August 2020: 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:	Critically discuss Mintzberg's ways of structuring an organisation.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: Candidates should identify Mintzberg's model, e.g: ***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.	Up to 2 marks
Required: Candidates should discuss Mintzberg's model, e.g: ***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 8 marks To achieve above a pass there must be critical discussion which may include discussion on the individual parts of the model

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:	Up to 3 marks To achieve above a pass there must be critical discussion

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. ***The Professional Organisation:*** Examples include hospitals, universities, public agencies and accountancy firms. ***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.	which may include discussion on the individual parts of the model OR comparisons to other ways of considering organistaional structures

Question 2:	Outline the legislative framework you need to consider if you were to make an application to become an SRA licensed entity.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: Candidates should set out what a licensing authority is, e.g: ***Application would be made to licensing authority (SRA):*** In order to get a license. ***Section 73(1) of the Legal Services Act 2007:*** Licensing authority means the LSB or an approved regulator that has been delegated as a licensing authority. ***Section 20 of the Legal Services Act 2007:*** Defines approved regulator. ***The Solicitors Regulatory Authority (SRA):*** Is a licensing authority and has authority to grant licences for five reserved legal activities: conduct of litigation, rights of audience, probate activities, administration of oaths and reserved instrument activities.	Up to 3 marks Candidates may not explicitly state that an application should be made to a licensing authority but should demonstrate knowledge of the same
Credit a discussion on the legislative framework for granting a license, e.g:	Up to 5 mark

Section 73(2) of the Legal Services Act 2007: The LSB is a licensing authority in relation to all reserved legal activities, and an approved regulator is a licensing authority in relation to any reserved legal activity in relation to which the designation is made. ***Section 84 of the Legal Services Act 2007:*** Sets out the rules for granting a license. ***Section 84(1) of the Legal Services Act 2007:*** The licensing authority must consider any application that is made to them. ***Section 84(3) of the Legal Services Act 2007:*** The licensing authority can only grant a license if they are satisfied the conditions of the licence will be complied with. ***Section 84(4) of the Legal Services Act 2007:*** If a licence is to be granted, it must be granted as soon as reasonably practicable. ***Section 84(5) of the Legal Services Act 2007:*** The licence will take effect from the date it is issued.	
Credit any reference and examples of how compliance with authorisation rules would need to be demonstrated in order to get a licence, e.g: ***Section 83(3) of the Legal Services Act 2007:*** Licensing rules made by an approved regulator have effect only at a time when the approved regulator is a licensing authority. ***The SRA Authorisation Rules 2019:*** Would need to be complied with if making an application to the SRA. ***Rule 8 of the SRA Authorisation Rules 2019:*** Require that SRA regulated firms have compliance offices for legal practice and finance and administration.	Up to 3 marks To achieve more than a pass candidates must demonstrate depth to knowledge base beyond the primary legislative framework
Credit a discussion on any other relevant rules in relation to the licence, e.g: ***Section 85(1) of the Legal Services Act 2007:*** The terms of the license must state the reserved legal activities that are being granted and any conditions that need to be fulfilled. ***Section 85(3) of the Legal Services Act 2007:*** The LSB must have permitted the licensing authority to grant a license in respect of the named reserved legal activities.	Up to 3 marks

Section 86 of the Legal Services Act 2007: Modification of licence. ***Section 87 of the Legal Services Act 2007:*** A licensing authority must keep a register of licensed bodies. ***Section 88 of the Legal Services Act 2007:*** The certificate which is issued by the licensing authority is evidence of status.	

Question 3:	Explain how the SRA Handbook encourages firms to monitor and manage risk.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Note to Markers: The SRA Handbook is no longer in effect however candidates should have been credited for reference to either the new Rules and Regulations or the handbook because of the ACLT rules on learning new authority/changes to the law and the consequence of COVID 19 delaying the examination sitting. The first part of the guidance set out below should be considered where candidates have referred to the rules in the Handbook.	
Part 1	
Indicative Content	**Marks**
Required (an outline of the SRA framework and business procedure for managing and monitoring risk) e.g: ***The SRA Handbook 2011:*** Sets out the SRA Standards and Regulations. ***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. ***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 actions to be taken to both prevent the risk from occurring and reduce the impact of the risk should it happen.	Up to 2 marks

