's objectives.	
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+		10
Indicative Content		**Marks**
Required: ***Performance Management:*** Performance management is strategic as well as operational. Its aim is to ensure that employees contribute positively to business objectives. It is a process for establishing a shared workforce understanding about what is to be achieved at an organisation level. It is about aligning the organisational objectives with the employees' agreed measures, skills, competency requirements, development plans and the delivery of results. ***Highlight risks:*** unfair dismissal, discrimination and breach of contract (including wrongful dismissal and constructive dismissal). ***Unfair Dismissal Claims:*** Most common claim. Employees can only claim unfair dismissal if they've worked for a qualifying period - unless they're claiming for an automatically unfair reason. Claim may be made by an employee who is dismissed on grounds of incapability. ***Section 108 of the Employment Rights Act 1996:*** requires an individual to have been in employment for one year's continuous service unless they were employed after 6 April 2012 when a two-year requirement applies. ***A discrimination claim:*** for example, if an employee contends that the only reason they were subjected to a performance management process was because of a protected characteristic. ***Equality Act 2010:*** makes it law that every private, public and voluntary organisation must not discriminate against		Up to 5 marks

employees and people that use their services because of particular characteristics. ***A breach of contract claim:*** in relation to any failure by the employer to comply with its contractual obligations, including any contractual capability or disciplinary procedure. ***Wrongful dismissal:*** There is no qualifying period for wrongful dismissal claim. Wrongful dismissal claims are normally made where there is been a breach of contract. Such a breach may be due to taking unfair disciplinary action, failure to provide a safe working environment, or failure to investigate harassment and victimisation complaints. ***Constructive dismissal:*** occurs where an employee feels that he has been given no option but to resign from his job. It is for the employee to prove that his employer committed a breach of contract so serious that he was unable to remain in his role.	
Any other relevant point to describe the termination of retainer (credit any case law/points of law correctly cited and applied) e.g: ***Section 94 of the Employment Rights Act 1996:*** Provides that every employee has the right not to be unfairly dismissed. ***Section 98 of the Employment Rights Act 1996:*** Poor performance falls into one of the potentially 'fair' categories for dismissing an employee. To avoid a claim of unfair dismissal an employer would need to demonstrate an honest and reasonable belief in an employee's incapability to do the job to the level required and demonstrate that it has carried out the performance management and dismissal process in a fair and reasonable way. ***Assessing an honest and reasonable belief in an employee's incapability to do the job to the level required and way performance management process carried out:*** the Employment Tribunal will in part have regard to whether the employer has complied with the ACAS Code of Practice on Disciplinary and Grievance matters (ACAS Code). Not only will a failure to follow the ACAS Code be taken into account in determining if the dismissal is fair, it can also result in an increase in any unfair dismissal compensation by up to 25%. ***Section 4 of the Equality Act 2010:*** sets out the protected characteristics (age, disability, gender reassignment, marriage and civil partnerships, pregnancy or maternity, race, religion or belief, sex, sexual orientation (gay, lesbian or bisexual)).	Up to 6 marks

Section 120(1) of the Equality Act 2010: Gives an employment tribunal jurisdiction to hear complaints of discrimination under the act. ***Section 123(1) of the Equality Act 2010:*** The normal time limit for making a discrimination claim in the employment tribunal is 3 months less one day from the date when the discrimination happened. ***Under section 124(2) of the Equality Act 2010:*** a tribunal may make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; order the respondent to pay compensation to the complainant or make an appropriate recommendation. ***Claims of wrongful dismissal:*** can be made to a tribunal within three months of the dismissal, or a case can be taken at county or High Court up to six years after the dismissal. Claims brought to a tribunal are capped at £25,000, and legal costs can be recovered if the claim is taken to the county or High Court. Whilst damages are based on salary and benefits for the notice period, there is no cap on the amount that can be awarded. ***Constructive dismissal claims:*** Constructive dismissal is a way of establishing the fact of dismissal when there has been no formal termination of the contract by the employer. Constructive dismissal is not a claim in its own right as an alternative to wrongful or unfair dismissal. An employee may use constructive dismissal as evidence that s/he was dismissed as part of a claim that the dismissal was either wrongful at common law and/or unfair under section 94 of the Employment Rights Act 1996 1996. ***Counter-claim:*** If an employee makes a breach of contract claim to an employment tribunal, the employer can make a counterclaim. Both claims have to be heard, and it is possible for an employee to lose his or her claim and for the employer to win. *Patel v RCMS Ltd (1999):* Patel brought a breach of contract claim and RCMS lodged a counterclaim for damages for Patel's breach of contract in failing to return computer equipment. Patel had failed to make her claim in time and was barred, but the tribunal allowed RCMS's claim. The EAT found that there was nothing in law to say that if the employee's claim failed, the employer's claim was automatically lost, and ruled that it should be heard. ***Bullying:*** The Employment Rights Act 1996 provides basic protection, although the concepts of "bullying" and "harassment" are not defined within it. The Protection from Harassment Act 1997, originally designed to deal with stalkers, has been used by both employees and employers. Whistleblowers who have been bullied or	

harassed may rely on the Public Interest Disclosure Act 1988.	

Section B

Candidates must answer **THREE** questions in this section out of the following five.

