August 2019: 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:	People who work in costs firms tend to have defined roles and follow strict rules and procedures. Handy described this type of organisation as having a role culture. Explain, using academic theory, alternative ways a costs firm may be structured.

Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: Candidates should explain Charles Handy and outline his model and identify alternate theorists, e.g: ***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. ***The model:*** Relates to four cultures. Handy described each individual culture, relating it to one of the Greek gods. ***Apollo or Role Culture:*** Represented by a temple, the pillars being functions and divisions. It has rational people who work according to defined roles and follow rules and procedures. A bureaucracy, it has stability and certainty. However, it can find it hard to adapt and change. ***Mintzberg suggests:*** In contrast to Handy, Mintzberg's model has 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.	Up to 4 marks To achieve a pass a candidate must explain who Charles Handy is and outline his description of role culture.
Required: Candidates should discuss Handy's model, e.g: ***Zeus or Power Culture:*** This culture is one of centralized, or top-down, power and influence. This is the spiders web where the leader has connection across the whole organisation. These may be formal and informal lines of authority. This is a leader centric organisation. This means it is capable of fast decision making and moving forward. Its downside comes in being dependent on an individual and the quality of their decisions. It can also be detrimental to	Up to 4 marks To achieve more than a pass a candidate should identify how these models may be appropriate for a costs firm.

bringing in other staff to help it grow and develop. These can often be new organisations still developing and being led by the individual who established it. ***Athena or Task Culture:*** This culture is about solving problems through a network of task forces, working parties and various groups. It will define the problem and then allocate the resources to solving it. Its strength is in its flexibility and providing solutions. It struggles when repetition and predictability are needed. This may be particularly relevant if the firm takes on a lot of costs management work or work that is urgent with tight deadlines. ***Dionysius or Person Culture:*** This differs from the other parts of the model in that the organisation exists to help the individual succeed rather than the other way around. People come together to help them succeed by sharing resources or promote the member of the group. In this, the individual professionals are supreme, and management is not highly regarded. This is particularly relevant where costs lawyers make up the body of workers at a costs firm.	
A discussion on alternative theorists (credit any points/ correctly cited and described) e.g: ***The Entrepreneurial Organisation:*** Shaped by a strategic apex creating centralisation. Power is focused strongly with the chief executive and is coordinate through direct supervision. This is most comparable to Handy's Zeus or Power Culture. ***The Machine Organisation:*** This is shaped by its technostructure and works on the basis of standardised routines and operating tasks. It is highly centralised and controlled. This is most comparable to Handy's Appollo or Role Culture. ***The Diversified Organisation:*** This is a set of semi-autonomous units under a central administrative structure. The units are usually called divisions with a central administration referred to as the headquarters, which allocates capital and tracks performance. This is most comparable to Handy's Athena or Task Culture.	Up to 6 marks To achieve more than a pass a candidate should compare and contrast Handy's model to alternative structures/models.

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. This is most comparable to Handy's Dionysius or Person Culture. ***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. This is most comparable to Handy's Athena or Task Culture. ***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. ***The Political Organisation:*** 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. This is based on culture and therefore there is a clear overlap between Handy's model.	

Question 2:	Summarise the legislative requirements for firms to have compliance officers and how the rules ensure that a firm complies with its regulatory and legal requirements when managing functional areas of a firm.	
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+		10
Indicative Content		**Marks**
Required: Candidates should set out what the legislative requirements for HOLPS and HOFAs are, e.g: ***Section 91 and Part 2 of Schedule 11, paragraph 11, of the Legal Services Act 2007:*** Requires ABSs to appoint a Head of Legal Practice (HOLP) but there is no corresponding statutory requirement for solicitor's practices.		Up to 3 marks Candidates must identify the relevant legislation and identify that the legislation

Section 92 and Part 2 of Schedule 11, paragraph 13, of the Legal Services Act 2007: Requires ABSs to appoint a Head of Finance and Administration (HOFA) but there is no corresponding statutory requirement for solicitor's practices.	concerns ABS and Heads of.
Credit a discussion on the SRA Authorisation Rules and the requirement for SRA firms to have COLPS and COFAs e.g: ***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. ***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.	Up to 3 mark To achieve more than a pass a candidate must be able to identify the SRA requirements are wider than the legislative requirements.
Credit a further discussion on the legislative framework on HOLP and HOFAs e.g: ***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	Up to 3 marks