Any relevant point on the regulatory framework (credit any point raised and applied) e.g: ***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 Rules and Regulations do 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 Rules. ***Risk management principles:*** The SRA does not define the risk management principles that it expects firms and individuals to employ when running a business.	Up to 6 marks To achieve more than a pass candidates must demonstrate depth to knowledge base by discussing that there is no regulatory requirement to have a risk management policy
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	Up to 4 marks

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 to identify risk and raise a risk as an issue which should be documented on risk log. ***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. ***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.	
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. ***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.	Up to 2 marks
Part 2	
Indicative Content	**Marks**
Required (an outline of the SRA framework and business procedure for managing and monitoring risk) e.g:	Up to 2 marks Candidates do not need to

The SRA Handbook 2011: Has been replaced by the SRA Standards and Regulations. ***Rule 2 of the SRA Code of Conduct for Firms:*** This rule is entitled compliance and business systems. ***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 actions to be taken to both prevent the risk from occurring and reduce the impact of the risk should it happen.	have made specific reference to the Handbook having been replaced but should set out clearly the relevant rules that govern the management of risk in SRA regulated firms.
Any relevant point on the regulatory framework (credit any point raised and applied) e.g: ***Rule 2.1(a) of the SRA Code of Conduct for Firms:*** Requires that firms must have effective governance structures, arrangements, systems and controls in place that ensure compliance with all the SRA's regulatory arrangements, as well as with other regulatory and legislative requirements, which apply. ***Rule 2.1(b) of the SRA Code of Conduct for Firms:*** Requires that firms must have effective governance structures, arrangements, systems and controls in place that ensure compliance by managers and employees with the SRA's regulatory arrangements which apply to them. ***Rule 2.1(c) of the SRA Code of Conduct for Firms:*** Requires that firms must have effective governance structures, arrangements, systems and controls in place that ensure compliance by managers and interest holders and those employed or contracted do not cause or substantially contribute to a breach of the SRA's regulatory arrangements. ***Rule 2.1(d) of the SRA Code of Conduct for Firms:*** Requires that firms must have effective governance structures, arrangements, systems and controls in place that ensure compliance officers are able to discharge their duties. ***Rule 2.2 of the SRA Code of Conduct for Firms:*** Requires firms to keep and maintain records to demonstrate compliance with your obligations under the SRA's regulatory arrangements.	Up to 6 marks To achieve more than a pass candidates must demonstrate depth to knowledge base by discussing that there is no regulatory requirement to have a risk management policy

Rule 2.3 of the SRA Code of Conduct for Firms: Requires firms to remain accountable for compliance with the SRA's regulatory arrangements where work is carried out through others, including managers and those employed or contracted with. ***Rule 2.4 of the SRA Code of Conduct for Firms:*** Requires firms to actively monitor financial stability and business viability. ***Rule 2.5 of the SRA Code of Conduct for Firms:*** Requires firms to identify, monitor and manage all material risks to the business, including those which may arise from connected practices. ***No strict regulatory requirement to develop a risk management policy:*** The SRA Standards and Regulations do 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 Rules. ***Risk management principles:*** The SRA does not define the risk management principles that it expects firms and individuals to employ when running a business.	
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 to identify risk and raise a risk as an issue which should be documented on risk log.	Up to 4 marks

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. ***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.	
Any relevant point to describe the roles of a COLP and COFA (credit any point raised and applied) e.g: ***The SRA Authorisation Rules 2019, SRA Account Rules and the SRA Codes of Conduct:*** Would need to be complied with. ***Rule 8.1 of the SRA Authorisation Rules:*** Sets out the requirement for compliance officers and their functions, one of which is that they are required to report failures. ***Rule 9.1 of the SRA Code of Conduct for Firms:*** Sets out what a COLP is required to do. ***Rule 9.2 of the SRA Code of Conduct for Firms:*** Sets out what a COFA is required to do.	Up to 2 marks

Question 4:	Explain the risks faced by firms when implementing performance management strategies.
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	Up to 2 marks To achieve more than a pass candidates must apply their knowledge base to the question set and

