June 2019: Unit 3 Marker Guidance

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

However, candidates may provide alternative correct answers and there may be unexpected approaches in candidates' scripts. These must be given marks that fairly reflect the relevant knowledge and skills demonstrated.
Mark schemes should be read in conjunction with the published question paper and any other information provided in this guidance about the question.
Before you commence marking each question you must ensure that you are familiar with the following:

- ☑ the requirements of the specification;
- ☑ these instructions;
- ☑ the exam questions (found in the exam paper which will have been provided to you along with this document); and
- ☑ the marking rubric for each of the questions which you have been asked to mark.

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

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

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

may still achieve the same level and mark as a response which does all or some of this. Where you consider this to be the case you should **make a note on the script** and be prepared to discuss the candidate's response with the moderators to ensure consistent application of the mark scheme.

Section A

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

Question 1:	Describe Handy'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 discuss Charles Handy and outline his model, e.g: ***Charles Handy:*** Produced a model of business based on its organisational culture. This provides an insight into how an organisation can be structured and managed as well as an idea of the type of organisation a person might fit in to best. ***The model:*** Relates to four cultures. He described each individual culture, relating it to one of four Greek gods.	Up to 2 marks To achieve a pass a candidate must explain who Charles Handy is and outline his model.
Required: Candidates should further discuss Handy's model, e.g: ***Zeus or Power Culture:*** This culture is one of centralized, or top-down, power and influence. This is the spiders web where the leader has connection across the whole organisation. These may be formal and informal lines of authority. This is a leader centric organisation. This means is capable of fast decision making and moving forward. Its downside comes in being dependent on an individual and the quality of their decisions. It can also be detrimental to bringing in other staff to help it grow and develop. These can often be new organisations still developing and being led by the individual who established it. ***Apollo or Role Culture:*** Represented by a temple, the pillars being functions and divisions. It has rational people who work according to defined roles and follow rules and procedures. A bureaucracy, it has stability and certainty. However, it can find it hard to adapt and change. Generally large organisations, insurance companies and government administration. ***Athena or Task Culture:*** It is about solving problems through a network of task forces, working parties and various groups. It will define the problem and then allocate the resources to solving it. Its strength is in its flexibility and providing solutions. It struggles when repetition and predictability are needed. Found in research and development departments, consultancies and advertising agencies.	Up to 6 marks

Dionysius or Person Culture: This differs from the others in that the organisation exists to help the individual succeed rather than the other way around. People come together to help them succeed by sharing resources or promote the member of the group. In this, the individual professionals are supreme and management is not highly regarded. This is a model that is becoming more common with outsourced services. These are typified by doctors, lawyers, architects etc.	
A discussion on alternative theorists (credit any points/ correctly cited and described) e.g: ***Mintzberg suggests:*** In contrast to Handy, Mintzberg's model has seven ways to ideally structure an organisation. In the first five there is a core part of the organisation that exerts key influence over its structure. ***The Entrepreneurial Organisation:*** Shaped by a strategic apex creating centralisation. Power is focused strongly with the chief executive and is coordinate through direct supervision. This is most comparable to Handy's Zeus or Power Culture. ***The Machine Organisation:*** This is shaped by its technostructure and works on the basis of standardised routines and operating tasks. It is highly centralised and controlled. This is most comparable to Handy's Appollo or Role Culture. ***The Diversified Organisation:*** This is a set of semi-autonomous units under a central administrative structure. The units are usually called divisions with a central administration referred to as the headquarters, which allocates capital and tracks performance. This is most comparable to Handy's Athena or Task Culture. ***The Professional Organisation:*** This is driven by its operating core and aims towards professional autonomy. This is built around the skills and knowledge of professional staff who are employed because they know how to do the job and are relied upon to deliver. This is most comparable to Handy's Dionysius or Person Culture. ***The Innovative Organisation:*** The core to this are the support staff and teams. These are often research based organisations which deliver through being flexible in rapidly changing environments, relying on experts, training, letting people get on with their job as they see fit in multi-disciplined teams. This is most comparable to Handy's Athena or Task Culture.	Up to 6 marks To achieve more than a pass candidates should compare and contrast Handy's model to alternative structures/models.

The Missionary Organisation: At its core, it is the mission, its ideology, that counts above all else. This core is clear, focused, distinctive and inspiring. ***The Political Organisation:*** This doesn't really have a core, or co-ordinating mechanism, and perhaps should not be included in a list of business models. In a real sense this exists to a degree in all organisations, often characterised by conflict. This is based on culture and therefore there is a clear overlap between Handy's model.	