Question 5:	You are a costs lawyer working for a firm of solicitors, Damson and Berry LLP, located in Oswestry. Your firm act on behalf of the Defendants, former directors of Street Bank, in a group litigation matter. There are 3,400 claimants. Mr Blunt is the solicitor that has conduct of the matter and he has approached you to give advice in relation to an application to amend a costs budget. The Claimants originally sought an order for costs budgeting and costs were budgeted by agreement. Both budgets were agreed without any budget phases being set by the court. The Claimants' budget was agreed at a total of £16,609,030.53. The total of the Defendants' budget is £18,140,266.24. The trial is underway. The trial commenced on the 22 July 2018. Oral submissions started on the 2 August 2018. The trial is due to conclude on the 12 September 2018. Mr Blunt has highlighted the following developments in the litigation which he believes would justify an amendment to the Defendant's budget: 1. an extension to the trial timetable; 2. the Defendants' application for specific disclosure which led to the provision of 784 additional documents by the Claimants; and 3. service by the Claimants' of an additional expert report. You are required to write the **body of a memo** to Mr Blunt setting out whether an application should be made to amend the budget or if it is a matter best left to assessment. Your advice should cover whether you consider the case developments are significant enough to justify a departure from the budget.
Total Marks Attainable	20

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, for example simply outlining the rules. The answer may not indicate any real understanding that costs management is in place in order to ensure cases are managed proportionately. 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 the candidate fully understands how the CPR operates and any view expressed will be unsupported by evidence or authority.
Pass	10+	An answer which addresses MOST of the following points: When a CMO will be made, how the court will approach making a CMO, what amounts to a significant development when making an application to amend a budget, the different approach taken to budgeted costs and incurred costs at a CMC and the impact of a CMO on assessment. Candidates will demonstrate a good depth of knowledge of the subject with good application and some analysis, although the candidate may demonstrate some areas of weakness.
Merit	12+	An answer which addresses ALL of the points required for a pass (as set out above) PLUS there will be evidence that the candidate has a very good understanding of the law in some depth, but this may be expressed poorly or may be weak in places but strong in others. The candidate should show very good, appropriate references to the relevant law and authority. Work should be written to a very high standard with few, if any, grammatical errors or spelling mistakes etc.
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 the candidate should be supported by relevant authority and/or case law throughout. The candidate may make the link between applications to amend and the conflict between agreed/approved budgets. The candidate should be able to show critical assessment and capacity for independent thought on the topic. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc. taking into account it has been written under exam conditions.

Indicative Content	Marks
Required: ***CPR 3.15:*** Costs Management Orders ***CPR 3.15(1):*** The court can manage the costs of any party. ***CPR 3.15(2):*** where a costs budget has been filed, the court will make a costs management order unless it considers the matter can be conducted justly and proportionately without a costs management order. A costs management order will: ✓ record the extent the incurred costs were agreed; ✓ the extent budgeted costs were agreed; and ✓ the approval of budgeted costs once revised. ***CPR 3.15(3):*** once a CMO has been made, the court can control the recoverable costs. ***CPR 3.15(4):*** The court can record on the face of the order any comments on the incurred costs to be taken into account at detailed assessment. ***CPR PD 3E 7.10:*** the CMO concerns only the phase totals; it is not the role of the judge to fix or approve hourly rates; and any detail within the budget is for reference purposes only.	Up to 5 marks
Credit any reference to the importance of making an application to amend, e.g: ***CPR PD 3E, 7.6:*** budgets can be amended if there are significant developments in the litigation. ***Murray & Anor v Neil Dowlman Architecture Ltd [2013]:*** The court takes a dim view of amending a budget due to a mistake once it is approved. ***Elvanite Full Circle Ltd. v Amec Earth & Environmental (UK) Ltd. [2013]:*** On assessment Coulson J refused to amend the budget. Costs were £531,946 and the budget was £268,488. Application to amend after judgment is a contradiction in terms. Any application to vary should be made immediately if it becomes apparent that the original budget costs have been exceeded by more than a minimal amount. ***Simpson v MGN Ltd [2015]:*** There will be sanctions for not making an application albeit that the judge will not want to impose a disproportionate and unjust sanction to ensure compliance with the overriding objective. ***Churchill v Boot [2016]:*** *a change in the value of the claim or a longer trial length did not amount to a significant*	Up to 8 marks

development in the case. In this case conduct was a significant consideration for the court in arriving at their decision. ***Sharp v Blank [2017]:*** Interim applications may be significant development. When making an application to amend incurred costs should not be amended on the last approved budget.	
Credit discussion on assessment and good reason to depart, e.g: ***CPR 3.18:*** When costs are assessed on the standard basis where there is a costs management order consideration must be given to the last approved or agreed costs budget of the receiving party and there cannot be any departure from this unless there is good reason. Additionally, any comments made on incurred costs can be considered. ***Harrison v University Hospitals Coventry and Warwickshire NHS Trust [2017]:*** CPR 3.18 is not ambiguous. Estimated costs agreed and subject to a Cost Management Order have already, in theory, been through a detailed assessment. It would be going against the intent of the rule to require another detailed assessment of estimated costs to be performed without 'good reason'. ***Merrix v Heart of England NHS Trust [2017]:*** Carr J did not define what a 'good reason' to depart from the budget would be. BUT if the party had spent less than the budgeted sum, complying with the indemnity principle would be a good reason. She also commented that, when considering hourly rates, changing the rates might be a good reason to award a different sum for certain phases. ***RNB v London Borough of Newham [2017]:*** Hourly rates have also been deemed a good reason to depart because they are a mandatory component in Precedent H which cannot be subjected to the rigours of detailed assessment at the CCMC. ***Bains v Royal Wolverhampton NHS Trust [2017]:*** High Court decision held the opposite that a reduction of hourly rates for incurred costs was not a good reason to depart from the CMO. ***Nash v Ministry of Defence [2018]:*** A reduction in hourly rates for incurred costs does not appear to mean it follows that there should be a reduction on budgeted costs. ***Jallow v Ministry of Defence [2018]:*** SCCO decision. Followed Bains and Nash, a reduction of hourly rates for	Up to 8 marks

incurred costs did not mean the same rates should be applied to budgeted costs.	