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.	should not simply cite authority but think about the risks presented
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 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***	Up to 4 marks

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 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.	Up to 4 marks
Any other relevant point to describe a breach of contract claim (credit any case law/points of law correctly cited and applied) e.g:	Up to 4 marks

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 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 work in-house at Honey and Muster LLP. Your firm is acting for the claimant, Joanne Smith, in respect of an action against the police. Mr Muster, a senior partner of the firm, has conduct of the matter. Joanne had brought claims for damages under the Data Protection Act 1998 (DPA) and the Human Rights Act 1998 (HRA), for misfeasance in public office, the misuse of private information and psychological harm. All claims were funded by a CFA dated 1 January 2018 and proceedings were issued on 23 March 2018. The defendant admitted liability under the DPA and the HRA. The claims for damages for misfeasance and misuse of private information went to trial. The claimant lost on the former but won on the latter. The trial judge rejected the claimant's claim for personal injury damages arising out of the defendant's conduct. Ms Smith failed to beat the defendant's Part 36 offer. The issue has now arisen as to whether Ms Smith is entitled to QOCS protection in relation to her costs liability. Mr Muster has approached you to write a letter to Ms Smith setting out what cases QOCS applies to, when costs protection under the rules may be lost and whether, in your view, Ms Smith has QOCS protection in respect of her claim. Write the body of a letter to Ms Smith advising when a claimant is entitled to the protection of QOCS and in what 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 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 in relation to QOCs. The answer may not indicate any real understanding that QOCS offers limited costs protection for the claimant in cases commenced post LASPO. 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: Which cases QOCs applies to, when a costs order can be enforced and to what extent, when the court's permission is required to enforce an order and the concept of a mixed claim. 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 is likely to have discussed the difficulty the courts have faced when striking out claims or when claims are discontinued, the definition of fundamental dishonest and the concept of setting off costs. 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 (CPR or case law) throughout. The candidate may make observations about uncertainty in some areas and the need for further clarity from the rule committee. 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 (candidates are required to explore what QOCS is): ***CPR 44.2(1):*** The Court retains discretion as to costs and QOCS does not impact this. ***CPR 44.2(2)(a):*** The normal rule that the losing party to litigation is ordered to pay the winning party's costs is not displaced by QOCS. ***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

Any other relevant point to describe 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 as a separate commercial dispute. ***QOCS:*** will not apply to applications for pre-action disclosure. ***CPR 44.17:*** QOCs will not apply where the claimant had entered into a 'pre-commencement funding arrangement'. ***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. ***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. ***Landau v Big Bus Co Ltd [2014]:*** Didn't apply to an appeal where the substantive action was CFA funded.	Up to 4 marks
Any other 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	Up to 3 marks

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 enforce the recovery of those costs against any damages and interest awarded to the claimant from any other defendant.	
Any other relevant point to describe the enforcement of costs orders, under 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 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 sefendant to a counterclaim for injunctive relief holding them equally	Up to 5 marks

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 44.16, 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	6 Marks

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 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. ***Commissioner of Police of the Metropolis v Andrea Brown: Chief Constable of Greater Manchester (Appellant) v Andrea Brown (Respondent) and Equality and Human Rights Commission (Intervener) [2018]:*** The claimant advanced claims other than for personal injury and the Judge therefore had discretion to permit enforcement of the defendants' costs to the extent that he considered it just to do so. ***Brown v Commissioner of Police of the Metropolis & Anor [2019]:*** Qualified one-way costs shifting (QOCS) does not automatically apply to 'mixed' claims involving both a personal injury and non-PI element but it is the starting point for standard PI cases. The case also recommended a review of the rules. ***CPR 44.16(3):*** The orders under CPR 44.16 against claimants can be enforced to their full extent only with court permission.	