Question 2:	Explain 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:*** 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 18 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: ***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.	Up to 5 mark

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 2011:*** Would need to be complied with if making an application to the SRA. ***Rule 8.5(b) and (d) of the SRA Authorisation Rules:*** Require that SRA regulated firms have compliance offices for legal practice and finance and administration.	Up to 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. ***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.	Up to 3 marks

Question 3:	Critically discuss how the SRA Handbook encourages leaders to monitor and manage risk.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**

Required (an outline of the SRA framework and business procedure for managing and monitoring risk) e.g: *The SRA Handbook 2011:* Requires businesses, or roles within a business, to be controlled effectively and in accordance with proper governance and sound financial and risk management principles. *A risk management policy:* Having a risk management policy would make it easier for the SRA to engage with firms with a view to resolving any compliance issues. Such a policy would outline the risks posed to a business and provides a set of 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: ***Chapter 7 of the SRA Handbook 2011:*** This chapter is entitled the management and supervision of a firm. It states that everyone has a role to play in the efficient running of a business, although of course that role will depend on the individual's position within the organisation. ***Outcome 7.1:*** Requires that firms must have a clear and effective governance structure and reporting lines. ***Outcome 7.2:*** Requires that firms must also have effective systems and controls in place to achieve and comply with all the SRA Handbook principles, rules and outcomes and other requirements of the Handbook. ***Outcome 7.3:*** Requires that firms identify, monitor and manage risks to comply with all the principles, rules and outcomes and other requirements of the Handbook, if applicable, and to take steps to address and identified issues. ***Outcome 7.4:*** Requires that firms must have in place systems and controls for monitoring the financial stability of the firm and risks to money and assets that the firm holds entrusted by clients and others. Again, there is also an obligation to take steps to deal with any issues that may be identified. ***Outcome 7.5:*** Requires that firms must ensure compliance with legislation. ***No strict regulatory requirement to develop a risk management policy:*** The SRA Handbook does not require firms to have a risk management policy but devising and maintaining one will allow firms to identify, monitor and manage risks. It will provide evidence to the SRA that they are running the business in accordance with sound risk	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

management principles; and managing risks to comply with the SRA Handbook. ***Risk management principles:*** The SRA does not define the risk management principles that it expects firms and individuals to employ when running a business. Instead, it describes outcomes that must be achieved in order to comply with the SRA principles.	
Any relevant point on the business theory of managing risks (credit any point raised and applied) e.g: ***A risk management policy:*** A risk management policy helps identify risks and implement a plan for managing them. Risks include both opportunities and threats, and both should be managed through the risk management process. ***Contents:*** A risk management policy should contain details of risk management responsibilities; your definition of risk; your process for identifying and/or reporting risk; your system for evaluating risk; details of the risks you have identified; and responses to those risks, i.e. your process for managing them. ***Risk Management Process:*** Such a process would have an initiation, which would define the scope and objectives of risk management. A key output is the risk management plan. It would allow for anyone 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.	Up to 4 marks
Any relevant point to describe the roles of a COLP and COFA (credit any point raised and applied) e.g: ***The SRA Authorisation Rules 2011, SRA Account Rules and the SRA Code of Conduct:*** Would need to be complied with. ***Rule 8.5(b) and (d) of the SRA Authorisation Rules:*** Require that SRA regulated firms have compliance offices for legal practice and finance and administration.	Up to 2 marks

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

Question 4:	Explain the legal considerations for a firm 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 organisation level. It is about aligning the organisational objectives with the employees' agreed measures, skills, competency requirements, development plans and the delivery of results. ***Highlight risks:*** unfair dismissal, discrimination and breach of contract (including wrongful dismissal and constructive dismissal). ***Bullying:*** Additional Risks may be identified, for example bullying. The Employment Rights Act 1996 provides basic protection, although the concepts of "bullying" and "harassment" are not defined within it. The Protection from Harassment Act 1997, originally designed to deal with stalkers, has been used by both employees and employers. Whistleblowers who have been bullied or harassed may rely on the Public Interest Disclosure Act 1988.	Up to 2 marks
Credit any point that further develops the risk of unfair dismissal, e.g: ***Unfair Dismissal Claims:*** Most common claim. Employees can only claim unfair dismissal if they've worked for a qualifying period - unless they're claiming for an automatically 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'	Up to 4 marks

categories for dismissing an employee. To avoid a claim of unfair dismissal an employer would need to demonstrate an honest and reasonable belief in an employee's incapability to do the job to the level required and demonstrate that it has carried out the performance management and dismissal process in a fair and reasonable way. ***Section 108 of the Employment Rights Act 1996:*** Requires an individual to have been in employment for one year's continuous service unless they were employed after 6 April 2012 when a two-year requirement applies. ***Assessing an honest and reasonable belief in an employee's incapability to do the job to the level required and way performance management process carried out:*** The Employment Tribunal will in part have regard to whether the employer has complied with the ACAS Code of Practice on Disciplinary and Grievance matters (ACAS Code). Not only will a failure to follow the ACAS Code be taken into account in determining if the dismissal is fair, it can also result in an increase in any unfair dismissal compensation by up to 25%.	
Any other relevant point to describe a discrimination claim (credit any case law/points of law correctly cited and applied) e.g: ***A discrimination claim:*** For example, if an employee contends that the only reason they were subjected to a performance management process was because of a protected characteristic. ***Equality Act 2010:*** Makes it law that every private, public and voluntary organisation must not discriminate against employees and people that use their services because of particular characteristics. ***Section 4 of the Equality Act 2010:*** Sets out the protected characteristics (age, disability, gender reassignment, marriage 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	Up to 4 marks