Question 6:	You are a costs lawyer who heads the costs department at, Harney Nicks LLP, a large firm in Birmingham. You have been asked to advise on the merits of an appeal following the provisional assessment and oral hearing in a clinical negligence matter. Your firm act on behalf of Miss Lenton who brought proceedings against Burbridge NHS Trust. Miss Lenton suffered a miscarriage in February 2015. In April 2015 she underwent a scan at Burbridge Hospital and was told there was no retained product. A routine scan on 20 July 2015 revealed some retained product and on 21 July 2015 she had an operation to remove this. Due to the delay she suffered continuous bleeding and prolonged pain. Her depressive symptoms were also exacerbated. On 13 July 2016 Miss Lenton instructed solicitors and on 15 July 2016 she entered into a Conditional Fee Agreement. On 22 August 2016 Harney Nicks LLP wrote to the Trust notifying them of the potential claim and requesting their client's medical notes. On 28 August 2016 (before receipt of the medical notes) Miss Lenton took out an ATE insurance policy with PATCH. The total premium including insurance premium tax (IPT) was £6,042. £5,088 of the premium (including IPT) was stated to be recoverable from Miss Lenton's opponent whilst the remainder was to be paid out of her damages. On 2 July 2017 the Trust made a Part 36 offer in the sum of £2,500 which was accepted on 8 July 2017. Miss Lenton had still not received any expert medical advice. Miss Lenton's bill of costs was served on 24 September 2017 totalling £15,795, including disbursements and VAT, of which £5,088 was the recoverable element of the ATE insurance premium. The bill was provisionally assessed on 1 January 2018 with the premium allowed in full. Burbridge NHS Trust then requested an oral hearing solely in respect of the premium. On 17 May 2018 the court found, in favour of the Trust, that it was unreasonable for the policy to have been taken out when it was, before Misss Lenton's solicitors had seen her medical records to confirm the facts, and therefore before there could be any assessment of risk. On 15 June 2018 Miss Lenton was given permission to appeal. Today is the 17 June 2018 and you are tasked with writing a letter of advice on the merits of the appeal, namely: 1. does the recoverability of ATE premiums engage the CPR; 2. does the new test of proportionality apply to clinical negligence premiums; and 3. should the timing of acquiring the policy affect its recoverability.

	Prepare **the body of a letter** of advice advising of the merits of appeal in this particular case.

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: Definitions and salient points in respect of ATE and premiums, recoverability pre and post LASPO and the exception to the general rule in respect of clinical negligence matters. Candidates will demonstrate a good depth of knowledge of the subject (i.e. a good understanding of the legislative framework around the recoverability of premiums) with good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness.
Merit	12+	An answer which addresses ALL of the following points: Definitions and salient points in respect of ATE and premiums, recoverability pre and post LASPO and the exception to the general rule in respect of clinical negligence matters. The answer is also likely include some discussion on the reasonableness of premiums. Candidates will demonstrate a very good depth of knowledge of the subject (i.e. a good understanding of the legislative framework around the recoverability of premiums) with good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness.
Distinction	14+	An answer which includes ALL the requirements for a pass (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. All views expressed by the candidate should be supported by relevant authority and/or case law. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc. taking into account it has been written under exam conditions.

Indicative Content	**Marks**
Required a discussion on the statutory framework for the recoverability of ATE premiums in clinical negligence claims, e.g: *After the Event Insurance:* is a policy that can be taken out by a solicitor, on the client's behalf, to ensure that, in the event of a claim not being successful, the client is not left liable for the payment of any legal fees. *Generally:* the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) renders that ATE premiums are no longer recoverable from the paying party. ***Section 44 of the Legal Aid Sentencing and Punishment of Offenders Act 2012:*** made various amendments to section 58 and 58A of the Courts and Legal Services Act 1990 (the provisions which legalise CFAs) in respect of the recoverability of success fees. ***Section 46(1) of the Legal Aid Sentencing and Punishment of Offenders Act 2012:*** introduced a new section 58C of the Courts and Legal Services Act 1990 which prevents recovery of any premium for an after the event insurance policy. *Section 58C of the Courts and Legal Services Act 1990:* a costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless permitted under subsection section 58C(2) of the Courts and Legal Services Act 1990.	Up to 7 Marks

Section 58C(1) of the Courts and Legal Services Act 1990: a costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless permitted under subsection section 58C(2) of the Courts and Legal Services Act 1990. ***Section 58C(2) of the Courts and Legal Services Act 1990:*** the Lord Chancellor may make regulations in clinical negligence cases permitting for the recovery of ATE premiums in relations to medical experts reports. ***Emily Nokes v Heart of England Foundation NHS Trust [2015]:*** Defendant argued that the premium was not recoverable because there were two separate premiums recoverable and the wording of the policy did not comply with the new regulations. ***Section 46(2) of the Legal Aid Sentencing and Punishment of Offenders Act 2012:*** revoked section 29 of the Access to justice Act 1999. ***Section 46(3) of the Legal Aid Sentencing and Punishment of Offenders Act 2012:*** it is the date of the insurance that is relevant to recoverability not the date of the CFA.	
Credit a discussion on whether the recoverability of ATE premiums engage the CPR, e.g: ***Section 51 of the Senior Courts Act 1981 and CPR 44.2:*** Court has discretion as to costs BUT emphasis on proportionality because of the standard basis of assessment (CPR 44.3(2) and the overriding objective). ***The tests of proportionality:*** Lownds v Home Office 2002 for old test, CPR 44.3 for new test. ***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. ***CPR 44.3 (3):*** where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.	Up to 7 Marks

