# June 2017: 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:** | **Discuss Mintzberg's ways of structuring an organisation.** |
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| **Total Marks Attainable**<br><br>Fail = 0-4.9<br>Pass = 5+<br>Merit = 6+<br>Distinction = 7+ | 10 |
| **Indicative Content** | **Marks** |
| **Required:**<br><br>***Mintzberg suggests:*** there are seven ways to ideally structure an organisation.<br><br>***In the first five:*** there is a core part of the organisation that exerts key influence over its structure. | Up to 2 marks |
| **Required:**<br><br>***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.<br><br>***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.<br><br>***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.<br><br>***The Professional Organisation:*** This is driven by its | Up to 8 marks |

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| 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'.<br><br>***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.<br><br>***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.<br><br>***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:**<br><br>***The Entrepreneurial Organisation:*** Tends to be smaller and owner managed; a lot of organisations go through this stage | Up to 3 marks |

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| at the start.<br><br>***The Machine Organisation:*** Typically larger, older organisations in a stable environment carrying out repetitive work.<br><br>***The Professional Organisation:*** Examples include hospitals, universities, public agencies and accountancy firms.<br><br>***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. | |

| **Question 2:** | Describe the statutory requirement for, and the duties of, a HOFA in solicitors' firms. |
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| **Total Marks Attainable**<br><br>Fail = 0-4.9<br>Pass = 5+<br>Merit = 6+<br>Distinction = 7+ | 10 |
| **Indicative Content** | **Marks** |
| **Required:**<br><br>***Requirement:*** The Legal Services Act 2007, under Part 2 of Schedule 11 requires ABSs to appoint a Head of Finance and Administration (HOFA), but there is no corresponding statutory requirement for solicitor's practices.<br><br>***Section 92(1) Legal Services Act 2007:*** *The Head of Finance and Administration of a licensed body must take all reasonable steps to ensure compliance with licensing rules made under paragraph 20 of Schedule 11 (accounts).*<br><br>***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.*<br><br>***The primary legislation and SRA Handbook differ on the title of the COFA role:*** but this does not affect its substance. The SRA, under rule 8.5(d) of the SRA Authorisation Rules 2011, has changed the title from Head of Finance and Administration (HOFA) to Compliance Officer for Finance and Administration (COFA). This rule requires that all SRA authorised firms have a COFA.<br><br>***The Compliance Officer for Finance and Administration*** | Up to 4 marks |

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| ***(COFA) has three core functions/duties:*** internal implementation of compliance systems; external reporting of failures to the SRA; maintaining records of compliance failures. | |
| **Any other relevant point to describe the internal compliance function (credit any points/points of law/descriptions correctly cited and applied) e.g:**<br><br>***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 Authorisation Rules 2011 (SRA AR). | Up to 1 mark |
| **Any other relevant point to describe the external reporting of failures to the SRA (credit any point/points of law/descriptions correctly cited and applied) e.g:**<br><br>***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.<br><br>***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;<br><br>***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.<br><br>***No definition of material failure:*** but the COFA should take into account all relevant factors, including (**Guidance Note to rule 8 of the SRA Authorisation Rules 2011**): the detriment or risk of detriment to clients; the scale of the issue; the overall impact on the firm, its clients and third parties; and the extent of any risk of loss of confidence in the firm, or the provision of legal services generally. | Up to 4 marks |
| **Any relevant point to describe the recording function (credit any point/points of law/descriptions correctly cited and applied) e.g:**<br><br>***Rule 8.5(e)(i), and Guidance Note to rule 8 of the SRA Authorisation Rules 2011 a COFA must:*** keep a record of all SRA AR 2011 compliance failures; and make this record | Up to 2 marks |

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| available to the SRA on request.<br><br>***No prescribed way for monitoring or recording compliance failures:*** but it should be done in a way that allows the COFA to: monitor overall compliance with the firm's various regulatory and statutory obligations; assess the effectiveness of the firm's systems and controls; identify and report a material pattern of failures; monitor overall compliance with the firm's various regulatory and statutory obligations; assess the effectiveness of the firm's systems and controls; and identify and report a material failure or pattern of failures. | |
| **Any other relevant point that describes the role and duty (credit any points/points of law correctly cited and described) e.g:**<br><br>***The 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.<br><br>***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.<br><br>***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. | Up to 2 marks |

| **Question 3:** | **Describe what is meant by a risk management policy with reference to existing regulatory requirements.** |
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| **Total Marks Attainable**<br><br>Fail = 0-4.9<br>Pass = 5+<br>Merit = 6+<br>Distinction = 7+ | 10 |
| **Indicative Content** | **Marks** |
| **Required:**<br><br>***A risk management policy should contain:*** details of risk | Up to 2 marks |

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| 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. | |
| **Any relevant point on the regulatory framework (credit any point raised and applied) e.g:**<br><br>***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.<br><br>***No strict regulatory requirement to develop a risk management policy:*** but devising and maintaining one will allow firms to identify, monitor and manage risks and will provide evidence to the SRA that they are running the business in accordance with sound risk management principles; and managing risks to comply with the SRA Handbook.<br><br>***The SRA does not define the risk management principles:*** that it expects firms and individuals to employ when running a business. Instead, it describes outcomes that must be achieved in order to comply with the SRA principles.<br><br>***Outcome 7.1:*** firms must have a clear and effective governance structure and reporting lines.<br><br>***Outcome 7.2:*** They must also have effective systems and controls in place to achieve and comply with all the SRA Handbook principles, rules and outcomes and other requirements of the Handbook.<br><br>***Outcome 7.3:*** requires firms to identify, monitor and manage risks to comply with all the principles, rules and outcomes and other requirements of the Handbook, if applicable, and to take steps to address and identified issues.<br><br>***Outcome 7.4:*** firms must have in place systems and controls for monitoring the financial stability of the firm and risks to money and assets that the firm holds entrusted by clients and others. Again, there is also an obligation to take steps to deal with any issues that may be identified. | Up to 6 marks |
| **Any relevant point to describe the risk management process (credit any point raised and applied) e.g:**<br><br>***Risk Management Process:*** initiate, identify, assess, plan | Up to 6 marks |