compensation to the complainant or make an appropriate recommendation.	
Any other relevant point to describe a breach of contract claim (credit any case law/points of law correctly cited and applied) e.g: ***A breach of contract claim:*** In relation to any failure by the employer to comply with its contractual obligations, including any contractual capability or disciplinary procedure. ***Wrongful dismissal:*** There is no qualifying period for wrongful dismissal claim. Wrongful dismissal claims are normally made where there is been a breach of contract. Such a breach may be due to taking unfair disciplinary action, failure to provide a safe working environment, or failure to investigate harassment and victimisation complaints. ***Claims of wrongful dismissal:*** Can be made to a tribunal within three months of the dismissal, or a case can be taken at county or High Court up to six years after the dismissal. Claims brought to a tribunal are capped at £25,000, and legal costs can be recovered if the claim is taken to the county or High Court. Whilst damages are based on salary and benefits for the notice period, there is no cap on the amount that can be awarded. ***Constructive dismissal:*** Occurs where an employee feels that he has been given no option but to resign from his job. It is for the employee to prove that his employer committed a 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.	Up to 4 marks

Section B

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

Question 5:	You are a costs lawyer working for a firm of solicitors located in Bradford, Harrisons LLP. Your firm is acting on behalf of the claimants in an unusual claim arising out of an incident at a hotel and spa when a violent criminal gained access to two hotel rooms and attacked your clients causing very serious injuries. Mr Cavendish is the solicitor that has conduct of the matter and he has approached you to give advice in relation to the costs budget. There has been a direction for a trial on liability only. At a CCMC, on 1 January 2019, Master Truman approved the parties' budgets for that trial. The claimants' budgets was approved in the total sum of £922,195. Mr Cavendish was expecting somewhere between 1,000 and 1,500 documents to be disclosed, which he expected would fill twenty to thirty lever arch files. This was not included in the assumptions of the budget. However, they have actually received 3,250 documents filling fifty-five lever arch files. The scale of disclosure is double what was expected. In the approved budget the phase for disclosure was approved at £52,724. Following conversations with Mr Cavendish you believe that the actual spend on disclosure is more likely to be in the region of £100,000. You believe most of the increase will be in solicitors' hours but you also believe that the figures allowed for disbursements, counsel and experts are also too low. The question now is whether you consider an application should now be made to amend the budget or if it is a matter best left to assessment. You are required to write the body of a memo to Mr Cavendish setting out whether an application should be made to amend the budget or if it is a matter best left to assessment. Your advice should cover whether you consider the case developments are significant enough to justify a departure from the budget and whether the court will approve specific hours and disbursements.
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 budgets and CMOs. The answer may not indicate any real understanding that costs management is in place in order to ensure cases are managed proportionately. The answer will be weak in its presentation of points and its application of the law to the facts. There will be little evidence that the candidate fully understands how the CPR operates and any view expressed will be unsupported by evidence or authority.
Pass	10+	An answer which addresses MOST of the following points: When a CMO will be made, how the court will approach making a CMO, what amounts to a significant development when making an application to amend a budget, the different approach taken to budgeted costs and incurred costs at a CMC and the impact of a CMO on assessment. Candidates will demonstrate a good depth of knowledge of the subject with good application and some analysis, although the candidate may demonstrate some areas of weakness.
Merit	12+	An answer which addresses ALL of the points required for a pass (as set out above) PLUS there will be evidence that the candidate has a very good understanding of the law in some

		depth, but this may be expressed poorly or may be weak in places but strong in others. The candidate is likely to have discussed the importance of assumptions in demonstrating to the court what is a significant development and that the current authority mainly concerns downward departures on budgeted costs at assessment. The candidate should show very good, appropriate references to the relevant law and authority. Work should be written to a very high standard with few, if any, grammatical errors or spelling mistakes etc.
Distinction	14+	An answer which includes ALL the requirements for a pass (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. All views expressed by the candidate should be supported by relevant authority and/or case law throughout. The candidate may make the link between applications to amend and the conflict between agreed/approved budgets. The candidate should be able to show critical assessment and capacity for independent thought on the topic. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc. taking into account it has been written under exam conditions.