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.	
Credit a further discussion on the SRA Authorisation Rules and COLPS and COFAs 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. ***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.	Up to 3 marks
Credit any further relevant e.g: ***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:*** 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	Up to 2 marks

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. ***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:	Discuss how the SRA requirements to manage and supervise the business may be met by implementing a risk management policy.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required (an outline of the SRA framework and business procedure for managing and monitoring risk) e.g: ***The SRA Handbook 2011:*** Requires businesses, or roles within a business, to be controlled effectively and in accordance with proper governance and sound financial and risk management principles. ***A risk management policy:*** Having a risk management policy would make it easier for the SRA to engage with firms with a view to resolving any compliance issues. Such a policy would outline the risks posed to a business and provides a set of	Up to 2 marks

actions to be taken to both prevent the risk from occurring and reduce the impact of the risk should it happen.	
Any relevant point on the regulatory framework (credit any point raised and applied) e.g: ***Chapter 7 of the SRA Handbook 2011:*** This chapter is entitled the management and supervision of a firm. It states that 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 7.1:*** Requires that firms must have a clear and effective governance structure and reporting lines. ***Outcome 7.2:*** Requires that firms 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 that firms 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:*** Requires that 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. ***Outcome 7.5:*** Requires that firms must ensure compliance with legislation. ***No strict regulatory requirement to develop a risk management policy:*** The SRA Handbook does not require firms to have a risk management policy but devising and maintaining one will allow firms to identify, monitor and manage risks. It 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. ***Risk management principles:*** The SRA does not define the risk management principles that it expects firms and individuals to employ when running a business. Instead, it describes	Up to 6 marks To achieve more than a pass a candidate must demonstrate depth to knowledge base by discussing that there is no regulatory requirement to have a risk management policy

outcomes that must be achieved in order to comply with the SRA principles.	
Any relevant point on the business theory of managing risks (credit any point raised and applied) e.g: ***A risk management policy:*** A risk management policy helps identify risks and implement a plan for managing them. Risks include both opportunities and threats, and both should be managed through the risk management process. ***Contents:*** 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:*** Such a process would have an initiation which would define the scope and objectives of risk management. A key output is the risk management plan. It would allow for anyone within a firm to identify risk and raise a risk as an issue which should be documented on the risk log. ***Risk Evaluation:*** This process requires consideration as to how likely is it that the risk will come to pass and have an impact and if it does come to pass how severe the consequences will 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. ***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.	Up to 4 marks
Any relevant point to describe the roles of a COLP and COFA (credit any point raised and applied) e.g: ***The SRA Authorisation Rules 2011, SRA Account Rules and the SRA Code of Conduct:*** Would need to be complied with. ***Rule 8.5(b) and (d) of the SRA Authorisation Rules:*** Require that SRA regulated firms have compliance offices for legal practice and finance and administration.	Up to 2 marks

Rule 8.5(c) and (e) of the SRA Authorisation Rules: Require compliance offices for legal practice and finance and administration to keep records and report failures**.**	

Question 4:	Explain the risks associated with costs firms putting in place processes to maintain and improve the performance of their workforce.

Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: Candidates should explain what is meant by performance management and should outline the risks faced by firms, e.g: ***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). ***Bullying:*** Additional Risks may be identified, for example 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.	Up to 2 marks
Credit any point that further develops the risk of unfair dismissal, e.g: ***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	Up to 4 marks

unfair reason. Claim may be made by an employee who is dismissed on grounds of incapability. ***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. ***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. ***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%.	
Any other relevant point to describe a discrimination claim (credit any case law/points of law correctly cited and applied) e.g: ***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 employees and people that use their services because of particular characteristics. ***Section 4 of the Equality Act 2010:*** Sets out the protected characteristics (age, disability, gender reassignment, marriage	Up to 4 marks

and civil partnerships, pregnancy or maternity, race, religion or belief, sex, sexual orientation (gay, lesbian or bisexual)). ***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.	
Any other relevant point to describe a breach of contract claim (credit any case law/points of law correctly cited and applied) e.g: ***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. ***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:*** 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	Up to 4 marks

breach of contract so serious that he was unable to remain in his role. ***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. ***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.	