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| responses and implement response.<br><br>***Initiate:*** this defines the scope and objectives of risk management. A key output is the risk management plan.<br><br>***Identify:*** anyone can raise risk. These should be documented on risk log.<br><br>***Assess:*** this requires some form of quantitative risk analysis.<br><br>***Plan Responses:*** generally, these fall into 1 of 4 categories - avoid, reduce, transfer or accept.<br><br>***Implement Responses:*** and recorded on the log, carry through any action and monitor the risk if it has not been removed.<br><br>***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.<br><br>***Consider focus needed (can be divided into four categories):*** avoid: in this type of response you change some element in the project so the risk is no longer there; reducing: is taking some action to make its likelihood less likely or impact less severe; transfer: means making someone else responsible for the risk; or you could just accept it: and deal with it when it arises or see it as so severe there is no point in worrying.<br><br>***Risk Log or Register:*** Risks are normally recorded and tracked using a risk log or register. The log is usually managed by the project manager and will often also have review and diary dates in order to help keep track. | |

| **Question 4:** | **Explain the legal considerations for a firm when implementing performance management strategies.** |
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| **Total Marks Attainable**<br><br>Fail = 0-4.9<br>Pass = 5+<br>Merit = 6+<br>Distinction = 7+ | 10 |

| Indicative Content | Marks |
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| **Required:**<br><br>***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.<br><br>***Highlight risks:*** unfair dismissal, discrimination and breach of contract (including wrongful dismissal and constructive dismissal).<br><br>***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.<br><br>***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.<br><br>***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 charactheristic.<br><br>***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.<br><br>***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.<br><br>***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. | Up to 5 marks |

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| ***Constructive dismissal:*** occurs where an employee feels that he has been given no option but to resign from his job. It is for the employee to prove that his employer committed a breach of contract so serious that he was unable to remain in his role. | |
| **Any other relevant point to describe the termination of retainer (credit any case law/points of law correctly cited and applied) e.g:**<br><br>***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.<br><br>***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%.<br><br>***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)). 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 (section 123(1) of the Equality Act 2010). 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.<br><br>***Counter-claim:*** If an employee makes a breach of contract claim to an employment tribunal, the employer can make a counterclaim. Both claims have to be heard, and it is possible for an employee to lose his or her claim and for the employer to win. *Patel v RCMS Ltd* (1999 IRLR 161; EAT), Patel brought a breach of contract claim and RCMS lodged a counterclaim for damages for Patel's breach of contract in | Up to 6 marks |

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| 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.<br><br>***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.<br><br>***Constructive dismissal claims:*** Constructive dismissal is a way of establishing the fact of dismissal when there has been no formal termination of the contract by the employer. Constructive dismissal is not a claim in its own right as an alternative to wrongful or unfair dismissal. An employee may use constructive dismissal as evidence that s/he was dismissed as part of a claim that the dismissal was either wrongful at common law and/or unfair under section 94 of the Employment Rights Act 1996 1996.<br><br>***Bullying:*** The Employment Rights Act 1996 provides basic protection, although the concepts of "bullying" and "harassment" are not defined within it. The Protection from Harassment Act 1997, originally designed to deal with stalkers, has been used by both employees and employers. Whistleblowers who have been bullied or harassed may rely on the Public Interest Disclosure Act 1988. | |

**Section B**

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

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| **Question 5:** | You work in-house at Greaves and Muster LLP. Your firm has acted for the claimant, Jonathan Dumbledoor, in respect of his personal injury claim. He initially instructed Harrison and Hawkes in December 2013 and entered into a conditional fee agreement on the 3 March 2014 which was supported by an ATE policy.<br><br>Liability was disputed by the defendant and, eventually, Harrison and Hawkes terminated the conditional fee agreement on the 4 April 2015. This had the effect of also terminating the ATE cover pursuant to contractual provisions.<br>Mr Dumbledoor then instructed your firm and entered into a fresh CFA on 6 August 2015. Proceedings were issued in |

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| | December 2015 and the case came up for trial on the 1 December 2016 when the claim was dismissed. With the order for dismissal was an order that the issue of whether or not the claimant was entitled to the protection of QOCS under CPR 41.13 to 44.17 be directed for determination by the regional costs judge.<br><br>Write the **body** of a memo to your solicitor colleague advising when a claimant is entitled to the protection of QOCS and, in what situation that protection may be lost. |
| **Total Marks Attainable** | 20 |