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. Whatever basis: Reasonableness would always be considered. ***Rogers v Merthyr Tydfil [2007]:*** costs judges do not have the expertise to second guess the insurance market, still less to deconstruct a policy that is offered as a package into its constituent parts. ***Callery v Gray (No 2) [2001]:*** a costs judge was asked by the Court of Appeal to investigate the reasonableness of the ATE premium. The following points were made: ☑ a high limit of indemnity does not of itself indicate an unreasonable premium; ☑ block risk policies are not unreasonable; ☑ the premium to be allowed is the total premium paid, not the pure underwriting risk premium; ☑ assessment fees and profit costs of complying with the policy are recoverable; ☑ the receiving party need not have made the best choice, it just needs to be a reasonable choice when choosing the particular ATE insurer; ☑ it is reasonable to insure before sending the pre-action letter to the other side; ☑ it is reasonable to wait until the defendant's reaction to the claim is known; and ☑ if the premium is at or above the top of the range of other policies, the purchaser needs to explain why it chose this insurance—the court may disallow some elements of the premium if they are inflated or do not relate to insuring a costs liability. ***Allan Coleman v Medtronic Ltd [2016]:*** the case determined that a claimant will not be held to be unreasonable even when taking out ATE insurance to protect.	
Credit a discussion on the new test of proportionality and it's application to clinical negligence premiums, e.g: ***BNM v MGN Ltd [2016]:*** Master Gordon-Saker, amongst other things, considered whether the new test of proportionality should apply to recoverable premiums. In this case, at first instance, it was decided that the test of proportionality does apply to recoverable premiums. ***King v Basildon & Thurrock Hospital NHS Trust [2016]:*** The test of proportionality in CPR 44.3(5) did not apply to	Up to 7 Marks

additional liabilities. The proportionality of additional liabilities should be dealt with under the old rules which existed before the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into force. ***Murrell v Cambridge University Hospital NHS Trust [2017]:*** confirmed the old test was applicable, the new definition of costs under CPR 44.1 did not include additional liabilities. ***BNM v MGN Ltd [2016]:*** Two stage approach: Line by line reduction considering reasonableness and then a line by line reduction considering proportionality ***May v Wavell Group [2016]:*** Two stage approach: Line by line considering reasonableness and then a broad brush deduction to reach a 'proportionate' figure. ***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 in CPR 44.3(5)(a) to (e). ***Mitchell v Gilling Smith [2017]:*** An unreported SCCO decision, held that arguments based on hindsight were irrelevant for the purpose of CPR 44.3(5). In this case an after-the-event insurance premium of £10,000 for costs relating to medical experts' reports was held not to be disproportionate in a clinical negligence claim that settled for £200,000 even though only the sum of £2,000 was ultimately paid for expert evidence. ***Peterborough & Stamford Hospital NHS Trust [2017]:*** ATE premium taken out after 1 April 2013, Court of Appeal held that the new proportionality test applies to post-LASPO clinical negligence ATE premiums.	
Credit a discussion on whether the timing of acquiring the policy affects its recoverability, e.g: ***Callery v Gray (No 2) [2001]:*** it is reasonable for a claimant to purchase ATE insurance at the same time as entering into a conditional fee agreement with their solicitor. ***Peterborough & Stamford Hospitals NHS Trust v McMenemy and Reynolds v Nottingham University Hospitals NHS Foundation Trust [2017]:*** the Court of Appeal held that it was reasonable for ATE policies to be taken out in clinical negligence cases at the outset, i.e when the CFA is entered into.	Up to 3 Marks

Question 7:	You work for a city Law firm, Hentons Law. Tom Hampson, a Partner in the firm, has approached you for advice in relation to a

	case he has conduct of in which he is acting for Mr and Mrs Thomas. The matter concerns a child called Sally. Sally is a 7 year old girl whose mother died of cancer a year ago. The issue in the case is with whom Sally should live: her father or Mr and Mrs Thomas. Mr and Mrs Thomas were family friends of Sally's mother. Proceedings commenced prior to the mother's death as the mother had made it clear that her wish was for Mr and Mrs Thomas to care for Sally. In the first instance proceedings it was decided that, upon the mother's death, Sally should live with her father. Mr and Mrs Thomas have appealed that decision and the appeal has been allowed. They are arguing that when the original decision was made the judge presiding had erred in applying a 'presumption' of natural parent care and had attached too great a significance to the biological ties of Sally to her father. Mr and Mrs Thomas have been advised that the court are required to balance Sally's right to be raised within her own family, the benefit to Sally of continuity of care (she had been living with Mr and Mrs Thomas for around two years), and Sally's ability to grieve properly and healthily from the loss of her mother. The psychological evidence is that Sally's ability to grieve will be assisted by her living with Mr and Mrs Thomas. A re hearing has been directed. Tom Hampson believes Sally's father should contribute to Mr and Mrs Thomas' costs because in the last year the father has made unsuccessful interlocutory applications (or has unsuccessfully opposed interlocutory applications) on at least four occasions; the three most notable are: 1. The father opposed Sally attending a bereavement day at a local bereavement charity because it would interfere with his contact schedule. 2. The father opposed Mr and Mrs Thomas' application for Sally to make a trip to Alaska for her maternal cousin's wedding. Six informal requests for his permission were made over a period of time before he stated his formal opposition, four of those requests were ignored. The father opposed to the trip because of the threat of military action by terrorists both in the UK and the United States, the risk that Sally would not be returned and that there had been no written confirmation of the wedding. The father did not attend the hearing. 3. The father made two unsuccessful applications to substitute the expert and applications for disclosure. He did not attend the hearing listed to deal with the requests and his application was not made in the proper form. Write the **body of a memo** setting out how costs in family cases are usually dealt with and how the costs in this particular case are likely to be dealt with.
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. An answer which makes little or no sense OR is so poorly written as to lack coherence OR the answer will only demonstrate an awareness of some of the more obvious issues and is likely to be poorly written.
Pass	10+	An answer which includes MOST of the requirements, namely: An explanation of what family proceedings are, explanations of the three costs regimes in family proceedings and an explanation as to the rules on assessment under the CPR. The answers will be written to a reasonable standard, but may contain some grammatical errors or spelling mistakes etc. Appropriate authority will be used throughout although some points advanced may not be supported.
Merit	12+	For a mark in this band, the answer will deal with ALL of the requirements. Candidates will have produced responses that have more depth and more application and analysis, as appropriate. Candidates will have identified the clean sheet regime would be applicable in this scenario and if the court were minded to make an order in the client's favour then the starting point would be the general rule. Candidates will have produced responses which are written to a high standard with few, if any, grammatical errors or spelling mistakes etc.
Distinction	14+	An answer which includes ALL of the requirements for a pass (as set out above) PLUS demonstrates an excellent depth of knowledge. Excellent application of the law to the arguments made and critical analysis of the same. All views expressed by the candidate should be supported by relevant authority and/or case law. Work which is written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc. taking into account it has been written under exam conditions.