Indicative Content	Marks
Required: an explanation as to what costs management is, when parties are required to file budgets, e.g: ***CPR 3.12 (1):*** Applies to all Part 7 Multi Track with four exceptions. ***CPR 3.12 (2):*** Purpose of costs management is the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective. ***CPR 3 PD 3E, para 2:*** Even where parties do not have to file budgets the court has discretion to order them to do so. ***CPR 3.13(1):*** Provides that (except for litigants in person or as the court may otherwise order), all parties must file and exchange budgets where value under £50,000 with DQs and in any other case not less than 21 days before CMC. ***CPR 3.13(2):*** In the event that a party files and exchanges a budget under paragraph (1), all other parties, not being litigants in person, must file an agreed budget discussion report no later than 7 days before the first case management conference. ***PD 3E para 6A:*** Provides what a budget discussion report must set out.	Up to 2 marks
Credit any discussion on the courts approach to an application to amend and what may amount to a significant development, e.g: ***CPR PD 3E, 7.6:*** Budgets can be amended if there are significant developments in the litigation. ***Murray & Anor v Neil Dowlman Architecture Ltd [2013]:*** The court takes a dim view of amending a budget due to a mistake once it is approved. ***Elvanite Full Circle Ltd. v Amec Earth & Environmental (UK) Ltd. [2013]:*** On assessment Coulson J refused to amend the budget. Costs were £531,946 and the budget was £268,488. Application to amend after judgment is a contradiction in terms. Any application to vary should be made immediately	Up to 8 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

if it becomes apparent that the original budget costs have been exceeded by more than a minimal amount. ***Simpson v MGN Ltd [2015]:*** There will be sanctions for not making an application albeit that the judge will not want to impose a disproportionate and unjust sanction to ensure compliance with the overriding objective. ***Churchill v Boot [2016]:*** A change in the value of the claim or a longer trial length did not amount to a significant development in the case. In this case conduct was a significant consideration for the court in arriving at their decision. ***Sharp v Blank [2017]:*** Interim applications may be significant development. When making an application to amend incurred costs should not be amended on the last approved budget. *CPR PD 3E, 7.9:* If interim applications are made which, reasonably, were not included in a budget, then the costs of such interim applications shall be treated as additional to the approved budgets. *Al-Najar v the Cumberland Hotel (London) Ltd [2018]:* The claimants were entitled to revise their trial budget because there had been a significant development in the litigation. Disclosure was of a scale and complexity that was much larger than had actually been budgeted for, which was not envisaged and which could not have been reasonably envisaged.	
Credit discussion on assessment and good reason to depart, e.g: ***CPR PD 44, 3.2:*** Where there is no CMO in place and the costs exceed the budget by 20% or more the receiving party must serve a statement of reasons with the bill. ***CPR 3.18:*** When costs are assessed on the standard basis where there is a costs management order consideration must be given to the last approved or agreed costs budget of the receiving party and there cannot be any departure from this unless there is good reason. Additionally, any comments made on incurred costs can be considered. ***Harrison v University Hospitals Coventry and Warwickshire NHS Trust [2017]:*** CPR 3.18 is not ambiguous. Estimated costs agreed and subject to a Cost Management Order have already, in theory, been through a detailed assessment. It would be going against the intent of the rule to require another detailed assessment of estimated costs to be performed without 'good reason'.	Up to 8 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

Merrix v Heart of England NHS Trust [2017]: Carr J did not define what a 'good reason' to depart from the budget would be. BUT if the party had spent less than the budgeted sum, complying with the indemnity principle would be a good reason. She also commented that, when considering hourly rates, changing the rates might be a good reason to award a different sum for certain phases. ***Vertannes v United Lincolnshire Hospitals NHS Trust [2018]:*** Receiving party was ordered to re draw a bill of costs. A CMO cannot be deemed superseded. Even where there is, on the face of it, a good reason to depart this isn't a good reason to depart from the CMO generally. ***RNB v London Borough of Newham [2017]:*** Hourly rates have also been deemed a good reason to depart because they are a mandatory component in Precedent H which cannot be subjected to the rigours of detailed assessment at the CCMC. ***Bains v Royal Wolverhampton NHS Trust [2017]:*** High Court decision held the opposite that a reduction of hourly rates for incurred costs was not a good reason to depart from the CMO. ***Nash v Ministry of Defence [2018]:*** A reduction in hourly rates for incurred costs does not appear to mean it follows that there should be a reduction on budgeted costs. ***Jallow v Ministry of Defence [2018]:*** SCCO decision. Followed Bains and Nash, a reduction of hourly rates for incurred costs did not mean the same rates should be applied to budgeted costs. ***Barts Health NHS Trust v Hilrie Rose Salmon [2019]:*** The indemnity principle is a good reason to depart. Once you have established a good reason for a phase you are free to challenge any other sums within that phase without identifying further good reason.	
Credit discussion on the making of a costs management order and the approval of budgets, e.g: ***CPR 3.15:*** Costs Management Orders ***CPR 3.15(1):*** The court can manage the costs of any party. ***CPR 3.15(2):*** where a costs budget has been filed, the court will make a costs management order unless it considers the matter can be conducted justly and proportionately without a costs management order. A costs management order will:	6 Marks