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| Fail | up to 9.9 | An answer which deals with the basic requirements of the question, but in dealing with those requirements only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues, for example simply outlining the rules. The answer may not indicate any real understanding that QOCS only becomes an issue at 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 enforcement stage. There will be some discussion and a differentiation between the circumstances when the courts 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 the candidate may demonstrate some areas of weakness. |
| Merit | 12+ | An answer which addresses ALL of the points required for a pass (as set out above) PLUS there will be evidence that the candidate has a very good understanding of the law in some depth, but this may be expressed poorly or may be weak in places but strong in others. The candidate should show very good, appropriate references to the relevant law and authority. Work should be written to a very high standard with few, if any, grammatical errors or spelling mistakes etc. |
| Distinction | 14+ | An answer which includes ALL the requirements for a pass (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. All views expressed by the candidate should be supported by relevant authority and/or case law throughout.<br><br>The candidate 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 with few, if any, grammatical errors or spelling mistakes etc. taking into account it has been written under exam conditions. |

| **Indicative Content** | **Marks** |
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| **Required (candidates are required to explore what QOCS is):**<br><br>*QOCS doesn't:* displace the normal rule that the losing party to litigation is ordered to pay the winning party's costs.<br><br>*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 |

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| **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:**<br><br>*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<br><br>*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.<br><br>*QOCS:* will not apply to applications for pre-action disclosure.<br><br>CPR 44.17: QOCs will not apply where the claimant had entered into a 'pre-commencement funding arrangement'.<br><br>*Landau v Big Bus Co Ltd [2014]:* didn't apply to an appeal where the substantive action was CFA funded<br><br>*CPR 48:* defines a pre-commencement funding arrangement (essentially a CFA entered into before 1 April 2013). | Up to 6 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:**<br><br>*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.<br><br>*CPR 44.14 (2):* may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed. | Up to 3 marks |
| **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:**<br><br>*CPR 44.15:* Orders can be enforced where proceedings are | Up to 5 marks |

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| 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.<br><br>*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.<br><br>*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.<br><br>*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 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. | |
| **Any other 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:**<br><br>*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.<br><br>*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).<br><br>*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 | Up to 7 marks |

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| order for costs against that other person.<br><br>*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.<br><br>*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.<br><br>*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.<br><br>*CPR 44.16(3):* the orders under CPR 44.16 against claimants can be enforced to their full extent only with court permission. | |

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| **Question 6:** | You work in house for a defendant firm specialising in medical negligence matters. One of the partners, Derick Donally, acted for Harpurs Eye Hospital NHS Foundation Trust in a claim that was brought by Ms Alexia Ferguson. The claim was funded under a CFA and by way of an ATE policy.<br><br>The claim settled and a consent order was sealed by the Warwick County Court on the 6 July 2015 whereby judgment was entered for the claimant in the sum of £3,250 and the defendant was ordered to pay the claimant's costs of the claim on the standard basis.<br><br>The claim was brought as a result of the defendant's failure to refer the claimant for imaging and it was alleged that, had the defendant done so, a pituitary tumour would have been found twelve months earlier than was the case.<br><br>The claimant first instructed her solicitors, Barnetts, on the 7 August 2013 and letters of claim were sent to this defendant, as well as two other proposed defendants, on the 20 May 2014. In a letter of response dated the 14 November 2014, the defendant's insurer admitted breach of duty, but denied causation. Proceedings had been issued against this defendant and two other defendants on the 10 December 2014, but the claims against the other defendants were not pursued.<br><br>The claimant's solicitor made a Part 36 offer to the defendant to accept the sum of £5,500 in settlement of the claim on the 19 January 2015. This offer was rejected. On 28 January 2015 the claimant served proceedings on the defendant. On the 28 May 2015 the defendant made a Part 36 offer of £1,500. Following further offers and telephone discussions, a settlement figure of £3,250 was proposed by the claimant's solicitor and was accepted by the defendant on 8 July 2015.<br><br>The claimant's solicitors have served their bill of costs in the sum of £72,320.85. The After the Event Insurance premium is £31,976.49.<br><br>Derick Donally now seeks your advice on the recoverability of the premium, specifically in relation to the experts.<br><br>Write the **body** of a memo to Derick Donally advising on the recoverability of the ATE premium in this matter and advise on the possibility that the premium may be reduced on assessment. |

| **Total Marks Attainable** | 20 |
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| 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.<br><br>Candidates will demonstrate a good depth of knowledge of the subject (i.e. a good understanding of the legislative framework around the recoverability of premiums) with good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness. |
| Merit | 12+ | An answer which addresses ALL of the following points: Definitions and salient points in respect of ATE and premiums, recoverability pre and post LASPO and the exception to the general rule in respect of clinical negligence matters. The answer is also likely include some discussion on the reasonableness of premiums.<br><br>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** |
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| **Required:**<br><br>*After the Event Insurance:* is a policy that can be taken out by a solicitor, on the client's behalf, to ensure that, in the event of a claim not being successful, the client is not left liable for the payment of any legal fees.<br><br>*Generally:* The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) renders that ATE premiums are no longer recoverable from the paying party.<br><br>Section 44 of the Legal Aid Sentencing and Punishment of Offenders Act 2012: made various amendments to section 58 and 58A of the Courts and Legal Services Act 1990 (the provisions which legalise CFAs) in respect of the recoverability of success fees.<br><br>Section 46 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 10 marks |