Section B

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

Question 5:	You are a costs lawyer working in-house at a firm of solicitors that deals predominantly with defendant work. You have been approached by Scott Harrison, a solicitor at the firm, regarding his client Sunny Sightseeing Tours Ltd (SST Ltd). SST Ltd have been defending a claim brought by two claimants that went on a package holiday SST Ltd had provided. The holiday was to Magaluf for 14 nights in January 2017. Both claimants have alleged that they suffered gastroenteritis caused by inadequate hygiene practices at their hotel. The claimants brought the proceedings for breach of contract under the Package Travel Regulations 1992. In September 2018 the claimants' solicitor made an application to come off the record. Since then the claimants have failed to comply with the order made upon allocation which required them to provide a standard disclosure list and an updated schedule of loss. In December 2018 Scott Harrison, on behalf of SST Ltd, applied to have the claim struck out for failure to comply with the court order. The claimants were correctly served with the application notice and accompanying documents, as well as the notice of hearing. The claim was struck out without a hearing prior to the defendant's strike-out application being heard because the claimants also failed to pay the trial fee. The matter now remains listed in respect of costs before Deputy District Judge Henry, who had struck out the matter. Write the body of a memo to your solicitor colleague advising when a claimant is entitled to the protection of QOCS and whether, in this situation, that protection may be lost.
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 candidates only do so superficially and do 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 QOCS only becomes an issue at the enforcement stage. 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 QOCS protection operates, when QOCS will not be relevant, the impact on the normal rule in costs and that QOCS becomes an issue at the enforcement stage. There will be some discussion and a differentiation between the circumstances when the court's permission will or will not be required to enforce a costs order. Candidates will demonstrate a good depth of knowledge of the subject with good

		application (some examples of when the applicable provisions may bite) and some analysis, although candidates 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 candidates have 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. Candidates will identify that the most relevant parts of the provisions t. o the scenario are found in CPR 44.15. Candidates should show very good, appropriate references to the relevant law and authority. Work should be written to a very high standard taking into consideration that it is written in exam conditions.
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 topic of QOCS. Work should be written to an exceptionally high standard taking into consideration that it is written in exam conditions.

Indicative Content	**Marks**
Required (candidates are required to explore what QOCS is): ***Qualified One Way Cost Shifting (QOCS) doesn't:*** Displace the normal rule that the losing party to litigation is ordered to pay the winning party's costs as provided for by CPR 42.2(2). ***QOCS limits:*** The circumstances in which such costs orders can be enforced and provides for circumstances where they can be enforced with or without court permission.	Up to 2 marks
Candidates must set out where QOCS does/doesn't apply (credit any case law/points of law correctly cited and applied) e.g: ***CPR 44.13:*** QOCS applies to personal injury and fatal accidents claims both under the Fatal Accidents Act 1976 and under section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 ***Wagenaar v Weekend Travel Ltd (trading as Ski Weekend) & Serradj [2014]:*** 'Proceedings' under CPR 44.13(1) was intended to cover only the claims brought by the claimant, not additional claims added by the defendants, which, in this case, did not concern a claim for PI damages but a separate commercial dispute. ***QOCS:*** Will not apply to applications for pre-action disclosure.	Up to 6 marks For a pass mark, a candidate should demonstrate knowledge of when QOCS does/doesn't apply.

CPR 44.17: QOCS will not apply where the claimant had entered into a 'pre-commencement funding arrangement' as defined by CPR 48.2. ***CPR 48:*** Defines a pre-commencement funding arrangement (essentially a CFA entered into before 1 April 2013). ***Catalano v Espley-Tyas Development Group (2017):*** Court of Appeal confirmed CPR 44.17 applies even where the Claimant subsequently entered into a post 1st April 2013 CFA or ATE. ***Landau v Big Bus Co Ltd [2014]:*** Didn't apply to an appeal where the substantive action was CFA funded. ***Price v Egbert Taylor & Co. [2016]:*** The Claimant's letter of claim stated that there was a pre 1st April 2013 CFA in place. However, this was not the case and the Court held that the Claimant was stopped from relying on the costs protection of QOCS as the Defendant had relied upon the representation that there was a pre 1st April 2013 such that QOCS would not apply.	
Candidates should identify that the relevant provisions are found in CPR 44.15, where QOCS applies and the court's permission is not required to enforce the order (credit any case law/points of law correctly cited and applied) e.g: ***CPR 44.15:*** Orders can be enforced where proceedings are struck out because there were no reasonable grounds for bringing the proceedings, there is an abuse of process or the conduct of the claimant (or a person acting on his behalf with his knowledge) is likely to obstruct the just disposal of the proceedings. ***Wall v British Canoe Union [2015] (claim no. A38YP644) (Unreported):*** The widow of a man who died in a canoeing accident was not eligible for QOCS protection because her claim against the defendant was struck out pursuant to CPR 3.4 as disclosing no reasonable grounds for bringing a claim. ***Brahilka v Allianz Insurance (Claim No. A93YP597 in the Romford County Court) (unreported):*** the claimant's claim was struck out when he failed to attend the trial of a road traffic accident claim. An adjournment in this matter was deemed to	Up to 7 marks For higher than a pass mark a candidate should make some application to the scenario.