Indicative Content	Marks
Required (consideration as to what is meant by family proceedings and a consideration of the costs framework under the FPR and CPR e.g): ***Defining 'family proceedings':*** No single source provides a complete definition. ***Family cases may include (for example):*** Marriage and civil partnership; Matrimonial and partnership finance; The care of children either by their parents or by the state; Domestic abuse; The way in which a family home is occupied; Child abduction; Egg and sperm donors; and Gender recognition. ***No single source provides a complete definition of family proceedings:*** Section 58A of the Courts and Legal Services Act 1990 and the Courts Act 2003. ***Family Procedure Rules 2010:*** apply to family proceedings and use the definition found within Section 75(3) Courts Act 2003. ***Rule 2.1 of the Family Procedure Rules 2010:*** rules apply to proceedings in the High Court and the Family Court. ***Rule 2.3 of the Family Procedure Rules 2010:*** family proceedings are defined with reference to section 75(3) of the Courts Act 2003. ***Section 75(3) of the Courts Act 2003:*** defines family proceedings as those in the Family Court and proceedings in the Family Division of the High Court where they cannot be heard by another division. ***Rule 28 and the Practice Direction 28A of the Family Procedure Rules 2010:*** contain the costs provisions. ***The CPR:*** In some family cases the CPR (CPR 44-48) will apply rather than the FPR 2010.	Up to 6 marks
Required:	Up to 3 marks To achieve MORE than a

The three costs regimes in family proceedings: Clean sheet, No Order and Costs follow the event. ***The 'clean sheet' regime:*** follows the FPR costs rules. This regime applies in all cases heard in the Family Court other than financial remedy proceedings. It also applies to those proceedings heard in the Family Division of the High Court which can only be allocated to the Family Division. This regime means there is unlikely to be any costs shifting. ***The 'no order regime':*** prevails in all financial remedy proceedings. This regime means there is unlikely to be any costs shifting. ***The 'costs follow the event' regime:*** is taken from the Civil Procedure Rules (CPR) and generally requires the unsuccessful party to pay the costs of the successful party. This is the costs regime applicable to the Family Division of the High Court when dealing with proceedings under statutes which can be allocated to other divisions of the High Court.	pass candidates must identify that the question relates to financial remedy proceedings
Credit discussion on the costs follow the event regime, e.g: ***Costs follow the event regime:*** costs shifting, the general rule is likely to apply, for example in TOLATA 1996 claims. ***CPR 44-48:*** apply as usual.	Up to 1 mark
Credit discussion on the No Order regime, e.g: ***Financial remedy proceedings and proceedings in connection with a financial remedy:*** the general rule is that there shall be no order as to costs. This regime applies to the substantive final hearing of an application for an order in financial remedy proceedings and to interim variation orders. ***Proceedings in connection with a financial remedy:*** such proceedings include: Interim orders; Interim hearings; Final orders to set aside an application; Determination of a beneficial share in property; and Disposing of the application other than by final financial order. ***Rule 28.3(1) of the Family Procedure Rules 2010:*** Rule 28.3 applies to financial remedy proceedings. ***Rule 28.3(2) of the Family Procedure Rules 2010:*** the CPR apply with some modifications. The court does not have discretion as to costs (CPR 44.2 (1)), the factors that the court should consider when making an order do not apply (CPR 44.2 (4)) and nor does the definition of conduct (CPR 44.2 (5)). ***Rule 28.3(4)(b) of the Family Procedure Rules 2010:***	Up to 6 marks

defines financial remedy proceedings as proceedings requiring a financial order. ***Rule 28.3 (5) of the Family Procedure Rules 2010:*** the general rule is that the court will not make an order for costs against the unsuccessful party. ***Rule 28.3 (6) of the Family Procedure Rules 2010:*** but the court may make an order if it is considered appropriate on the grounds of conduct. ***Rule 28.3 (7) of the Family Procedure Rules 2010:*** conduct is defined.	
Credit discussion on the clean sheet regime, e.g: ***Clean sheet regime:*** no costs shifting, parties bear own costs, examples include Children Act 1989 proceedings. ***Rule 28.1 of the Family Procedure Rules 2010:*** the court may make such order as it considers just. ***Rule 28.2 of the Family Procedure Rules 2010:*** the Costs provisions in the CPR will apply with some modification, for example; this rule disapplies the general rule (CPR 44.2(2)) and basis of assessment. The court's discretion (CPR 44.2(1)), the factors to take into account when making an order (CPR 44.2(4)) and the definition of conduct (CPR 44.2(5)) are not excluded. ***Solomon v Solomon (2013):*** if the court decide to make an order where there is costs shifting then the starting point should be costs follow the event.	Up to 4 marks
Any relevant point to describe costs assessment in family proceedings e.g: ***Costs assessment in family proceedings:*** where they do not involve legal aid they are assessed in accordance with the Civil Procedure Rules 1998, SI 1998/3132 (CPR). The CPR apply to all between the parties costs assessments. ***The court will decide whether private costs should be assessed on:*** either the standard basis; whereby costs will be allowed that are proportionate to the matters in issue, with any doubt as to whether they were reasonably incurred or reasonable and proportionate being resolved in favour of the paying party, with the court having regard to all the circumstances or the indemnity basis (rare); where any doubt as to whether costs are reasonably incurred or reasonable in amount is resolved in favour of the receiving party, consequently the amount recoverable under an indemnity costs order is significantly higher, with the court having regard to all the circumstances. Indemnity costs are unusual in family proceedings unless the conduct of a litigant is considered in some material respect(s) to be unreasonable or a disproportionate use of the court's time and resources. (CPR 44.3(1)–CPR 44.3(3)).	Up to 7 marks