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| Section 46 (1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012: provides for an exemption to apply to clinical negligence claims. These clinical negligence ATE premiums remain recoverable from the paying party in order to cover the costs of the expert reports obtained in relation to liability and causation.<br><br>*Section 58C of the Courts and Legal Services Act 1990:* a costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless permitted under subsection section 58C(2) of the Courts and Legal Services Act 1990.<br><br>Paragraph 3(1) of the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings Regulations (No 2) 2013: These can now be part of a costs order, as per:<br><br>*How much of the premium relates to the costs of an expert report:* and thus, how much of the premium is recoverable? It is difficult for the insurer to readily identify a proportion of the premium which relates solely to the costs of an expert report. The paying party has a particularly laborious task in challenging the insurer's assessment of the risks once the matter has concluded and the receiving party is faced with a demanding task to justify the premium in cases which are often medically complex. The question also remains whether the ATE premium can cover further medical expenses which are not technically reports, such as questions and conferences. | |
| **Any other relevant point to describe the principle (credit any case law/points of law correctly cited and applied) e.g:**<br><br>*Paragraph 3 of the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No.2) Regulations 2013:* outlines the legal framework where costs orders may require payment of an amount of the relevant part of the premium. It states that a costs order made in favour of a party to clinical negligence proceedings who has taken out a costs insurance policy may include provision requiring the payment of an amount in respect of all or part of the premium of that policy if the financial value of the claim for damages in respect of clinical negligence is more than £1,000; and the costs insurance policy insures against the risk of incurring a liability to pay for an expert report or reports relating to liability or causation in respect of clinical negligence (or against that risk and other risks).<br><br>*Emily Nokes v Heart of England Foundation NHS Trust* | Up to 8 marks |

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| [2015] EWHC B6 (Costs): The premium was from Temple Litigation in the sum of £5,680 plus insurance premium tax. The defendant submitted that the policy was non-compliant with section 58C in that two separate premiums were payable and those premiums were self-insured and thus unable to comply with Section 58C (2) (d) and (e). On the defendant's interpretation, the policy was not recoverable between the parties. The claimant's position was that the policy, on a proper interpretation, was compliant with the statute - there was one policy of insurance payable simply divided to show which part is payable in relation to expert reports. Master Leonard set out the question to be answered: *"whether, on a proper reading by reference to established contractual principles of interpretation, the policy does or does not comply with the statutory requirements".* Master Leonard found the policy was fully compliant with the statutory requirements and the premium of £5,680 plus insurance premium tax was reasonable and proportionate. It was compliant with Section 58C of the Courts and Legal Services Act 1990 and the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings(No.2) Regulations 2013. In *Nokes*, Master Leonard held that the premium was neither unreasonable nor disproportionate. Master Leonard's judgment is not binding and a decision from a higher court is awaited in order for the issue to be determined. | |
| **Any other relevant point to describe the reasonableness of an insurance premium (credit any case law/points of law correctly cited and applied) e.g:**<br><br>*ATE premiums can be challenged on three grounds:* not all of the sum paid was in fact a premium; the premium agreed was unreasonably high; conduct.<br><br>*The court will consider the following factors in deciding whether the premium is reasonable:*<br><br>☑ where the insurance cover is not purchased in support of a CFA with a success fee, how its cost compares with the likely cost of funding the case with a CFA with a success fee and supporting insurance cover;<br>☑ the level and extent of the cover provided;<br>☑ the availability of any pre-existing insurance cover;<br>☑ whether any part of the premium would be rebated in the event of early settlement; and<br>☑ the amount of commission payable to the receiving party or his legal representatives or other agents.<br><br>*Callery v Gray (No 2) [2001] 4 All ER 1:* a costs judge was | Up to 6 marks |

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| asked by the Court of Appeal to investigate the reasonableness of the ATE premium. The following points were made:<br><br>☑ a high limit of indemnity does not of itself indicate an unreasonable premium;<br>☑ block risk policies are not unreasonable;<br>☑ the premium to be allowed is the total premium paid, not the pure underwriting risk premium;<br>☑ assessment fees and profit costs of complying with the policy are recoverable;<br>☑ the receiving party need not have made the best choice, it just needs to be a reasonable choice when choosing the particular ATE insurer;<br>☑ it is reasonable to insure before sending the pre-action letter to the other side;<br>☑ it is reasonable to wait until the defendant's reaction to the claim is known; and<br>☑ 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.<br><br>*Allan Coleman v Medtronic Ltd [2016] EWHC B27 (Costs):* reiterates the approach a judge will take when assessing the amount recoverable for ATE premiums incurred prior to 2013. In this case, the claimant, who had the benefit of a CFA and a costs amnesty from the defendant, took the view that settlement was unlikely and did not justify further delays in its claim. The case determined that a claimant will not be held to be unreasonable even when taking out ATE insurance to protect against a comparatively small exposure. The case illustrates that judges are not willing, in the absence of expert evidence, to substitute their own judgment for that of an insurer's assessment of the risk. Rather, a broad brush approach is taken when looking to reduce the recoverable amount of an ATE premium. | |

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| **Question 7:** | You work in-house at Thomas and Reverend LLP. The firm has a large family litigation department specialising in ancillary relief. The firm does not have a legal aid franchise. Miss Robins, a senior partner at the firm, acts for Mr Marvin Archer, a former cohabitee who was in a relationship with Jenny Dredd.<br><br>Miss Robins represents Mr Archer in respect of Ms Dredd's application under the Trusts of Land and Appointment of Trustees Act 1996, pursuant to which she claims a beneficial interest in their last home. The claim is for a 50% beneficial interest or share in their last joint home, a property called |