Any relevant point to describe set-off of costs orders, under CPR 44.12, (credit any case law/points of law correctly cited and applied) e.g: ***CPR 44.12(1):*** Where a party entitled to costs is also liable to pay costs, the court may assess the costs which that party is liable to pay and either set off the amount assessed against the amount the party is entitled to be paid and direct that party to pay any balance; or delay the issue of a certificate for the costs to which the party is entitled until the party has paid the amount which that party is liable to pay ***Howe v Motor Insurers' Bureau [2017]:*** The court does have jurisdiction under CPR 44.12 to order a set-off of costs in cases where the claimant has QOCs protection. ***Faulkner v Secretary of State for Energy and Industrial Strategy [2020]:*** The court's exercise of the discretion to order set-off in QOCs cases will depend of the facts of the case before the court. ***Ho v Adelekun (no.2) [2020]:*** The court are bound by Howe. However, this decision is being appealed. Rule committee should look to see if there should be a blanket rule that allows for set off of all Ds costs.	Up to 3 marks

Question 6:	You work in house for a defendant firm, Donnelly and Donoghue LLP, specialising in medical negligence matters. One of the partners, Deborah Donnelly, acted for Shrewsbury Eye Hospital NHS Foundation Trust in a claim that was brought by Mr Peter Parker. Mr Parker had instructed Honey and Muster LLP and the claim was funded under a CFA and by way of an After the Event (ATE) policy. Mr Parker alleged that the defendant failed to refer him for imaging and had the defendant done so a melanoma would have been found twelve months earlier than was the case. Mr Parker first instructed his solicitors on 7 August 2017 and a letter of claim was sent to the defendant on 20 May 2018. In a letter of response dated12 November 2018 the defendant's insurer admitted breach of duty but denied causation. Proceedings were issued on 10 December 2018. After lengthy negotiations, the claim settled and a consent order was sealed by Shrewsbury County Court on14 November 2019 whereby judgment was entered for the claimant in the

	sum of £6,500 with the defendant to pay the claimant's costs of the claim on the standard basis. The claimant's solicitors have now served their bill of costs in the sum of £69,320.85. This includes an ATE insurance premium of £29,323.57. Deborah Donnelly now seeks your advice on the recoverability of the premium, specifically in relation to the experts. Write the body of a memo to Deborah Donnelly advising on the recoverability of the ATE premium in this matter and advise on the possibility of the premium being reduced on assessment.
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 to 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 recoverability of the premium and what challenges may be made as to the recoverability, 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. ***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). ***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. ***The tests of proportionality:*** Lownds v Home Office 2002 for old test and CPR 44.3(2) and (5) 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. ***Whatever basis:*** Reasonableness would always be considered.	Up to 5 Marks
Candidates should have developed their discussion on the recoverability of the premium, e.g:	Up to 5 Marks To achieve more than a pass a

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. ***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. ***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 re liability and causation in clinical negligence proceedings, the part of the policy recoverable relates to the experts reports, and the damages claimed are valued at £1000.00 or more. ***Peterborough & Stamford Hospital NHS Trust v McMenemy [2017]:*** There are no other 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.	candidate must explain in detail the framework of the law on recoverability of premiums.
Candidates should have developed their discussion on what challenges may be made as to the proportionality of the premium, 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	Up to 6 Marks To achieve more than a pass there must be strong evidence that the candidate is able to apply

this case, at first instance, it was decided that the new 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. ***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 [2017]:*** Two stage approach: Line by line reduction considering reasonableness and then a line by line reduction considering proportionality. New definition of costs does not include additional liabilities in pre-LAPSO CFAs. CPR44.3(5) does not apply to additional liabilities even if ATE incepted after 1 April 2013. ***May v Wavell Group [2016]:*** **T**wo stage approach: Line by line considering reasonableness and then a broad brush deduction to reach a 'proportionate' figure. ***May v Wavell Group [2017]:*** The CPR 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 CPR 44.3(5) did apply to post LASPO premiums and 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 v McMenemy [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. The CPR is	the authority to the facts of the question

engaged when assessing recoverability of ATE premiums and they are subject to the scrutiny of the Court. The Court require expert evidence if a premium is to be challenged. *Callery* remains good law. ***West and Demouilpied v Stockport NHS Foundation Trust [2020]:*** Proportionality is a two stage test and once reasonableness has been considered the Court should remove all unavoidable costs before making any deduction to reach a proportionate figure. Unavoidable costs may include ATE premiums. The Court require expert evidence if a premium is to be challenged. *Callery* remains good law.	
Candidates should have developed their discussion on what challenges may be made as to the reasonableness of the premium, e.g: ***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. ***Callery v Gray (No 2) [2002]:*** 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.This was a Supreme Court decision. ***Rogers v Merthyr Tydfil [2007]:*** Followed the decision in Callery v Gray.	Up to 4 Marks

