CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JUNE 2021
LEVEL 6 – UNIT 15 - CIVIL LITIGATION

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2021 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report,** which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

Overall, the performance of candidates on this paper showed an encouraging improvement from the January paper. It was clear that many centres had used the Case Study Materials to good effect and had prepared candidates well for the examination.

This was particularly evident in question 3(b) which, although it addressed a key element of the unit, was nonetheless a technically demanding question. Those candidates who were well prepared were able to obtain high marks on this question. There were similar signs of good preparation in the answers to questions 1(c), 2(a) and 4(a).

In general, candidates seemed to have a reasonable knowledge of the core areas of Civil Litigation. As a result, most candidates were able to correctly identify the subject matter of each question and refer to at least some of the relevant points. There were also very few candidates who referred to law that was no longer in force or the old SRA Code of Conduct. This was an improvement on the January 2021 paper.

With respect to examination technique, whilst there were some important flaws in the manner in which candidates approached the paper, candidates seemed to manage their time well. Most candidates were therefore able to provide coherent answers to all of the questions.

There were, however, some areas where there was definite room for improvement. As with previous papers, there were a number of candidates who didn't read the question or at least didn't adapt what they said to the question that was asked. This meant that some candidates simply wrote down all they knew or had prepared on a topic and so included material that wasn't relevant or helpful.

A related issue was a failure to properly analyse the facts. This meant that candidates missed important elements in the information they were given and so went down the incorrect route in their answer. There were, for example, a disappointingly large number of candidates who were wrong on the costs consequences of the part 36 offer in question 3(a). Unfortunately, these candidates referred to the rules relating to an offer made by the claimant when the offer in the scenario came from the defendant.

In a similar vein, a number of candidates did not refer to the fact that the defence had been filed in question 4(c). This had a direct effect on the procedural steps that should have been referred to in the answer.

Even where candidates dealt with the relevant points, they didn't always make the best of the knowledge that they had. Candidates needed to be more systematic in their approach and practically apply their knowledge to the facts. In 2(b), for example, candidates should have considered each of the requirements in Practice Direction 25B.2.1 and discussed how they applied in this case.

Indeed, in general candidates performed less well on the longer questions which required more application of the law to the facts. In particular, the lowest marks were achieved on questions 1(b) (the Claim Form) and 2(b) (see above). Both of these questions required candidates to analyse the facts of the case so that they could present their client's case in a coherent manner. The better candidates were able to show their deeper understanding of the law when answering these questions by the manner in which they used the law and the facts in their client's best interests.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1

This was the question on which candidates performed the best, although there was some variation between how candidates did on the sub-questions. This seems largely to be because the two shorter questions tested candidates' knowledge of key areas of Civil Litigation but involved less application of that knowledge.

(a)

This was the highest scoring question on the paper. Although it demanded some analysis of the facts in order to identify the correct protocol, once this was done candidates simply had to recount the key steps under the relevant protocol. Most candidates did this well.

1(b)

In contrast, this was the lowest scoring question on the paper. This tested a mainstream element of Civil Litigation as it involved preparing the Particulars of Claim on the back of Claim Form in a relatively straightforward debt matter. There were no particular key points that most candidates missed. Instead, candidates suffered from not approaching their answers in a systematic way and so missing some of the finer detail that was required.

(c)

This was the second highest scoring question. It was a relatively straightforward question about applying for summary judgment which is a common topic in the Civil Litigation assessments. Candidates dealt with this well as they recognised why the application could be made and demonstrated a good knowledge of the relevant law.

Question 2

This question was dealt with reasonably well although there was a contrast between how candidates performed between 2(a) and 2(b). Most candidates seemed to have considered the fact patterns in the Case Study Materials sufficiently well to appreciate that there would be a question on an interim payment. However, candidates didn't always make good use of that knowledge.

(a)

This question simply required candidates to identify the need for an interim payment and outline the procedure for doing so. Most candidates made a reasonable attempt at this question although again some marks were lost as a result of a failure to refer to some of the finer detail required.

(b)

As noted elsewhere candidates didn't always approach this question in a particularly systematic way and so didn't use the law sufficiently well to help them with their answer. In particular, there was insufficient reference to the relevant part of Practice Direction 25B which contains the specific requirements that candidates should have referred to.

Question 3

As a whole this was the question that was dealt with least well. This was perhaps not surprising as the two sub questions were amongst the most challenging on the paper. Nonetheless, candidates didn't do as well as they could have on question 3(a) where they surprisingly scored less well on the common topic of Part 36 than they did on detailed assessment in 3(b) which is rarely dealt with.

3(a)

This question represented something of a missed opportunity for many candidates. It was a relatively straightforward question about the costs' consequences of a defendant's Part 36 offer. A large number of candidates wrongly referred to the consequences of a claimant's offer and so lost a lot of marks as a result.