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| | Moonbeam House.<br><br>The parties met and began their relationship in 1988. They began to live together the following year when Jenny was aged 22 and Marvin was aged 38. 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 2015. They had no children.<br><br>Moonbeam House and its 14 acres of land have been valued, for the purposes of the proceedings, at around £2,300,000. There is borrowing of about £1,400,000 secured upon it. If that borrowing is deducted from the assessed likely selling price, it leaves about £900,000. If costs of sale are assumed at around £70,000, the net equity is of the order of £830,000.<br><br>Miss Robins has sought your advice in relation to how this type of case is like to differ from a 'normal' family law dispute.<br><br>Write the **body** of a memo to Miss Robins setting out how costs in family cases are usually dealt with and how the costs in this type of case are likely to be dealt with. |

| **Total Marks Attainable** | 20 |
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| 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 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** |
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| **Required (consideration as to what is meant by family proceedings and a consideration of the costs framework under the FPR and CPR e.g):**<br><br>***Defining 'family proceedings':*** No single source provides a complete definition; rather, it is necessary to trawl through | Up to 6 marks |

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| the definitions provided in the Senior Courts Act 1981 and the Family Procedure Rules (FPR). This includes the Trusts of Land and Appointment of Trustees Act 1996, when they are heard in the Family Court or the Family Division.<br><br>***Section 58(3) and 58A of the Courts and Legal Services Act 1990:*** Definition in the ***CLSA does not include TOLATA so CFAs may be used in these proceedings.***<br><br>***Application of the CPR:*** The general rule that costs follow the event is specifically disapplied in family proceedings. However, in some family cases the CPR will apply rather than FPR 2010, this includes applications under the Trusts of Land and Appointment of Trustees Act 1996.<br><br>***FPR PD 28A:*** CPR 44-47 CPR apply with modifications<br><br>***FPR 28.1:*** Court may make an order for costs where it is just<br><br>***FPR 28.2:*** CPR 44.2(2) is disapplied<br><br>***FPR 28.3:*** In financial remedy proceedings 44.2(1) does not apply, there are certain situation defined as to when costs may be awarded e.g where Calderbank offers have been made<br><br>***The three costs regimes in family proceedings:*** The 'clean sheet' regime which follows the FPR costs rules. This regime applies in all cases heard in the Family Court other than financial remedy proceedings. It also applies to those proceedings heard in the Family Division of the High Court which can only be allocated to the Family Division; The 'costs follow the event' regime is taken from the Civil Procedure Rules (CPR) and generally requires the unsuccessful party to pay the costs of the successful party. This is the costs regime applicable to the Family Division of the High Court when dealing with proceedings under statutes which can be allocated to other divisions of the High Court; and the 'no order regime' which prevails in all financial remedy proceedings. | |
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| **Any other relevant point to describe the three costs regimes in family proceedings e.g:**<br><br>***The court's powers and its discretion:*** Costs orders are always at the discretion of the court. This discretion is particularly clear in the clean sheet regime as the FPR allows the court to make any costs order that it thinks is just. Courts are also empowered to decide who should pay costs – and the payer need not be a party to the proceedings.<br><br>***Financial remedy proceedings and proceedings in connection with a financial remedy:*** the general rule is that | Up to 6 marks |

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| there shall be no order as to costs. This regime applies to the substantive final hearing of an application for an order in financial remedy proceedings and to interim variation orders.<br><br>***No order regime:*** FPR rule 28.3 sets out the occasions in which the court may consider a costs order to be justified; conduct in relation to the proceedings (be it before or during them) may justify the award of an adverse costs order. The court may make a costs order at any stage of the proceedings and therefore at all interim hearings. However, proceedings in connection with a financial remedy are dealt with under the FPR clean sheet regime. These rules can cause confusion and, as a result, the wrong rules can easily be applied.<br><br>***FPR clean sheet regime:*** the FPR allows the court to make any costs order that it thinks is just. | |
| **Any relevant point to describe the difference between costs under the CPR and FPR e.g:**<br><br>***Overriding objective:*** The FPR require the court to look at the impact of any costs order on the welfare of all children and also of the adults concerned with the proceedings. Welfare issues are not mentioned in Part 1 of the CPR, the proportionality of any costs order is still of significance under FPR Part 1.<br><br>***The two major differences between costs under the FPR and CPR are that:*** Costs do not follow the event in family proceedings; and fixed costs do not apply in family proceedings, other than some of the fixed costs of enforcement such as when making a charging order or an attachment of earnings order. | Up to 3 marks |
| **Any relevant point to describe costs assessment in family proceedings e.g:**<br><br>***Costs assessment in family proceedings:*** where they do not involve legal aid they are assessed in accordance with the Civil Procedure Rules 1998, SI 1998/3132 (CPR). The CPR apply to all between the parties costs assessments.<br><br>***The court will decide whether private costs should be assessed on:*** either the standard basis; whereby costs will be allowed that are proportionate to the matters in issue, with any doubt as to whether they were reasonably incurred or reasonable and proportionate being resolved in favour of the paying party, with the court having regard to all the circumstances or the indemnity basis (rare); where any | Up to 5 marks |