Peterborough & Stamford Hospital NHS Trust v McMenemy [2017]: Confirmed that Callery v Gray and Rogers v Merthyr Tydfil were still good law. ***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 any further discussion or use of authority e.g: ***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. Whatever basis: Reasonableness would always be considered.	Up to 4 Marks

Question 7:	You work as a costs lawyer for Sutton Solicitors. Mr Sutton is an experienced family lawyer that acts on behalf of high net worth clients. Mr Sutton has approached you for your assistance in relation to one of his clients, Mrs Patricia Dongle. After 22 years, Mr and Mrs Dongle's marriage came to an end in 2018. There were two children of the marriage and during the course of their partnership the couple had built up vast wealth. At the time of separation they owned a plane, a helicopter and a 115m super yacht called Doris. The divorce has been bitter. Mr Dongle has fought hard to avoid having to share any of the family wealth with Mrs Dongle. The High Court has already made findings that Mr Dongle had hidden assets in a Bermuda Trust with the intention

	of evading his legal obligations to Mrs Dongle and Mr Dongle even went so far as to invent stories that the couple had already divorced in Russia, producing forged documents within proceedings. The final hearing in respect of the couple's finances is now listed to take place on 20 August 2020. Mrs Dongle is seeking in excess of £370m plus the art collection worth approximately £97m. This is an amount equivalent to 39.5% of the couple's wealth. An offer for settlement in these terms was made by Mrs Dongle on 20 March 2019. You are required to write the body of an email to Mr Sutton 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 consider when making a costs 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 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 no order 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 conduct of the parties, as defined by the FPR. 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

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.	
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. ***Rule 28.3 (6) of the Family Procedure Rules 2010:*** The	Up to 7 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

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 work as an in-house costs lawyer for an SRA regulated firm, Hornets Ltd, located in Hammersmith. The firm specialises in clinical negligence, private client and commercial litigation. Simon Spratt, a solicitor within the firm, has asked for your advice in relation to his client Mr Billy Britton. Mr Britton's mother, Freda Britton, died in 2017. Mrs Britton was 92 when she died. She had signed a Will three years earlier which bequeathed Billy an equal share of £600,000 along with his two sisters. However, his sisters, Penny Harper and Catherine Chiltern were arguing that they were meant to receive more inheritance than Billy. The sisters consider that an earlier executed Will, where they would each receive 40% of the estate and their brother the remaining 20% should be accepted as their mother's final wishes instead. Billy's sisters are both claiming that their mother was too weak to understand what she was signing in 2014 and argue that the Will that she had signed in 2013 should be treated as her final wishes. They are claiming that Freda had suffered a fall five days before signing the Will so nobody can be completely satisfied that she knew and approved the 2014 Will. They are also arguing that the Will was not properly witnessed and there had been inadequate family discussions before or after the 2014 Will was signed. Billy insists that following the death of his father he had carried out the express instructions of his father's Will and worked collaboratively with his mother to ensure that her wishes were fulfilled. A caveat has been issued by the Probate Registry and the Executors of the estate of Mrs Britton have applied to the court under the CPR Part 7 procedure to prove the will in solemn form.

	Write the body of a memo to Simon Spratt setting out the rules on costs in contentious probate matters with specific consideration of the general rule under the CPR.
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 general rule and its applicability in contentious probate matters, the three exceptions to the general rule in contentious probate and the propositions in Kostic. Credit will be given to any reasonably written answer and any reasonable conclusion. 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 (discussion of the application of the CPR in contentious probate cases) e.g : ***CPR 44.2(2)(a):*** The general rule that costs follow the event applies to costs in non-contentious probate, contentious probate and Inheritance (Provision for Family and Dependents) Act 1975 claims. Following this rule, the costs	Up to 5 marks