CPR 44.4(3): whether on the standard or the indemnity basis, the court will have regard to, inter alia, the following: ☑ the conduct of all parties both before and during the proceedings and the efforts made throughout to settle ☑ the amount or value of the assets involved ☑ the importance of the matter to the parties ☑ the particular complexity, difficulty or novelty of the issues raised ☑ the skill, effort, specialist knowledge and responsibility involved ☑ the time spent on the case and the place and circumstances in which the work was done. ***CPR 44.4(1)(a):*** on an assessment on the standard basis the court will only allow costs that are proportionate to the matters in issue and resolve any doubt as to whether they were reasonably incurred or reasonable and proportionate in amount in favour of the paying party. (*K v K* [2016] EWHC 2002 (Fam), *Khazakstan Kagazy PLC v Zhunus* [2015] All ER (D) 252). ***CPR 44.4(1)(b):*** where costs are assessed (rarely) on an indemnity basis the amount recoverable under an indemnity costs order will be significantly higher as the court will consider any doubt as to whether costs are reasonably incurred or reasonable in amount in favour of the receiving party. ***Indemnity costs are unusual in family proceedings:*** unless the conduct of a litigant is considered in some material respect(s) to be unreasonable or a disproportionate use of the court's time and resources. (*H v Dent (Re an Application for Committal (No. 2: Costs))* [2015] EWHC 2228 (Fam), *Noorani v Calver* [2009] EWHC 592 (QB)).	

Question 8:	You work for a costs firm, Costs Heroes Ltd, located in Milton Keynes. You have received instructions from Mr Skiller of Skiller and Harper LLP in relation to his client Asif Moazzam.` In February 2017 Mr Moazzam was arrested by West Midlands Counter Terrorism Command and charged with seven offences under terrorism legislation. He was remanded in prison. Mr Moazzam denied that he was ever involved in terrorism but he accepted that he had been in Syria and had been involved, between November 2015 and April 2016, in providing basic fitness training to "some individuals who might later become involved in resistance to a military onslaught". The Crown Prosecution Service ("CPS") disclosed material which fleshed out the details of the allegations against Mr Moazzam. On 14 March 2017 HM Treasury froze the funds and economic resources of Mr Moazzam for the same reasons given in the criminal allegations.

	Six months later, on 1 October 2017, the CPS stated that it would no longer proceed with the prosecution. It offered no evidence in relation to the charges brought and Mr Moazzam was formally acquitted. An Assistant Chief Constable of the West Midlands police told the press that Mr Moazzam was "innocent". Mr Moazzam was released from prison where he had been since his arrest. On 2 October 2017, Mr Skiller wrote to HM Treasury stating that the freezing of Mr Moazzam's funds should cease immediately and that the decision should be quashed because it had been made unlawfully. On 14 October 2017 the freezing of the funds was revoked but the initial decision was not quashed. On 17 December 2017 Mr Moazzam's bank wrote to him and indicated that it intended to close his bank account because Mr Moazzam fell outside the "risk appetite" of the bank. Subsequently other banks have refused to continue to provide him banking facilities. Mr Moazzam now wishes to apply for a protective costs order in relation to his application for judicial review in respect of the decision. The issue before the court will be whether HM Treasury had reasonable grounds for believing, at the time, Mr Moazzam was or had been involved in terrorist activity and it was necessary to impose financial restrictions on him. Write the body of a memo to Mr Skiller setting out the statutory tests for costs capping orders in judicial review cases.
Total Marks Attainable	20

Fail	up to 9.9	This mark should be awarded where candidates: Fail to advise on the framework of the rules governing the granting of a costs capping order. Fail to adhere to the instructions provided in the question completely or in a substantial part of the answer. An answer which makes little or no sense or is so poorly written as to lack coherence.
Pass	10+	Candidates may have considered MOST of the following: the definition of public interest proceedings, the factors the court will consider when determining if proceedings are public interest proceedings and how an application for a costs capping order will be made. Credit will be given to any reasonably written answer and any reasonable conclusion that, providing it can be demonstrated the proceedings are public interest proceedings and the financial resources of the parties suggest there should be an order that an order will be made. Candidates should use appropriate references to the relevant law and authority throughout but not all points advanced may be appropriately supported.
Merit	12+	An answer which includes ALL of the requirements for a pass (as set out above) PLUS Candidates will have produced responses that have more depth and with more application to the facts provided. There will also be a demonstration that the candidate is able to analyse, as appropriate. Candidates will have produced responses which are written to a high standard with few, if any, grammatical errors or spelling mistakes etc. taking into account it is written under exam conditions.
Distinction	14+	An answer which includes ALL of 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. Candidates should have a clear and reasoned view as to the rules on costs capping orders. The advice should be very well structured. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc. taking into account it has been written under exam conditions.