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| doubt as to whether costs are reasonably incurred or reasonable in amount is resolved in favour of the receiving party, consequently the amount recoverable under an indemnity costs order is significantly higher, with the court having regard to all the circumstances. Indemnity costs are unusual in family proceedings unless the conduct of a litigant is considered in some material respect(s) to be unreasonable or a disproportionate use of the court's time and resources. (CPR 44.3(1)–CPR 44.3(3)).<br><br>***CPR 44.4(3):*** Whether on the standard or the indemnity basis, the court will have regard to, inter alia, the following:<br><br>☑ the conduct of all parties both before and during the proceedings and the efforts made throughout to settle<br>☑ the amount or value of the assets involved<br>☑ the importance of the matter to the parties<br>☑ the particular complexity, difficulty or novelty of the issues raised<br>☑ the skill, effort, specialist knowledge and responsibility involved<br>☑ the time spent on the case and the place and circumstances in which the work was done.<br><br>***CPR 44.4(1)(a):*** On an assessment on the standard basis the court will only allow costs that are proportionate to the matters in issue and resolve any doubt as to whether they were reasonably incurred or reasonable and proportionate in amount in favour of the paying party. (*K v K* [2016] EWHC 2002 (Fam), *Khazakstan Kagazy PLC v Zhunus* [2015] All ER (D) 252).<br><br>***CPR 44.4(1)(b):*** Where costs are assessed (rarely) on an indemnity basis the amount recoverable under an indemnity costs order will be significantly higher as the court will consider any doubt as to whether costs are reasonably incurred or reasonable in amount in favour of the receiving party.<br><br>***Indemnity costs are unusual in family proceedings:*** unless the conduct of a litigant is considered in some material respect(s) to be unreasonable or a disproportionate use of the court's time and resources. (*H v Dent (Re an Application for Committal (No. 2: Costs))* [2015] EWHC 2228 (Fam), *Noorani v Calver* [2009] EWHC 592 (QB)). | |
| **Any relevant point to describe what a client/practitioner will face under the CPR e.g:**<br><br>***Pre-Action Conduct:*** The court has the power to take into | Up to 4 marks |

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| account pre-action conduct in making any order for costs (CPR 44.3(5)(a)) and in determining the quantum of those costs (CPR 44.5(3)(a)(i))) whether or not there is a pre-action protocol in respect of those proceedings;<br><br>***Part 36 offers:*** which afford a cost protective environment for the making of offers; for example, it is implicit in Part 36 offers that if the claimant accepts the defendant's Part 36 offer, the defendant will pay the claimant's costs. It is therefore a misnomer for Part 36 offers to include a 'no order for costs' provision, a surprisingly regular occurrence which undermines the cost protection element of Part 36 offers; practitioners should therefore be aware to avoid this mistake. | |
| ***An anomaly:*** proceedings under the Inheritance (Provision for Family and Dependants) Act 1975, the Protection from Harassment Act 1997 or the Trusts of Land and Appointment of Trustees Act 1996 adopt the clean sheet approach to costs when heard in the Family Court, but in the Family Division of the High Court follow the CPR with costs following the event. | |
| **Any relevant point to describe the difference between costs under the CPR and FPR e.g:**<br><br>***May give more detail to the definition of 'family proceedings':*** These proceedings may be affected by international as well as national law. They include:<br><br>☑ Marriage and civil partnership;<br>☑ Matrimonial and partnership finance;<br>☑ The care of children either by their parents or by the state;<br>☑ Domestic abuse;<br>☑ The way in which a family home is occupied;<br>☑ Child abduction;<br>☑ Egg and sperm donors; and<br>☑ Gender recognition.<br><br>And proceedings under:<br>☑ The Inheritance (Provision for Family and Dependants) Act 1975;<br>☑ The Protection from Harassment Act 1997; and<br>☑ The Trusts of Land and Appointment of Trustees Act 1996<br>when they are heard in the Family Court or the Family Division.<br><br>***Proceedings in connection with a financial remedy:*** such proceedings include: | Up to 2 marks |

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| ☑ Interim orders;<br>☑ Interim hearings;<br>☑ Final orders to set aside an application;<br>☑ Determination of a beneficial share in property; and<br>☑ Disposing of the application other than by final financial order. | |

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| **Question 8:** | You work for a firm of solicitors, Maynard, Davidson and Grundy LLP, located in West Yorkshire. The firm specialise in family, private client matters and commercial litigation. It is because of the litigation arm of the firm that more and more contentious probate instructions have been received by the firm.<br><br>Mr Harcourt is a costs lawyer who has worked for the firm for about fifteen years. He is the head of the costs department and is also your line manager. It has been common practice for him to attend the initial appointments for any new contentious probate clients so as to offer sound advice at the initiation of a case. He has then been responsible for reviewing all client care letters and retainers before they have been sent out.<br><br>Recently, at a department meeting, Mr Harcourt divulged to the costs department that there is increased pressure to provide further support to the commercial litigation department and, as such, he will no longer have any time to devote to the private client department. He has, thus, asked that you draft some training materials so that appropriate training may be provided to the private client department in respect of the potential costs implications in a contentious probate matter.<br><br>Write the **body** of the training materials setting out the position, in contentious probate matters, regarding the normal rule under the CPR that 'costs follow the event' and the exceptions to this rule. |
| **Total Marks Attainable** | 20 |

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| Fail | up to 9.9 | This mark should be awarded where candidates: Fail to advise on the general rule in costs and the potential exceptions applicable in contentious probate matters. 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 initially discuss the general rule on costs and the discretion afforded under the CPR for the court to make a different order where it sees fit. Candidates may have identified any rules that are not applicable in probate matters and will have identified all exceptions to the general rule, although these may be identified somewhat superficially. Credit will be given to any reasonably written answer and any reasonable conclusion that, unless there is a good reason to depart from the general rule, that costs should follow the event. Candidates should also have demonstrated some evidence that they have a good understanding of the exceptions to the general rule in contentious probate matters. This may be expressed poorly or may be weak in places but strong in others. Candidates should use appropriate references to the relevant law and authority throughout but not all points |