be disproportionate because the claim was valued at around £1,000. The district judge held that CPR 44.15(c)(i) applied and the costs order was enforceable. ***Reckitt Benckiser (UK) Ltd v Home Pairfum Ltd [2004]:*** was a patent case with a defendant attempting to join the claimant's solicitors as a Part 20 defendant to a counterclaim for injunctive relief holding them equally liable due to their sending threatening letters. This was seen more as a means to make the relationship between solicitor and claimant uncomfortable than there being a genuine need for injunctive relief. ***Kite v Phoenix Pub Group [2015]:*** Application to strike out and 2 days before it was heard the claimant discontinued. The District judge set aside notice of discontinuance and claim struck out. ***Shaw v Medtronic Corevalve LLC and others [2017]:*** The claimant is entitled to discontinue, the notice of discontinuance in this case was not set aside. There is a distinction between a claim being struck out and set aside, this may be a lacuna in the rules.	
Any relevant point to describe the enforcement of costs orders, under CPR 44.14, where QOCS applies (credit any case law/points of law correctly cited and applied) e.g: ***CPR 44.14(1):*** Orders can be enforced to the extent that the amount of the costs does not exceed the damages awarded to the claimant. The claimant can be ordered to pay the defendant's costs up to the amount awarded to him. This covers a situation where a claimant fails to beat a defendant's Part 36 offer. ***CPR 44.14 (2):*** may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed. ***Jeffrey Cartwright v Venduct Engineering Limited [2018]:*** Court of Appeal decision. In claims where the claimant has issued proceedings against multiple defendants, those defendants against whom the claimant has lost or discontinued and obtained an order for costs against the claimant can proceed to	3 Marks

enforce the recovery of those costs against any damages and interest awarded to the claimant from any other defendant.	
Any relevant point to describe the enforcement of costs orders, under CPR 44.16, where QOCS applies and the court's permission is required to enforce the order (credit any case law/points of law correctly cited and applied) e.g: ***CPR 44.16(1):*** costs orders against claimants can be enforced to their full extent only with court permission where the claim is found, on the balance of probabilities, to be fundamentally dishonest. ***Menary v Darnton [2016]:*** on appeal of the RTA claim it was determined a collision had not in fact occurred and the claimant had instigated a claim without a reasonable belief in its truth. Fundamental dishonesty was established for the purpose of CPR 44.16(1). ***Gosling v Hailo and Screwfix Direct [2014]:*** fundamentally dishonesty was defined as dishonesty that went to the root of the whole or a substantial part of the claim as opposed to dishonesty relating only to a collateral matter or a minor self-contained head of damage. ***CPR 44.16(2)(a):*** Where the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses) the court can make an order for costs against that other person. ***Howlett and Howlett v Davies and Ageas [2017]:*** The Court can make and enforce a costs order against a non-party in accordance with CPR 46.2. ***CPR 44.16(2)(b):*** Costs orders against claimants can be enforced to their full extent providing the court has given permission where the claim includes a claim for financial benefit unrelated to personal injury either for the claimant or for another party. This part therefore gives the court the power to deny a claimant QOCS protection in a claim, for example, which is primarily a	6 Marks

property damage claim but which includes a personal injury claim. ***CPR PD 44, para 12.2:*** Includes examples of when CPR 44.16(2)(b) may apply and the examples given are subrogated claims and claims for credit hire. ***Jeffreys v Commissioner of Police for the Metropolis [2017]:*** Unsuccessful PI claim against the police had included claims for malfeasance, loss of liberty, fear and upset; that were not personal injury heads of claim. Under CPR 44.16(2)(b) and the court's discretion, the claimant was ordered to pay 70% of the defendant's costs. ***CPR 44.16(3):*** The orders under CPR 44.16 against claimants can be enforced to their full extent only with court permission.	