✓ record the extent the incurred costs were agreed; ✓ the extent budgeted costs were agreed; and ✓ the approval of budgeted costs once revised. ***CPR 3.15(3):*** once a CMO has been made, the court can control the recoverable costs. ***CPR 3.15(4):*** The court can record on the face of the order any comments on the incurred costs to be taken into account at detailed assessment. ***CPR PD 3E 7.10:*** the CMO concerns only the phase totals; it is not the role of the judge to fix or approve hourly rates; and any detail within the budget is for reference purposes only. ***Redfern v Corby Borough Council [2014]:*** The court may, in determining the amount of a given phase to which approval is given, take into account the costs incurred to date by setting a figure which impliedly criticises those costs as being excessive and leaving very little for prospective costs. ***CIP Properties Ltd v Galliford Try Infrastructure Ltd [2015]:*** The court may achieve a similar result by approving budget figures in a way which sets a benchmark figure in relation to anticipated recoverable incurred costs so that, if the party recovers more than that figure in relation to incurred costs, the amount for future costs is reduced pound for pound. ***Harrison v University Hospitals Coventry and Warwickshire NHS Trust [2017]:*** Incurred costs will be subject to DA and the estimated costs will be subject to the test of proportionality. ***Yirenki v Ministry of Defence [2018]:*** A master conducting a cost budgeting exercise had erred in principle in approving specific hours and disbursements rather than total figures for each phase of the proceedings and in expressly reserving matters, such as hourly rates, to be disputed at a detailed assessment.	

Question 6:	You are a costs lawyer working for a costs drafting firm in Bolton. You have been approached by a solicitor, Harry Hinton, for your advice on the recoverability of an ATE premium. Mr Hinton's firm represented a claimant in a claim against an NHS Trust. On 26 November 2017 the claimant suffered a fractured ankle. He was admitted to the King's Medical Centre in Bradford and discharged on 30 November 2017. On 5 December 2017 he returned to hospital in severe pain and was advised to elevate his leg. On 15 December 2017 he suffered further severe pain and shortness of breath. On re-attending the hospital he

	was diagnosed with a pulmonary embolism. As the blood clot had moved from his calf to his lung he also suffered a chest infection and pneumonia. He remained an in-patient until 26 December 2017. He suffered breathlessness well into 2018 and suffered from discomfort, worry and stress. In January 2019 the claimant instructed Mr Hinton, entered a CFA and immediately took out ATE insurance. The total premium was £6,127. Under the terms of the ATE policy the claimant has no personal liability to pay the premium. If the claim succeeded the expectation was that it would be paid by the unsuccessful defendant. If the claim had failed, or not all the premium was recovered from the defendant, the insurers would bear the loss. The claim settled for £11,500 in February 2019 by the claimant accepting an offer of compensation before any proceedings were issued and before any expert report was commissioned. You are required to write the body of an email to Mr Hinton setting out whether or not the premium of £6,127 is recoverable and what challenges may be made as to the recoverability, proportionality and reasonableness of the premium.
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.	Up to 5 Marks

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, CPR 44.3 for new test. ***Lownds v Home Office 2002:*** Approach (item by item then stand back) (items disproportionate but necessary are recoverable) applicable. ***CPR 44.3(5)(a) to (e):*** Lists the factors to be taken into account when considering if costs are proportionate. costs are proportionate if they bear a reasonable relationship to sums in issue, value of non-monetary relief, complexity of litigation, additional work generated by conduct, wider factors. ***Whatever basis:*** Reasonableness would always be considered.	
Candidates should have developed their discussion on the recoverability of the premium, e.g: ***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.	Up to 5 Marks To achieve more than a pass a candidate must explain in detail the framework of the law on recoverability of premiums.

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.	
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 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 [2016]:*** 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	Up to 6 Marks To achieve more than a pass there must be strong evidence that the candidate is able to apply the authority to the facts of the question

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 engaged when assessing recoverability of ATE premiums and they are subject to the scrutiny of the Court.	
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. ***The Future:*** A number of cases have been stayed for detailed assessment on the reasonableness and proportionality of the premium, awaiting the outcome of a test case which is expected in July 2019. ***West and Demouilpied v Stockport NHS Foundation Trust:*** Will address issues around applying the new proportionality test to post lapso premiums in clinical negligence cases and the evidence needed to put block rated premiums in issue.	Up to 4 Marks