Indicative Content	**Marks**
Required: ***Sections 88-90 of the Criminal Justice and Courts Act 2015:*** rules on 'Costs-Capping'. ***Section 88(2) of the Criminal Justice and Courts Act 2015:*** defines a "costs capping order": as an order limiting or removing the liability of a party to judicial review	Up to 4 marks Candidates MUST identify the framework of rules governing costs capping orders

proceedings to pay another party's costs in connection with any stage of the proceedings. ***Section 88(6) of the Criminal Justice and Courts Act 2015:*** the court may make a costs capping order only if it is satisfied that the proceedings are public interest proceedings and that, in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings, and it would be reasonable for the applicant for judicial review to do so.	
Credit a discussion on what amounts to public interest proceedings, e.g: ***Section 88(7) of the Criminal Justice and Courts Act 2015:*** proceedings are "public interest proceedings" only if a subject of the proceedings is of general public importance, the public interest requires the issue to be resolved, and the proceedings are likely to provide an appropriate means of resolving it. ***Section 88(8) of the Criminal Justice and Courts Act 2015:*** the court must have regard when determining whether proceedings are public interest proceedings include the number of people likely to be directly affected if relief is granted to the applicant for judicial review, how significant the effect on those people is likely to be, and whether the proceedings involve consideration of a point of law of general public importance.	Up to 3 marks
Credit a discussion on how the court may decide to make an order and the content of an order, e.g: ***Davey v Aylesbury Vale District Council [2007]:*** The normal 'loser pays' rule, found in CPR 44.2(2)(a) does not apply 'automatically' in judicial review cases because there is not sufficient justification in public law' for the same rule to be followed. ***Booth v Bradford Metropolitan District Council [2000]:*** Must take into account all of the circumstances of a case and that costs do not necessarily follow the event unless it could be shown that the authority acted in bad faith or unreasonably. ***R (Corner House Research) v Sec of State for Trade and Industry [2005]:*** PCOs should only be made in exceptional circumstances, Essential principles for the making of a PCO include that the issues raised are of general public importance; the public interest requires that those issues should be resolved and the applicant has no private interest in the outcome of the case. ***Morgan v Hinton Organics [2009]:*** Expanded upon the principles, it was said there should be a flexible approach to PCOs' was to be encouraged, especially the requirement of 'no private interest'.	Up to 10 marks Candidates that achieve more than a pass MUST show evidence of their ability to apply the legal framework to the facts of the question

Section 89(1) of the Criminal Justice and Courts Act 2015: the matters to which the court must have regard when considering whether to make a costs capping order in connection with judicial review proceedings, and what the terms of such an order should be, include: ☑ The financial resources of the parties. ☑ The extent to which the applicant for the order is likely to benefit. ☑ The extent to which any person who has provided financial support may benefit. ☑ Whether legal representatives for the applicant for the order are acting free of charge. ☑ Whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally. ***Section 89(2) of the Criminal Justice and Courts Act 2015:*** a costs capping order that limits or removes the liability of the applicant for judicial review to pay the costs of another party to the proceedings if relief is not granted to the applicant for judicial review must also limit or remove the liability of the other party to pay the applicant's costs if it is. ***R (On the application of Hannah Beety & Ors) (Claimant) v Nursing & Midwifery Council (Defendant) & Independent Midwives UK [2017]:*** the court capped the claimant's liability for costs at £25,000 and the defendant's at £65,000.	
Credit a discussion on the procedural steps for making such an application, e.g: ***CPR 46.17(1)(a):*** an application for a judicial review costs capping order must be made on notice. ***CPR 23.3(2)(b):*** states an application without notice may be made where a rule or PD allows it. ***CPR PD 46, 10.2:*** An application should be made on the claim form (and there will be instances when a claim may be issued without notice). ***CPR 46.17(1)(b):*** applications must be supported by evidence setting out why a judicial review costs capping order should be made, a summary of the applicant's financial resources; the costs (and disbursements) which the applicant considers the parties are likely to incur in the future conduct of the proceedings; and if the applicant is a body corporate, whether it is able to demonstrate that it is likely to have financial resources available to meet liabilities arising in connection with the proceedings.	Up to 5 marks

Question 9:	You work for a firm of solicitors, Hathrop and Skiller, located in St Albans. You have been approached by Mr Marc Hamilton, an Assistant Solicitor at the firm, for your input into a matter upon which he has just received initial instructions.

	Mr Hamilton has been instructed by Hatfield Borough Council in relation to an application they wish to make for an injunction in respect of 22 Canary Road, Hatfield, Hertfordshire ("the site"). The site lies on the western bank of the river and within the green belt. Over the years the site and adjacent sites have been used for leisure purposes. Planning law enables small and unobtrusive buildings to be erected but moveable structures, such as caravans, for permanent residential use are not permissible. The council's officers have been monitoring the site for some time because of suspicions that it may be developed by gypsies and travellers. In recent months this has involved regular visits and the taking of photographs as to activity on the site. The council now wish to apply for an injunction, pursuant to town and country planning legislation, prohibiting: 1. causing or permitting any caravans, mobile homes, or other residential accommodation or structures to be stationed on the site; and 2. occupying or causing or permitting the occupation of caravans, mobile homes or other residential accommodation that are stationed on the site. As part of the initial advice to the client Mr Hamilton wishes to advise on how costs are usually dealt with on applications for interlocutory injunctions. Write **the body of an email** advising Hatfield Borough Council whether costs are likely to be ordered in favour of the claimant in the event of a successful application or if the costs should be reserved.
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. An answer which makes little or no sense OR is so poorly written as to lack coherence OR the answer will only demonstrate an awareness of some of the more obvious issues and is likely to be poorly written.
Pass	10+	An answer which includes MOST of the requirements, namely: An explanation of the normal rule in costs and the three situations that need to be considered when offering advice on costs in relation to injunctions. The primary focus of the question may have been missed with candidates simply providing a general framework, although there will be evidence that the candidate has the knowledge that is fit for purpose. The answers will be written to a reasonable standard, but may contain some grammatical errors or spelling mistakes etc. Appropriate authority will be used throughout although some points advanced may not be supported.
Merit	12+	This band will deal with ALL the requirements and the focus of the response will be injunctions granted on the balance of convenience. Candidates will have produced responses that have more depth and with more application to the facts provided. There will also be a demonstration that the candidate is able to analyse, as appropriate. Candidates will have produced responses which are written to a high standard with few, if any, grammatical errors or spelling mistakes etc. taking into account it is written under exam conditions.
Distinction	14+	An answer which includes ALL of the requirements for a pass (as set out above) PLUS demonstrates an excellent depth of knowledge. Excellent application of the law to the arguments made and critical analysis of the same. All views expressed by candidates should be supported by relevant authority and/or case law. Work which is written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc.