Question 6:	You are a costs lawyer working for a costs drafting firm in Brighton. You have been approached by a solicitor, Jessica Talbot, for your advice on the recoverability of an ATE premium. Ms Talbot has been acting on behalf of Mrs Everette, who brought a clinical negligence claim against the Brighton and Hove Hospitals NHS Trust in relation to the treatment she received following a miscarriage in July 2016. After entering into a CFA with her solicitors Ms Talbot requested her medical records from the NHS Trust. Before any medical records were received, or before expert evidence was obtained in relation to her claim, Mrs Everette took out an ATE insurance policy with PROT. The total premium, including IPT, came to £5,002 of which £4,008 (including IPT) was recoverable. Mrs Everette's claim settled for £2,900 before expert evidence was obtained. At provisional assessment the premium was allowed in full. At an oral hearing, requested by the Trust, the Deputy District Judge considered that it was unreasonable to have taken out the policy before Mrs Everette's medical records had been seen to confirm the facts and before there could be any assessment of risk. Permission to appeal has been granted on the basis that the Deputy District Judge had been wrong to hold that she should have waited to ascertain the level of risk before taking out an ATE policy. The appeal is listed to take place in two weeks before HHJ Magpie.

	Your instructing solicitor has written to you asking for your advice and specifically if you could answer the following three questions: a) Does the recovery of ATE premiums in post-LASPO clinical negligence cases engage the CPR? b) Following the April 2013 reforms, is it still good law that it is reasonable to take out an ATE policy at the outset of a claim when a claimant instructs solicitors? c) Does the new test of proportionality apply to the recovery of an ATE premium in a post-LASPO clinical negligence case? You are required to write the body of a letter of advice to Ms Talbot setting out whether or not you think the premium is recoverable and addressing her questions.

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 points required for a pass (above). The answer is also likely to include some discussion on the uncertainty in the law and the piecemeal development of the common law. Candidates are also likely to discuss 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 recoverability of the premium under current legislation e.g: ***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 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.	Up to 4 Marks

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 and not the date of the CFA. ***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. ***Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No 2) Regulations 2013:*** Insurance premiums are recoverable where the insurance is against the risk of incurring experts' fees regarding liability and causation in clinical negligence proceedings, the part of the policy recoverable relates to the expert's reports, and the damages claimed are valued at £1000.00 or more.	
Credit a discussion generally on what challenges may be made as to the recoverability, e.g: ***Emily Nokes v Heart of England Foundation NHS Trust [2015]*:** Identifying which part of the premium relates to experts' reports may be difficult. In this case the defendant argued that the premium was not recoverable because there were two separate parts to the premium and it was argued the policy did not comply with the new regulations. ***There have been a number of challenges to ATE premiums:*** Not all sum paid was premium, the premium is too high compared to others available on the market and the formula used leads to disproportionate premium. ***Peterborough & Stamford Hospital NHS Trust v McMenemy [2017]:*** There are few rules or practice directions to give guidance on the assessment and recoverability of premiums and it was commented in the C of A decision that this ought to be looked at by the Rules Committee.	Up to 2 Marks

Candidates should discuss whether the recovery of ATE premiums in post-LASPO clinical negligence cases engages the CPR, e.g: ***BNM v MGN Ltd [2016]:*** New definition of costs does not include additional liabilities in pre-LAPSO CFAs. ***Murrell v Cambridge University Hospital NHS Trust [2017]:*** The new definition of costs under CPR 44.1 did not include additional liabilities. ***Peterborough & Stamford Hospitals NHS Trust v McMenemy and Reynolds v Nottingham University Hospitals NHS Foundation Trust [2017]:*** The assessment of Ate invokes the CPR. ***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. ***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.	Up to 6 Marks To achieve more than a pass there must be strong evidence that the candidate is able to apply the authority to the facts of the question
Candidates should discuss whether, following the April 2013 reforms it is still good law that it is reasonable to take out an	Up to 3 Marks