Question 7:	You work as a costs lawyer for Dutton Solicitors. Mr Dutton is a family lawyer and he has approached you in relation to one of his clients, Mr Tony Barrett. Mr Barrett separated from his wife 7 years ago and at that time the firm dealt with proceedings in relation to the children of the family and in relation to his divorce from his wife. When the finances were dealt with, a periodical payments order was made and Mr Barrett had complied with this order and had been paying his former wife £1,500.00 a month since then. 12 months ago Mr Barrett contacted Mr Dutton because his financial circumstances had changed and he could no longer

	afford to make payments at that level. Mr Dutton applied to vary the periodical payments order on behalf of his client. The periodical payments order was varied and the sum was reduced to £900.00 per month. At the hearing, Mr Barrett's ex-wife sought an order that the husband should pay her costs in the sum of £140,000. The application was rejected by the Court on the basis the costs were 'not properly proportionate to the issues being investigated' but ordered the husband to pay £20,000 towards the wife's costs on the basis that the husband had failed to explain his financial circumstances adequately until the final hearing and that the position set out in the husband's Form E gave 'a deliberately misleading impression'. Mr Barrett wishes to appeal the judgment. He has been granted permission to do so. Mr Dutton is seeking you advise as to whether or not the appeal may be based on the fact that the judge failed to adequately consider the relevant rules relating to costs and that his reasoning on establishing the basis for his assessment of costs was inadequate. You are required to write the body of an email to Mr Dutton setting out how costs in family cases are usually dealt with, how the costs in this type of case should be dealt with and what rules the Court should have considered when making the order.
Total Marks Attainable	20

Fail	up to 9.9	This mark should be awarded to candidates whose papers fail to address any of the requirements of the question, or only touch on some of the more obvious points without dealing with them or addressing them adequately. An answer which makes little or no sense OR is so poorly written as to lack coherence OR the answer will only demonstrate an awareness of some of the more obvious issues and is likely to be poorly written.
Pass	10+	An answer which includes MOST of the requirements, namely: An explanation of what family proceedings are, explanations of the three costs regimes in family proceedings and an explanation as to the rules on 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.	Up to 6 marks

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.	
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 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.	Up to 3 marks
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	Up to 7 marks To achieve more than a pass there must be strong evidence that the candidate is

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 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.	able to apply the authority to the facts of the question
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:	Up to 2 marks

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.	
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. ***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]).	Up to 2 marks

Question 8:	You are a costs lawyer working for a firm of solicitors located in Central London, Tylers LLP. Your firm represents Mr Hargreaves in proceedings against Foodelivery, a hybrid marketplace for online food delivery. Mr Hargreaves' claim form seeks a declaration that the defendant was required under the Value Added Tax Regulations 1995 to provide him with a VAT invoice in relation to the supply of food delivery services he benefitted from on 15 March 2017. He ordered food and delivery through the defendant's online app for the benefit of his business. The value of the delivery service said to have been supplied was £6.34 and the amount of VAT that would be payable was £1.06. Mr Hargreaves did not contend that the case was about his ability to recover that amount as input tax, but rather raised issues of principle. The defendant denies that it provided delivery services and is arguing that it merely acted as an intermediary between the user, the third-party food outlet and delivery drivers so they are the only people from whom the claimant could be entitled to receive a VAT invoice, and that whether one would be provided would depend on whether they were registered for VAT.

	Mr Hargreaves wishes to apply for a protective costs order in proceedings against the defendant. He has instructed your firm to seek an order that, in the event of the claim failing in part or whole, the amount of any order for costs to be paid by him should be limited to £20,000. Mr Hargreaves contends that the principle that arises is one of great public importance because of the substantial amount of VAT that would be payable to HMRC if it were to be established that the defendant was liable to account for VAT when users of its app ordered food to be delivered, and to maintain public trust and confidence in the fair administration of VAT. Mr Hargreaves' description of the public interest pins on the mischaracterisation of the relevant relationship between the defendant, the third parties and the user of the service. Write the body of a letter of advice to Mr Hargreaves setting out the statutory tests for costs capping orders in judicial review cases and whether or not you believe he will be successful in obtaining the order he wants.

Total Marks Attainable	20

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

Indicative Content	**Marks**
Required: Candidates MUST identify the framework of rules governing costs capping orders e.g: ***Sections 88-90 of the Criminal Justice and Courts Act 2015:*** Rules on 'Costs-Capping' which replaced the common law rules on protective costs order in Judicial Review proceedings. ***Section 88(2) of the Criminal Justice and Courts Act 2015:*** Defines a "costs capping order": as an order limiting or removing the liability of a party to judicial review proceedings to pay another party's costs in connection with any stage of the proceedings.	Up to 4 marks