of contentious probate proceedings should be paid by one or more of the parties rather than by the estate. ***CPR 44.2(2)(b):*** The court does retain the power to 'make a different order' in contentious probate matters. ***CPR 44.2(4):*** The relevant factors the court should consider when making an order for costs (includes conduct). ***CPR 44.2(5):*** Sets out what conduct means and this includes (under CPR 44.2(5)(a)) any relevant pre-action protocol. Whilst not a pre-action protocol, the Association of Contentious Trust and Probate Specialists' (ACTAPS) Code is explicitly referred to within this part of the CPR. ***Under CPR 57.11(1):*** CPR 38 does not apply to probate claims. CPR 38 sets out the rules on discontinuance. ***James v James and Ors [2018]:*** Confirms that CPR 36 applies in contentious probate matters. In this case the offer made in this case was not a valid Part 36 offer because it was inconsistent with the wording of Part 36. Accordingly, whilst it was a letter to which the Court could have regard in the exercise of its discretion on costs, it was not one to which the more advantageous consequences of Part 36 applied.	
Required (discussion of the three exceptions to the 'normal' rule that 'costs follow the event) e.g: ***CPR 57.7(5):*** Contains the first of three exceptions to when costs should not follow the event in probate. This is the procedure for requiring a will to be proved without advancing a positive case. ***Spiers v English [1907]:*** Contains exception 2 and 3, where a testator had been the cause of the litigation, costs should come out of the estate; and where the circumstances led reasonably to an investigation of the matter, costs should be borne by both sides.	Up to 3 marks
Credit any relevant point in relation to a discussion of the exception in CPR 57.7.5 e.g: ***CPR 57.7(5)(a):*** A defendant may give notice in his defence that he does not raise any positive case but insists on the will being proved in solemn form and will cross-examine the witnesses who attested the will. ***CPR 57.7(5)(b):*** If a defendant gives such a notice, the court will not make an order for costs against him unless it	Up to 3 marks

considers that there was no reasonable ground for opposing the will. ***Wharton v Bancroft [2012]:*** Where a positive case is advanced the defendant may not be afforded costs protection and an order may be made against them where they are either unsuccessful or discontinue their claim.	
Credit any relevant point in relation to a discussion of the first exception in Spiers v English e.g: ***Exception 1:*** Where the testator himself has, or the residuary beneficiaries have, been the cause of the litigation in these cases costs should come out of the estate. ***Mitchell v Gard (1863):*** The 'basis of all rule on this subject should rest upon the degree of blame to be imputed to the respective parties'. ***Kostic v Sir Malcolm Chaplin and Mr Martin Saunders (chairman and secretary of the Conservative Party Association) & HM Attorney-General [2007]:*** Blame is being used in a causal rather than a moral sense. It may be possible for the testator's incapacity to trigger the exception just as readily as his failure to make a clear will. ***Re Cutcliffe's Estate [1959]:*** Coes not apply to a testator who gives beneficiaries a false impression of what is going to be in his will. ***Wharton v Bancroft [2012]:*** Norris J pointed out one unfortunate consequence of the first exception laid down in *Spiers v English* is in many circumstances to require a beneficiary who succeeds in proving the will to pay the costs of the losing challengers: where, for example, there is no residue.	Up to 5 marks
Credit any relevant point in relation to a discussion of the second exception in Spiers v English e.g: ***Exception 2:*** Where neither the testator nor the residuary beneficiaries are to blame for the litigation, but circumstances lead reasonably to an investigation of the matter: parties should bear their own costs ***Davies v Gregory (1873):*** If having 'taken all proper steps to inform themselves as to the facts of the case' the challengers nevertheless 'bona fide believe in the existence of a state of things which, if it did exist, would	Up to 2 marks