ATE policy at the outset of a claim when a claimant instructs solicitors, 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. ***West and Demouilpied v Stockport NHS Foundation Trust [2019]:*** Callery v Gray (No 2) [2001] is still good law.	
Candidates should discuss whether the new test of proportionality applies to the recovery of an ATE premium in a post-LASPO clinical negligence case, e.g: ***The tests of proportionality:*** Lownds v Home Office 2002 for old test, CPR 44.3 for new test. ***Lownds v Home Office 2002:*** Approach (item by item then stand back) (items disproportionate but necessary are recoverable) applicable. ***CPR 44.3(5)(a) to (e):*** Lists the factors to be taken into account when considering if costs are proportionate. 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. ***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 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.	Up to 8 Marks To achieve more than a pass a candidate must explain in detail the uncertainty that has existed around the test of proportionality and insurance premiums.

Murrell v Cambridge University Hospital NHS Trust [2017]: Confirmed the old test was applicable. ***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. ***West and Demouilpied v Stockport NHS Foundation Trust [2019]:*** Addressed issues around applying the new proportionality test to post lapso premiums in clinical negligence cases.	

Question 7:	You are a costs lawyer working in house at a firm of solicitors, Harbutt and Bassett LLP. Martha Stevens is a partner in the family department of the firm. She has approached you for advice in relation to her client, Ms Diane Foster, who is the applicant in proceedings brought under the Trusts of Land and Appointment of Trustees Act 1996, pursuant to which she claims a beneficial interest in her former home. The defendant to the proceedings is Deryk Bannister.

	The parties met and began a relationship in 1990. At that time, Diane was aged 19 and Deryk 32. They began to live together in 1991. They lived together for over 20 years although in the last few years of their relationship there were many difficulties between them. They separated in September 2017. The parties' former home has been valued, for the purposes of the proceedings, at around £2,300,000. There is an outstanding mortgage secured upon the property and once costs of sales are deducted it will leave about £1,900,000 of equity. The financial litigation has engaged leading counsel as well as junior counsel and has generated a phenomenal amount of documentation. Diane has incurred (including her estimated costs to the end of a fully contested current hearing) costs of about £800,000 inclusive of VAT. Deryk has incurred costs of about £506,000, inclusive of VAT. So, between them, these two parties have now incurred, or anticipate incurring, expenditure of about £1,300,000 on legal costs. Diane has requested advice from Martha on whether or not she will be able to recover her costs from Deryk. You are required to write the body of an email to Ms Stevens setting out how costs in family cases are usually dealt with, how the costs in this type of case should be dealt with and what rules the Court should have considered when making the order.
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 making an order under either the CPF or the FPR. 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 are likely to have identified the costs follow the event regime would be applicable in this scenario and if the court were minded to make an order in the client's favour then the factors in the CPR 44.2(4) would be considered. 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): ***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 an all-encompassing 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 family 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 (consideration as to what the costs regimes are in family proceedings e.g): ***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	Up to 3 marks To achieve more than a pass there must be strong evidence that the candidate is able to apply the authority to the facts of the question i.e

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:*** From the CPR, 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.	recognise that the costs follow the event regime applies in this particular scenario because of the definition of family proceedings.
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 in financial remedy proceedings. 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 within the CPR (CPR 44.2 (5)). ***Rule 28.3(4)(b) of the Family Procedure Rules 2010:*** 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.	Up to 7 marks

Rule 28.3 (6) of the Family Procedure Rules 2010: 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 so as to inclue the financial consequence on the parties.	
Credit discussion on the clean sheet regime, e.g: ***Clean sheet regime:*** This regime provides that the starting point is that there will be no costs shifting, parties bear their own costs, examples include Children Act 1989 proceedings (both public and private). ***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 and therefore do apply. ***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
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 2 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 CPR. The CPR apply to all between the parties costs assessments. ***CPR 44.3(1)(a) and CPR 44.3(2):*** 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.	Up to 2 marks

CPR 44.3(1)(b) and CPR 44.3(3): Where costs are assessed on an indemnity basis the amount recoverable under an indemnity costs order may 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]).	