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| | | advanced may be appropriately supported. |
| Merit | 12+ | Candidates will have initially discussed the general rule on costs and the discretion afforded under the CPR for the court to make a different order where it sees fit. Candidates will have identified any rules that are not applicable in probate matters and have identified all exceptions to the general rule with a reasonable depth of knowledge showing that the candidate has knowledge that is more than fit for purpose. This may be expressed reasonably in places but strong in others. Credit will be given to any reasonably written answer. The answer should demonstrate a good ability to put forward a reasoned and supported point of view, but this may not be expressed consistently well throughout the answer. Candidates should show appropriate references to the relevant law and authority. |
| 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 in contentious probate matters. 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** |
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| **Required (discussion of the 'normal' rule that 'costs follow the event)e.g :**<br><br>***CPR 44.2(2)(a):*** General rule that costs follow the event.<br><br>***CPR 44.2(3)(b):*** does not apply in the Court of Appeal.<br><br>***This rule applies:*** to costs in non-contentious probate, contentious probate and Inheritance (Provision for Family and Dependents) Act 1975 claims. Following this rule, the costs of contentious probate proceedings should be paid by one or more of the parties rather than by the estate.<br><br>***CPR 44.2(2)(b):*** the court has the power to 'make a different order'.<br><br>***CPR 44.2(4):*** The relevant factors the court should consider when making an order for costs (includes conduct).<br><br>***CPR 44.2(5):*** sets out what conduct means.<br><br>***CPR 44.2(5)(a):*** 'any relevant pre-action protocol' includes the Association of Contentious Trust and Probate Specialists' (ACTAPS) Code. | Up to 5 marks |
| **Required (discussion of the three exceptions to the 'normal' rule that 'costs follow the event) e.g:**<br><br>***The three exceptions to when costs should not follow the event in probate:***<br><br>1. CPR 57.7.5: The procedure for requiring a will to be proved without advancing a positive case.<br>2. In *Spiers v English* [1907]: contained exception 2 and 3, where a testator had been the cause of the | Up to 4 marks |

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| 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.<br><br>***Discontinuance:*** CPR 38 sets out the rules on discontinuance. Under CPR 57.11(1) CPR 38 does not apply to probate claims. | |
| **Credit any relevant point in relation to a discussion of the exception in CPR 57.7.5 e.g:**<br><br>***CPR 57.7.5(a):*** Procedure for requiring a will to be proved without advancing a positive case. 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, for that purpose, will cross-examine the witnesses who attested the will.'<br><br>***CPR 57.7.5(b):*** If this procedure is used 'the court will not make an order for costs against him unless it considers that there was no reasonable ground for opposing the will'<br><br>***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. | Up to 3 marks |
| **Credit any relevant point in relation to a discussion of the first exception in Spiers v English e.g:**<br><br>***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.<br><br>***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'.<br><br>***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 triggers the exception just as readily as his failure to make a clear will.<br><br>***Re Cutcliffe's Estate [1959]:*** does not apply to a testator who gives beneficiaries a false impression of what is going to be in his will.<br><br>***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 |

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| **Credit any relevant point in relation to a discussion of the second exception in Spiers v English e.g:**<br><br>*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<br><br>*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 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'. | Up to 2 marks |
| **A discussion of the 4 propositions in *Kostic* e.g:**<br><br>***Kostic v Sir Malcolm Chaplin and Mr Martin Saunders (chairman and secretary of the Conservative Party Association) & HM Attorney-General [2007] EWHC 2909 (Ch):*** a contentious probate matter, 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*.<br><br>***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.<br><br>***Proposition 2:*** moral blameworthiness was not the criterion for the application of the first exception [*Davies v Gregory* (1873) LR 3 P & D 28].<br><br>***Proposition 3:*** there was no correlation between eccentricity and testamentary incapacity [*Boughton v Knight* (1873) LR 3 P & D 64].<br><br>***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 | Up to 6 marks |

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| 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. | |
| **Any other relevant point to describe costs in contentious probate (credit any case law/points of law correctly cited and applied) e.g:**<br><br>***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.<br><br>***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'.<br><br>***CPR 46.3:*** where a personal representative has incurred costs on behalf of the estate.<br><br>***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.<br><br>***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.<br><br>***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. | Up to 3 marks |

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| **Question 9:** | You work for a firm of solicitors, Hathrop and Skiller, located in Shrophsire. Mr Skiller has been instructed by Mr Donald Ruff who has complained about a series of postings on a chat room hosted by Rollout Ltd. The postings were made over a number of months starting 9 months ago.<br><br>When instructing previous solicitors, Bolton and Kimp LLP, Mr |

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| | Ruff had unsuccessfully attempted to obtain an injunction in libel without notice. The matter has now been listed for a hearing following an application being made on notice. Rollout Ltd has been appropriately served and it is expected the company will be present and represented.<br><br>Very recently, Mr Ruff indicated that he did not want to pursue the application because he was concerned about the costs. Mr Skiller has worked very hard to obtain the consent of Rollout Ltd to the granting of an interim injunction within proceedings on the balance of convenience. Mr Skiller has advised his client that, in such circumstances, the costs should usually be reserved until the trial of the substantive issue. Mr Skiller has now gone on his annual family holiday to Florida. He left his assistant, Mrs Darcy - a junior solicitor - in charge of his files while he was away. Mrs Darcy received a telephone call from the client asking what this means. Mrs Darcy has approached you asking you to explain.<br><br>Write the **body** of a memo advising Mrs Darcy 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 |