There was also a QOCs point which arose on this question. The weaker candidates missed this but there were also some excellent points made on this issue.

(b)

It was gratifying to see how well some candidates did with this question. They had clearly studied and understood the relevant law in Part 47 in preparation for the examination. As a result, they were able to achieve high marks. By contrast, some candidates did flounder on this question although in general this was in keeping with their overall performance on the paper.

Question 4

This question was dealt with reasonably well on the whole and perhaps reflected the overall performance of candidates across the paper as it combined questions that clearly arose from the Case Study Materials, questions with a practical emphasis and those which demanded more technical knowledge.

(a)

This was a relatively straightforward question about the use of alternative dispute resolution (ADR). Most candidates managed to spot the issue and make some relevant points. The better answers took a more evaluative approach and so discussed the merits of ADR as against court proceedings.

(b)

This question wasn't dealt with as well as it could have been as the candidates didn't always directly answer the question. In particular, a fair number of candidates went further than they needed to in discussing the process of allocation. Unsurprisingly most candidates dealt well with the second part of the question which related to tracking.

(c)

The central point of this question was that our clients would now take part 20 proceedings against their sub-contractors. This had been hinted at in the Case Study Materials and so most candidates spotted this. Unfortunately, a number then failed to notice that a defence had been filed. This was an important factor in determining what procedural steps would be taken and so those candidates who missed this point lost marks as a result. Candidates could also have explained more clearly why part 20 proceedings were required and to what purpose.

4(d)

This was one of the least well answered questions on the paper but this was perhaps not surprising as it was one of the more complex and technical questions.

Of the two elements to the question, most candidates dealt better with the issues relating to disclosure. Some strong points were therefore made about privilege and general duties of disclosure. That being said some candidates failed to discuss the continuing duty of disclosure, whilst very few recognised the significance of Mr Yarmouth having signed the disclosure statement.

The answers on the Code of Conduct were weaker as candidates didn't demonstra a particularly detailed knowledge of the relevant provisions. That being said, mo candidates recognised that there was a professional conduct issue and most wou have taken broadly the right action in this situation.

SUGGESTED POINTS FOR RESPONSES
LEVEL 6 – UNIT 15 - CIVIL LITIGATION

The purpose of this document is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2021 examinations. The Suggested Points for Responses do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed. Candidates and learning centre tutors should review this document in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate's performance in the examination.

Question Number	Suggested points for responses	Max Marks
Q1(a)	• As a commercial debt, this matter would be dealt with under the Practice Direction Pre Action Conduct and Protocols • Under the protocol we should write to ACL giving details of the claim • I.e. that they owe £43,200 for a digger that has been delivered to them • The letter should attach copies of the email and invoice • ACL would then have to respond within a reasonable time • Confirming whether they accept the claim • And if they don't, explaining why not • Credit reference to ADR	7

Q1(b)	• Describe who parties are • And confirm acting in the course of a business • Give details of the agreement between the parties • By providing full details of the conversation between Ghulam Murtaza and Frank Anderson on 5th March • Together with copies of the email and invoice • In accordance with PD16.7 • Confirm breach of the agreement through non payment • Confirm sum claimed • Together with compensation of £100 • Under the Late Payment of Commercial Debts (Interest) Act 1998 • And interest under the same Act • This should be calculated as a lump sum from 30 days after the invoice up to the date of issue together with a daily rate from then on • See CPR 16.4 • Credit can be given for reference to including a prayer • And the statement of truth	15
Q1(c)	• ACL accept that the debt was owed • And the expert evidence undermines their defence • As a result, we could make an application for summary judgment • Under part 24 • As ACL have no real prospect of successfully defending the claim. NB If candidates refer to no reasonable prospect, they can be given the mark • And as this is a simple debt matter there is no other compelling reason why the case needs to be disposed of at trial	6
	Total	**28 marks**

Question Number	Suggested points for responses	Max Marks
Q2(a)	• Our client is suffering financial difficulties and needs money now to alleviate his difficulties • We would therefore make an application for an interim payment • This is a payment on account of the final damages that our client would receive • We would ask the other side to make a voluntary interim payment • If they did not, we would apply using the standard N244 supported • Requesting an interim payment on the basis that the Defendant had admitted liability to pay damages • See CPR 25.7(1)(a) • This would be accompanied by a witness statement and • The court fee • Draft order • This would have to be served on the other party at least 14 days before the hearing of the application • Under CPR 25.6(3)	9
Q2(b)	• The evidence required is dealt with in PD25B.2.1 • The sum of money sought • It is not clear what this would be, but it should not be more than a reasonable proportion of the likely final judgment (CPR25.7(4) • The items/matters in respect of which the interim payment is sought • We should clearly argue for money to cover the existing debts and to make up the shortfall whilst our client was waiting for Universal Credit to be paid. • The sum for which final judgment is likely to be given. • This is difficult to assess given the dispute between the parties but we could argue that this would be £25,000 plus an ongoing loss of earnings • The reasons for believing CPR 25.7 is made out (see above) • Details of the special damages • Any relevant documents – most notably the medical report • But perhaps also copies of any outstanding bills	11
	Total	**20 marks**