Question 8:	You are a costs lawyer working in house at a firm of solicitors, Harris and Turner. Mr Harris, a partner in the firm's litigation department, has contacted you about a judicial review matter. He represents the group of claimants in the matter, a group of nurses that work independently in private practice. The claimants have brought their claim for Judicial Review against the Nursing and Midwifery Council's (NMC) decision that the nurses' professional indemnity arrangements were inappropriate, with the level set at a tenth of the costs estimated by the membership organisation of which they were all members. The membership organisation, which had about 90 members, had arranged professional indemnity insurance through the second interested party in proceedings, Harvester Ltd. The NMC found that the indemnity offered was inappropriate given the nature and risks associated with the work the nurses undertook. The claimants wish to make an application for order that, should they lose, their liability to pay the NMC's costs would be limited to £20,000, with a reciprocal cap limiting their recovery to £50,000. The NMC are arguing that the issue affects only about 90 nurses and only a small number of clients. The claimants have indicated that they will have to withdraw their application for judicial review if they do not obtain the order they are seeking. The NMC's estimated costs are £250,000, a sum that would bankrupt the claimants if they lost, and those costs would be in addition to their own legal costs. Write the body of an email of advice to Mr Harris setting out the statutory tests for costs capping orders in judicial review cases and

	whether or not you believe he will be successful in obtaining the order his clients are seeking.

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: Candidates MUST identify the framework of rules governing costs capping orders e.g: ***Sections 88-90 of the Criminal Justice and Courts Act 2015:*** Rules on 'Costs-Capping' which replaced the common law rules on protective costs order in Judicial Review proceedings. ***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 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.	Up to 4 marks
Credit a discussion on what amounts to public interest proceedings, e.g:	Up to 5 marks

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. ***Eweida v British Airways [2009]:*** A PCO cannot be made in private litigation. ***R (on the application of Hawking) v Secretary of State for Health and Social Care [2018]:*** Judicial review proceedings challenging a decision made by a government department regarding the National Health Service was in the public interest and the claimants who had crowdfunded to fund the case met the statutory criteria for a cost capping order. ***Maugham QC v Uber London Ltd [2019]:*** Claim by a barrister against Uber for the provision of a VAT invoice. The claim was one between two private persons. Uber was a defendant in its capacity as a potential taxpayer and it carried out no public functions. Not appropriate for the court to make a PCO.	
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	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

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'. ***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.	Up to 5 marks

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.	

Question 9:	You are a costs lawyer working in-house at a firm of solicitors, Woolathorns LLP. Mr Woolathorn, a partner in the firm's litigation department, has contacted you about a matter. Woolathorns represent a well-known high street bank, Harpers, who obtained a judgment against Mr Sanderson in 2010 for £525,000 arising from his default on a mortgage. Some six years later, in 2016, Harpers had agreed to accept £20,500 in full and final settlement of its claim in reliance upon an allegedly fraudulent misrepresentation made by Mr Sanderson that he was penniless. Now, Harpers have instructed Mr Woolathorns to issue proceedings against Mr Sanderson on the basis that they have evidence he had significant assets. They wish to make an application for a worldwide freezing injunction against him, restraining him from disposing of his assets up to a value of £552,000, with the exception of £3,000 to cover the costs of legal advice and representation. Harpers will be seeking an interim injunction until the final determination is made. Write the body of an email advising Mr Woolathorn on the way costs will be determined in relation to the interim injunction. Your advice should detail how the costs of any injunction proceedings would ordinarily be dealt with and the consequence and reasoning of why costs may 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. ***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.	Up to 5 marks Candidates MUST identify that this is a question about an interim injunction and 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	Up to 2 marks

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.	
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: ***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'.	Up to 2 marks
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. ***No threat by the time of trial:*** **The position needs to be considered in light of the fact that** by the time of trial it may be	Up to 2 marks

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.	
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. A 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 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.	Up to 6 marks To achieve a distinction candidates MUST apply the principles of the authority to the facts in the scenario
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, 9.2:*** Where the court orders costs at the end of an interim injunction hearing which has lasted one day or less, it can summarily assess the costs of the application at the end of that hearing.	Up to 4 marks

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. ***N260A:*** **Credit may be given for a discussion of the new pilot and the identification of the relevant form in this case.** ***CPR PD 44, 9.10:*** Disproportionate and unreasonable costs will be disallowed. ***CPR 44.3(1)–CPR 44.3(3):*** Basis of Assessment.	