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| 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 in respect of injunctions granted on the balance of convenience. 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** |
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| **Required:**<br><br>***Discussion of the 'normal' rule that 'costs follow the event':*** had developed prior to the CPR and has survived the introduction of it 44.2(2)(a). Therefore, a claimant granted an interim injunction may understandably expect the court to order the defendant to pay the costs of the application.<br><br>***Three situations that should be considered:***<br><br>☑ Interim injunction application granted on (or agreed by consent on the basis of) the balance of convenience.<br>☑ 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.<br>☑ An injunction on a *quia timet* basis when by the time of trial it is clear that there was no threat by the respondent to violate the applicant's legal right, but the applicant says there was a threat when it started proceedings.<br><br>***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). | Up to 6 marks |
| **The focus of the question is interim injunction applications granted on (or agreed by consent on the basis of) the balance of convenience and candidates may evidence their ability to analyse the general rule in this regard with a discussion on the situations where it may be right to depart from the general approach e.g:**<br><br>***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:<br><br>☑ 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?'<br>☑ there may be cases where the balance of convenience is so clear, and the outcome of the hearing of the application for interim injunction should be so plain to the parties, that the court should conclude that an order should be made against the defendant for wasting time and money in fighting the issue. In those cases the injunction would be granted over and above the balance of convenience and on the basis of the claimant's strong | Up to 12 marks |

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| case, so that the claimant should be awarded their costs<br>☑ where the court forms the view that the matter is unlikely to proceed to trial, costs should not be reserved. If the matter does not proceed to trial, then an order for costs reserved or in the case, in the absence of a settlement, is not particularly useful for the parties and may as well not have been made. It would be undesirable in those circumstances to encourage the parties to go to trial or to discourage them from settling by having the uncertainty of a costs reserved order hanging over them<br>☑ if a defendant decides virtually at the last minute that he will not contest an issue for which trial has been set, he must give the court a satisfactory explanation for that delay or he will be at risk on costs. This reflects the fact that the defendant has unreasonably delayed. However, the court should not penalise a party who initially says he is going to contest the application and then capitulates, as this would encourage such a party to continue to fight to the end even if they expected to lose, in order to avoid the risk of having to pay the other side's costs<br><br>***Hospital Metalcraft Ltd v Optimus British Hospital Metalcraft Ltd* [2015] EWHC 3093 (Ch):** an example of the court applying the principles in *Picnic at Ascot*.<br><br>*The decision in Picnic at Ascot followed the decisions in Kickers International SA v Paul Kettle Agencies Ltd (1990) IP & T Digest 18.*<br><br>***Interflora v Marks & Spencer PLC [2014] EWHC 4168:*** the claimant was the unsuccessful party in an interim injunction application submitted that since the decision was based not on the merits of the underlying proceedings but on the balance of convenience and therefore it would be fair and appropriate (and indeed is done in other cases) to reserve the costs over to trial. The judge found that this is a case in which the normal rule should apply because it was a freestanding application which is freestanding and which the party who brought it failed and there is no reason why the court should depart from the normal rule, which is that the unsuccessful party should pay the successful party's costs. It was accepted by the court that 1/3rd of the costs claimed related to breach of confidence and not the injunction proceedings and that the 1/3 should be dealt with within the substantial proceedings. This left a total of £100,00 which was reduced substantially to £65,000bearing in mind it was essentially listed for a 1 day hearing and the costs claimed were substantial. | |
| **Credit any relevant point in relation to when a defendant that has successfully resisted an injunction may expect the court to order that his costs of the application be paid by** | Up to 3 marks |

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| **the claimant e.g:**<br><br>***Kickers International SA v Paul Kettle Agencies Ltd* (1990) IP & T Digest 18:** The court considered the following:<br><br>☑ a final order might award a party costs which, upon fuller consideration at trial, he would not have been given<br>☑ 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<br>☑ the possibility that there might be no further trial should be kept in mind<br>☑ 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. | |
| **Credit any relevant point in relation to an injunction on a *quia timet* basis when by the time of trial it is clear that there was no threat by the respondent to violate the applicant's legal right, but the applicant says there was a threat when it started proceedings e.g:**<br><br>***Quia timet ("because he fears"):*** is an injunction to restrain wrongful acts which are threatened or imminent but have not yet commenced.<br><br>***Merck Sharp Dohme Corp v Teva Pharma BV [2013] All ER (D) 106 (Jul):*** the court held that the applicant needs 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 |
| **Any other relevant point to describe costs assessment in this case (credit any case law/points of law correctly cited and applied) e.g:**<br><br>***CPR PD 44, para 9.2:*** Where the court orders costs at the end of an interim injunction hearing and that hearing has lasted one day or less, it can summarily assess the costs of the application at the end of that hearing.<br><br>***To assist the judge in assessing costs:*** the parties must file and serve Form N260 (Statement of costs (summary assessment)) at least 24 hours before the interim hearing. Costs assessed summarily are payable within 14 days of the order unless there is a specific order to the contrary (CPR | Up to 4 marks |

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| 44.7).<br><br>***Orders the court may/can make:*** CPR 44.2-6<br><br>***Implication if costs reserved:*** May be subject to DA procedure (CPR 47).<br><br>***Basis of Assessment:*** CPR 44.3(1)–CPR 44.3(3) | |