justify litigation, then, although no blame should attach to the testator or to the executors and persons interested in the residue, each party must bear his own costs'.	
A discussion of the 4 propositions in *Kostic* e.g: ***Kostic v Sir Malcolm Chaplin and Mr Martin Saunders (chairman and secretary of the Conservative Party Association) & HM Attorney-General [2007] EWHC 2909 (Ch)*:** Mr Justice Henderson held that these two recognised exceptions were guidelines not straitjackets. He went on and held that a number of propositions as to the meaning of the exceptions could be derived from authorities decided before *Spiers*. ***Proposition 1:*** In order for the first exception to apply, the touchstone was whether it was the testator's own conduct or the conduct of those interested in the residue that caused the litigation which had led to his Will being surrounded with confusion or uncertainty in law or fact [*Mitchell v Gard (1863) 3 Sw & Tr 275, 277*]. If it was the testor's own conduct it should not matter whether the problem related to the state in which the deceased left his testamentary papers, for example, where a will could not be found, or to the capacity of the deceased to make a will. ***Proposition 2:*** Moral blameworthiness was not the criterion for the application of the first exception [*Davies v Gregory* (1873) LR 3 P & D 28]. ***Proposition 3:*** There was no correlation between eccentricity and testamentary incapacity [*Boughton v Knight* (1873) LR 3 P & D 64]. ***Proposition 4:*** The second exception applied, and each party would bear their own costs, where neither the testator nor the persons interested in the residue had been to blame, but where the opponents of the will had been led reasonably to the bona fide belief that there were good grounds for impeaching the Will. The trend of more recent authorities was to encourage a very careful scrutiny of any case in which the first exception was said to apply and to narrow, rather than extend, the circumstances in which it would be held to be engaged. Further, each side should bear its own costs in an intermediate period of the proceedings up to the date on which expert reports were exchanged; whereafter costs should follow the event.	Up to 6 marks
Any other relevant point to describe costs in contentious probate (credit any case law/points of law correctly cited and applied) e.g:	Up to 3 marks

Re Good, deceased; Carapeto v Good and Others [2002] EWHC 640: The normal rules as to costs contained in the CPR should also be followed in probate actions save only that the judge should also take account of the guidance in the Spiers case, where an alternative costs order might be made. ***Re Plant deceased [1926]:*** The court considered whether the executor should have his costs out of the estate unless he had acted unreasonably. Scrutton LJ warned: 'I should be reluctant to do anything to create the idea that unsuccessful litigants might get their costs out of the estate'. ***CPR 46.3:*** where a personal representative has incurred costs on behalf of the estate. ***CPR 46.3(2):*** no other party has been ordered to pay them then in accordance to CPR 46.3(3) they are entitled to recover them from the Estate on the indemnity basis. ***Re Coles Estate [1962](Karminski J):*** Personal representative's prima facie right to recover costs from the estate unless deprived of them by Order of the Court. ***McCabe v MaCabe [2015]:*** Unsuccessful challenge to the Will where costs followed the event. Where the personal representatives were joined to the case by the losing party and the case did not turn on their evidence, for the Solicitors costs as Executor to be taken out of the Estate would have deprived the winning party. The losing party also had to pay them from an interpretation of the Wharton v Bancroft ruling. ***Burgess v Penny [2019]:*** Conduct in its broadest sense is a factor in some of the principles behind costs awards in probate claims. On a "half-win" basis, the court considered that the proper starting position was that the brother and sisters should each pay half of the others' costs however other factors may lead the court to depart from this approach.	

Question 9:	You work for an SRA regulated firm, Pear and Peach LLP, located in Derbyshire. Mr Pear is instructed by Mr Bernard Botch who has suffered loss and damage following a series of postings on a social media platform, My Book. The postings were made over a number of months and started 18 months ago.

	When instructing previous solicitors, Harper and Lee LLP, Mr Botch had unsuccessfully attempted to obtain an injunction in libel. That application had been made without notice. The matter has now been listed for a hearing of an on-notice application. My Book has been appropriately served and it is expected the company will be represented at the hearing. Very recently Mr Botch indicated that he did not want to pursue the application because he was concerned about the costs. Mr Pear has worked very hard to obtain the consent of My Book to the granting of an interim injunction within proceedings on the balance of convenience. Mr Pear has advised his client that the costs should usually be reserved until the trial of the substantive issue. Mr Pear has now asked for your assistance with writing to the client to set out what it means for costs to be reserved. Write the body of a letter of advice to Mr Botch setting out what it means for an injunction to be granted on the balance of convenience and the way costs will be determined in such a case. Your advice should detail how the costs of any injunction proceedings would ordinarily be dealt with and the consequence and reasoning of costs being reserved in this instance.
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	Up to 2 marks

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.	
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.	Up to 2 marks

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 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.	