Section 88(6) of the Criminal Justice and Courts Act 2015: The court may make a costs capping order only if it is satisfied that the proceedings are public interest proceedings and that, in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings, and it would be reasonable for the applicant for judicial review to do so.	
Credit a discussion on what amounts to public interest proceedings, e.g: ***Section 88(7) of the Criminal Justice and Courts Act 2015:*** proceedings are "public interest proceedings" only if a subject of the proceedings is of general public importance, the public interest requires the issue to be resolved, and the proceedings are likely to provide an appropriate means of resolving it. ***Section 88(8) of the Criminal Justice and Courts Act 2015:*** the court must have regard when determining whether proceedings are public interest proceedings include the number of people likely to be directly affected if relief is granted to the applicant for judicial review, how significant the effect on those people is likely to be, and whether the proceedings involve consideration of a point of law of general public importance. ***Eweida v British Airways [2009]:*** A PCO cannot be made in private litigation. ***R (on the application of Hawking) v Secretary of State for Health and Social Care [2018]:*** Judicial review proceedings challenging a decision made by a government department regarding the National Health Service was in the public interest and the claimants who had crowdfunded to fund the case met the statutory criteria for a cost capping order. ***Maugham QC v Uber London Ltd [2019]:*** Claim by a barrister against Uber for the provision of a VAT invoice. The claim was one between two private persons. Uber was a defendant in its capacity as a potential taxpayer and it carried out no public functions. Not appropriate for the court to make a PCO.	Up to 5 marks
Credit a discussion on how the court may decide to make an order and the content of an order, e.g: ***Davey v Aylesbury Vale District Council [2007]:*** The normal 'loser pays' rule, found in CPR 44.2(2)(a) does not apply 'automatically' in judicial review cases because there is not sufficient justification in public law' for the same rule to be followed. ***Booth v Bradford Metropolitan District Council [2000]:*** Must take into account all of the circumstances of a case and that costs do not necessarily follow the event unless it could be shown that the authority acted in bad faith or unreasonably.	Up to 10 marks Candidates that achieve more than a pass MUST show evidence of their ability to apply the legal framework to the

R (Corner House Research) v Sec of State for Trade and Industry [2005]: PCOs should only be made in exceptional circumstances, Essential principles for the making of a PCO include that the issues raised are of general public importance; the public interest requires that those issues should be resolved and the applicant has no private interest in the outcome of the case. ***Morgan v Hinton Organics [2009]:*** Expanded upon the principles, it was said there should be a flexible approach to PCOs' was to be encouraged, especially the requirement of 'no private interest'. ***Section 89(1) of the Criminal Justice and Courts Act 2015:*** The matters to which the court must have regard when considering whether to make a costs capping order in connection with judicial review proceedings, and what the terms of such an order should be, include: ☑ The financial resources of the parties. ☑ The extent to which the applicant for the order is likely to benefit. ☑ The extent to which any person who has provided financial support may benefit. ☑ Whether legal representatives for the applicant for the order are acting free of charge. ☑ Whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally. ***Section 89(2) of the Criminal Justice and Courts Act 2015:*** A costs capping order that limits or removes the liability of the applicant for judicial review to pay the costs of another party to the proceedings if relief is not granted to the applicant for judicial review must also limit or remove the liability of the other party to pay the applicant's costs if it is. ***R (On the application of Hannah Beety & Ors) (Claimant) v Nursing & Midwifery Council (Defendant) & Independent Midwives UK [2017]:*** The court capped the claimant's liability for costs at £25,000 and the defendant's at £65,000.	facts of the question
Credit a discussion on the procedural steps for making such an application, e.g: ***CPR 46.17(1)(a):*** An application for a judicial review costs capping order must be made on notice. ***CPR 23.3(2)(b):*** States an application without notice may be made where a rule or PD allows it. ***CPR PD 46, 10.2:*** An application should be made on the claim form (and there will be instances when a claim may be issued without notice). ***CPR 46.17(1)(b):*** Applications must be supported by evidence setting out why a judicial review costs capping	Up to 5 marks

order should be made, a summary of the applicant's financial resources; the costs (and disbursements) which the applicant considers the parties are likely to incur in the future conduct of the proceedings; and if the applicant is a body corporate, whether it is able to demonstrate that it is likely to have financial resources available to meet liabilities arising in connection with the proceedings.	

Question 9:	You work for a firm of solicitors, Baron and Earl LLP, located in Berkshire. Mr Baron has been instructed by Mr Henry Duval who is seeking advice in relation to a number of posts that have been made on a social networking site, Chirper Ltd. The posts started approximately 12 months ago and there have been a substantial number of them. Mr Duval has suffered damage to his reputation as a result of being defamed on Chirper Ltd and wishes to seek redress. Mr Duval has contacted Chirper Ltd numerous times about the posts, seeking their removal, but his correspondence has gone unanswered. An application has been made, on notice, to obtain an injunction in libel. The matter has been listed for a hearing. Chirper Ltd have been appropriately served and it is expected the company will be present and represented at the hearing. Over the past few days, Mr Duval has telephoned the office and left a message. He now says he does not want to pursue the application because he is concerned about the costs. Mr Baron has sought instructions from Mr Duval. He has left a voicemail for Mr Duval asking if he would agree to Mr Baron attempting to obtain the consent of Chirper Ltd to the granting of an interim injunction within proceedings on the balance of convenience. Mr Baron would like to send a follow up letter of advice and is seeking your assistance with drafting the same. Write the body of an email advising Mr Baron on 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 if the injunction is made on the balance of convenience.
Total Marks Attainable	20