Question Number	Suggested points for responses	Max Marks
Q3(a)	• There are two aspects to this: the general position under CPR36.17 and also the position with respect to QOCs given that this is a personal injury claim • The risk is that at trial our client doesn't achieve an award more advantageous than the defendant's offer. • Given that the defendants' medical evidence could be accepted and so the offer could be reasonable • If this did happen, our client would lose their protection under QOCs • Under which they would not have to pay costs • The court would most likely make a split order as to costs • Under which our client would receive their costs up until the end of the relevant period (normally 21 days after the offer is made) • The defendant would then receive their costs from the end of the relevant period • And interest on those costs. • This could result in a considerable reduction in our client's damages • Credit reference to After the Event Insurance to cover these costs	10
Q3(b)	• Within 3 months of the date of the order • We should serve a notice of commencement (N252) together with: • A copy of the bill of costs • A copy of any fee notes and evidence of disbursements and • Details of any costs or case management orders • The defendant would then have 21 days • To serve any points of dispute • If they don't, we can obtain a default costs certificate • If they do, we can serve a reply within 21 days • In any event, we must file a request for an assessment hearing on form N258 within 3 months of the date of expiry of the period for commencing proceedings • The court would then make a provisional assessment of the costs • Once we had received the court's provisional assessment, we would have 14 days to agree costs • If we were unable to do so, we could request an oral hearing • But would be at risk on costs if this did not achieve a sufficiently large adjustment of the court's provisional figure. • Credit for reference to Part 47	12

	• NB Candidates do not need to quote the numbers of the forms as long as they outline the necessary steps correctly	
	Total	**22 marks**

Question Number	Suggested points for responses	Max Marks
Q4(a)	• In his instructions, Mr Yarmouth has indicated that he is happy to take a pragmatic approach and wants to preserve the relationship with TAL • ADR would therefore be a sensible course of action here • Indeed, there might be provision for this in the contract with TAL • It is generally thought that ADR can be quicker and cheaper and so this would meet some of Mr Adderley's concerns • The process of ADR is also confidential and would avoid the adverse publicity that he has referred to • This might also help to preserve the relationship with TAL who we are told are important and longstanding clients. • The parties can also work out their own solution rather than having one imposed on them by the court which again might help their relationship in the future. • Credit can be given to students who discuss specific forms of ADR providing this is justified • As can reference to RFL being involved in the process given that they installed the machine • Credit can be given to candidates who refer to making an offer in settlement (Part 36 or otherwise) • Credit can also be given to candidates who mention that ADR is encouraged by the Protocol.	8
Q4(b)	• Before allocation, the parties would have to complete directions questionnaires • And prepare draft directions • Which should be served on the other side and agreed if possible • As to the track, this should be straightforward but is designed to ensure that candidates realise that it is the amount of the claim that is in dispute (see CPR 26.8(2)(a)) - £65,000 rather than the value of the contract £20,000) which is important for tracking. • There are other factors relating to the complexity and size of the case which would be taken into account • Under CPR 26.8(1) • But this claim would clearly be allocated to the multi track.	6

Q4(c)	• The report suggests that the problems are due to the actions of the sub-contractors, RFL, as they installed the machines • We would therefore make an additional/Part 20 claim against them • For a contribution or indemnity in relation to damages that YPL might be ordered to pay TAL • We are told that a defence has been filed • We would therefore need to obtain the court's permission • To issue the additional claim form • See CPR 20.7 • Which also provides that the claim form must contain or be accompanied by a particulars of claim • Credit can be given to candidates who suggest making a Part 36 offer	7
Q4(d)	• Here we would have to explain the continuing duty of disclosure • Under CPR 31.11 • This requires us to reveal the existence of disclosable documents throughout the case. • Credit for a sensible discussion of privilege • Mr Adderley has signed the disclosure statement • He should therefore be warned that he might be in contempt of court if he does not reveal the existence of the document • We should also advise him that we have a duty not to mislead the court • Under paragraph 1.4 of the Code of Conduct • And so, if he refused to reveal the existence of the document, we would have to cease to act for him • Credit could also be given to candidates who mention Principles 1,2,4 and 5 in their answer and/or • the duty of confidentiality under paragraph 6.3 if we ceased to act for the client • NB for the professional conduct points candidates can be awarded the mark without referring the relevant Principle or paragraph provided they correctly describe the duty. There are, however, two separate marks for misleading the court and the candidate must refer to both the duty and paragraph 1.4 to get both marks	9
	Total	**30 marks**