Indicative Content	**Marks**
Required: ***Section 51(3) of the Senior Courts Act 1981 and CPR 44.2(1):*** the court shall have full power to determine by whom and to what extent the costs are to be paid.	Up to 5 marks Candidates MUST identify that this is a question about an interim injunction and

CPR 44.2(2)(a): The 'normal' rule that 'costs follow the event' applies therefore a claimant granted an interim injunction may understandably expect the court to order the defendant to pay the costs of the application. ***CPR 44.2(2)(b):*** The court may however make any other order. ***CPR 44.2(6) and CPR PD 44, 4.2:*** Orders the court may/can make which includes, for example, reserving the costs of the application. ***Three situations that should be considered:*** ☑ Interim injunction application granted on (or agreed by consent on the basis of) the balance of convenience. ☑ A defendant that successfully resists an injunction application. ☑ An injunction on a *quia timet* basis.	that the Court has discretion as to costs but there are three situations that need to be considered as to whether or not the general rule applies
Candidates may have discussed the court's discretion in relation to the granting of interim injunctions e.g: ***Section 37(1) of the Senior Courts Act 1981:*** The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so. ***American Cyanamid Co v Ethicom Ltd [1975]:*** guidelines to establish whether an applicant's case merited the granting of an interlocutory injunction are: whether there is a serious question to be tried, what would be the balance of convenience of each party should the order be granted (in other words, where does that balance lie?) and whether there are any special factors.	Up to 2 marks
Credit discussion on Interim injunction applications granted on (or agreed by consent on the basis of) the balance of convenience, e.g: ***Balance of Convenience:*** When granting an injunction on the balance of convenience the court will weight up the inconvenience/loss to each party. ***Desquenne et Giral UK Ltd v Richardson [1999]:*** the Court of Appeal held that the costs of an interim injunction application granted on (or agreed by consent on the basis of) the balance of convenience should usually be reserved until trial of the substantive issue because, in such a situation, there is no successful or unsuccessful party at that stage for the purposes of CPR 44.2(2). ***Interflora v Marks & Spencer PLC [2014]:*** The judge found that in this case the general rule should apply because it was a freestanding application and there was no reason why the court should depart from the normal rule.	Up to 3 marks
Credit should be given to a discussion on when a defendant successfully resists an injunction application e.g:	Up to 2 marks

A defendant that has successfully resisted an injunction: may expect the court to order that his costs of the application be paid by the claimant. ***Merck Sharp Dohme Corp v Teva Pharma BV [2013]:*** for costs not to follow the event the court held that the applicant would need to justify coming to court and it can do that by showing that there was a 'sufficiently strong probability that an injunction would be required to prevent the harm to the claimant to justify bringing the proceedings'.	
Credit should be given to a discussion on an injunction on a *quia timet* basis, e.g: ***Quia timet ("because he fears"):*** is an injunction to restrain wrongful acts which are threatened or imminent but have not yet commenced. ***An injunction on a quia timet basis:*** when by the time of trial it is clear that there was no threat by the respondent to violate the applicant's legal right, but the applicant says there was a threat when it started proceedings.	Up to 2 marks
Credit should be given to a discussion on the factors the court will consider when deciding how costs should be dealt with: ***Kickers International SA v Paul Kettle Agencies Ltd (1990):*** The court considered the following: ☑ a final order might award a party costs which, upon fuller consideration at trial, he would not have been given ☑ failure to make a final order might have the practical effect of depriving a party of some or all of the costs, which in fairness he ought to have recovered ☑ the possibility that there might be no further trial should be kept in mind ☑ it might be unfair to order payment by a party whom might, as a result of trial, become entitled to set off an award for costs in his favour, such as where an order for immediate payment might hamper the party's conduct of the action or destroy his business or because the opposing party might not have the means to repay if there should be a subsequent order against it. ***Picnic at Ascot v Derigs (unreported) [2001]:*** Neuberger J held that there are circumstances where it would be right to depart from that general approach and set out guiding principles (the questions for the court are): ☑ Would it be unfair for the claimants to have their costs of the motion even if they lost at trial? ☑ Was the opposition to the motion justified? ☑ Is the balance of convenience clear? ☑ Is the matter likely to proceed to trial? ***Hospital Metalcraft Ltd v Optimus British Hospital Metalcraft Ltd [2015]:*** an example of the court applying the principles in *Picnic at Ascot*. Rose J held at the return date hearing of the claimant's application for an interim	Up to 6 marks To achieve a distinction candidates MUST apply the principles of the authority to the facts in the scenario

injunction that, in departure from the general rule that costs should be reserved until trial, the claimant was entitled to their costs, which were summarily assessed.	
Any other relevant point to describe costs assessment in this case (credit any case law/points of law correctly cited and applied) e.g: ***CPR PD 44, para 9.2:*** Where the court orders costs at the end of an interim injunction hearing and that hearing has lasted one day or less, it can summarily assess the costs of the application at the end of that hearing. ***CPR PD 44, 9.5:*** 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. ***CPR PD 44, 9.10:*** disproportionate and unreasonable costs. ***CPR 44.3(1)–CPR 44.3(3):*** Basis of Assessment.	Up to 3 marks