Fail	up to 9.9	This mark should be awarded to candidates whose papers fail to address any of the requirements of the question, or only touch on some of the more obvious points without dealing with them or addressing them adequately. An answer which makes little or no sense OR is so poorly written as to lack coherence OR the answer will only demonstrate an awareness of some of the more obvious issues and is likely to be poorly written.
Pass	10+	An answer which includes MOST of the requirements, namely: An explanation of the normal rule in costs and the three situations that need to be considered when offering advice on costs in relation to injunctions. The primary focus of the question may have been missed with candidates simply providing a general framework, although there will be evidence that the candidate has the knowledge that is fit for purpose. The answers will be written to a reasonable standard, but may contain some grammatical errors or spelling mistakes etc. Appropriate authority will be used throughout although some points advanced may not be supported.

Merit	12+	This band will deal with ALL the requirements and the focus of the response will be injunctions granted on the balance of convenience. Candidates will have produced responses that have more depth and with more application to the facts provided. There will also be a demonstration that the candidate is able to analyse, as appropriate. Candidates will have produced responses which are written to a high standard with few, if any, grammatical errors or spelling mistakes etc. taking into account it is written under exam conditions.
Distinction	14+	An answer which includes ALL of the requirements for a pass (as set out above) PLUS demonstrates an excellent depth of knowledge. Excellent application of the law to the arguments made and critical analysis of the same. All views expressed by candidates should be supported by relevant authority and/or case law. Work which is written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc.

Indicative Content	Marks
Required: ***Section 51(3) of the Senior Courts Act 1981 and CPR 44.2(1):*** the court shall have full power to determine by whom and to what extent the costs are to be paid. ***CPR 44.2(2)(a):*** The 'normal' rule that 'costs follow the event' applies therefore a claimant granted an interim injunction may understandably expect the court to order the defendant to pay the costs of the application. ***CPR 44.2(2)(b):*** The court may however make any other order. ***CPR 44.2(6) and CPR PD 44, 4.2:*** Orders the court may/can make which includes, for example, reserving the costs of the application. ***Three situations that should be considered:*** Interim injunction application granted on (or agreed by consent on the basis of) the balance of convenience. A defendant that successfully resists an injunction application. An injunction on a *quia timet* basis.	Up to 5 marks Candidates MUST identify that this is a question about an interim injunction and that the Court has discretion as to costs but there are three situations that need to be considered as to whether or not the general rule applies
Candidates may have discussed the court's discretion in relation to the granting of interim injunctions e.g: ***Section 37(1) of the Senior Courts Act 1981:*** The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so. ***American Cyanamid Co v Ethicom Ltd [1975]:*** Guidelines to establish whether an applicant's case merited the granting of an interlocutory injunction are: whether there is a serious question to be tried, what would be the balance of convenience of each party should the order be granted (in other words, where does that balance lie?) and whether there are any special factors.	Up to 2 marks
Credit discussion on Interim injunction applications granted on (or agreed by consent on the basis of) the balance of convenience, e.g:	Up to 3 marks

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.	
Credit should be given to a discussion on when a defendant successfully resists an injunction application e.g: ***A defendant that has successfully resisted an injunction:*** may expect the court to order that his costs of the application be paid by the claimant. ***Merck Sharp Dohme Corp v Teva Pharma BV [2013]:*** for costs not to follow the event the court held that the applicant would need to justify coming to court and it can do that by showing that there was a 'sufficiently strong probability that an injunction would be required to prevent the harm to the claimant to justify bringing the proceedings'.	Up to 2 marks
Credit should be given to a discussion on an injunction on a *quia timet* basis, e.g: ***Quia timet ("because he fears"):*** Is an injunction to restrain wrongful acts which are threatened or imminent but have not yet commenced. ***No threat by the time of trial:*** The position needs to be considered in light of the fact that by the time of trial it may be clear that there was no threat by the respondent to violate the applicant's legal right, but the applicant says there was a threat when it started proceedings.	Up to 2 marks
Credit should be given to a discussion on the factors the court will consider when deciding how costs should be dealt with: ***Kickers International SA v Paul Kettle Agencies Ltd (1990):*** The court considered the following: A final order might award a party costs which, upon fuller consideration at trial, he would not have been given. 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	Up to 6 marks To achieve a distinction candidates MUST apply the principles of the authority to the facts in the scenario

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.	
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. ***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.	Up to 4 marks