CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

LEVEL 6 - UNIT 15 - CIVIL LITIGATION

JUNE 2022

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 2022 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

The performance of candidates in this paper was mixed. There were some examples of good practice but also a large number of papers which were less strong. The manner in which candidates addressed the assessment raised some issues about how best to approach the examination and considering these issues will hopefully lead to an improved performance in the future.

The better candidates were well prepared for the paper and so were able not only to spot the relevant issues but also to give a detailed account of the relevant law. These candidates prepared well-structured and logical answers which applied the law in a clear and systematic way.

This strong approach was exemplified in the manner in which candidates approached question 4(a). In this question, candidates correctly identified the time periods relating to deemed service and responding to the claim. They applied these time limits in a precise and systematic way to the facts of the case. This then led them to the right date by which the defendant would have to respond to the claim. It also meant that they were able achieve high marks.

Unfortunately, the majority of candidates did not take such a strong approach to the questions. Indeed, there were a number of problems with the manner in which some candidates approached the paper.

Some of these problems have been commented on before. There were, for example, candidates who wrote all they knew about a particular topic without applying it to the facts of the question. This generally meant that they didn't address all of the relevant issues.

At the same time, whilst candidates generally identified the main topic in the question, they didn't always demonstrate a sufficiently detailed knowledge of the relevant points to do well. There were two main aspects to this.

Firstly, there were some questions where candidates clearly knew the relevant topic but didn't provide sufficiently detailed or systematic answers to maximise their marks. This was particularly the case in 1(a) where candidates didn't always discuss all the necessary steps under the protocol or the consequences of not complying with it. Similar issues arose in questions 2(a) on funding/costs and 3(c) on the procedure at trial. These questions covered core points that every candidate should be aware of and required relatively little application of the law. They therefore presented an opportunity for candidates to accumulate marks.

Secondly, candidates didn't always provide sufficient detail on the law and how it applied. This was particularly the case on some of the more technical questions such as 3(a) and 3(b).

In 3(a) the majority of candidates correctly indicated that the defendant's conviction should be included in the Particulars of Claim but didn't outline what details should be given in the Particulars. In a similar vein, in 3(b) candidates noted that we would have to serve a notice once Mohinder had reached 18 but didn't provide full details of what should be included in that notice.

The Case Study Materials had contained strong hints that questions such as this would be asked and so candidates should have prepared in advance a note of all of the relevant points to make in their answer. This would have allowed them to provide comprehensive answers to these questions.

More generally, candidates didn't demonstrate a good knowledge of some key elements of the law. Most notably the question where candidates did least well was 1(b) which concerned applying for relief from sanctions. This is a topic of fundamental importance in the practice of civil litigation and so candidates need to have a good knowledge of it. Whilst most candidates did make some reference to the need to apply for relief in this situation, very few showed an appreciation of how such an application would be dealt with in practice by applying the Denton test.

It was also quite concerning that in 2(b), candidates didn't show a particularly good knowledge of their obligations under the SRA Standard and Regulations when advising their client on funding and costs. This is, of course, a central issue in the relationship with any client and so candidates should be aware of these requirements.

On a related point, candidates generally didn't do well on 4(c) which related to cost budgets. In the Case Study Materials, candidates were directed to Practice Direction 3E as being an element of the

Civil Procedure Rules that they needed to be familiar with. Given the content of the Practice Direction, candidates could have anticipated a question on this issue and so could have prepared well for it.

This does the raise the question of how candidates use the Case Study Materials and indeed how they prepare more generally for the assessments. Candidates should look for pointers in the facts that they are given as to the questions that might come up in the paper.

At the same time, candidates should also make sure that they are fully conversant with the rules that are referred to in the Case Study Materials. These give a clear steer as to the areas that will be tested in the assessment. As noted above, being able to demonstrate a good knowledge and application of these rules will help candidates to accumulate marks.

That aside, candidates should also give some thought to the manner in which they approach the paper during the exam. There were quite a few candidates who wrote far too much on the first couple of questions and then clearly ran out of time towards the end of the paper where they provided very brief answers. Candidates should use the number of marks that are allocated to a question to help determine how much time they devote to the question in comparison to other parts of the paper.

At the same time, the answers that some candidates gave were too concise across the paper as a whole and so didn't include sufficient detail to achieve high marks.

Lastly, candidates should try to be as precise and systematic as they can be when answering the questions. This should come from good preparation and will allow candidates to provide comprehensive answers which will attract good marks.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

This was one of the questions where candidates performed relatively well. This was perhaps not surprising as candidates simply needed to show some knowledge of the relevant protocol, how it operated and the sanctions for not following the protocol. Whilst most candidates identified the correct area, they didn't always make the most of their knowledge as they provided insufficient detail on relevant points.

(b)

This was the question in which candidates did least well. In some ways, this is perhaps not surprising given that the question of relief from sanctions was not directly flagged up in the facts given in the Case Study Materials. However, this is explicitly dealt with in the Unit Specification and the Case Study Materials referred to the relevant part of the CPR. This is also an area that candidates would encounter in practice and applications such as this would be dealt with every day in most civil courts. It was therefore disappointing that very few candidates showed any knowledge of the Denton case and the test contained within it. Even fewer candidates applied this test successfully to the facts. This should be core knowledge for all candidates given the importance of this area in practice.

(c)

It is fair to say that this was one of the more challenging questions on the paper and so it was to be expected that candidates might perform less well. The question required candidates to form a judgement on a course of action that their client was proposing in relation to a part 36 offer. They therefore needed to know the rules and make an assessment of the client's actions based on that knowledge. The better candidates made a reasonable attempt at this.

At the same time, a lot of candidates simply outlined the costs consequences of a part 36 offer and made no attempt to apply this to the facts or advise their client in the manner required by the question.

Question 2(a)

This was a question which should have allowed the candidates to demonstrate their knowledge of a fundamental element of civil litigation which would be addressed in every case: the issue of funding and costs. As a whole, candidates did reasonably well on this but, again, didn't always make best use of their knowledge. Candidates didn't always take a sufficiently systematic approach to their answers. In addition, candidates could have made more reference to features that were specific to this case such as Qualified One-Way Costs Shifting and effect of the injured party being a minor.

2(b)

This question was not answered well. The candidates were asked to outline the professional conduct obligations that they owe to their client when discussing funding and costs. This is a core element of their relationship with the client, but the answers given exposed a comparatively weak knowledge of the relevant elements of the SRA Principles and the Code of Conduct amongst some candidates.

Question 3(a)

Whilst this was one of the more technically demanding questions, with respect to the knowledge that was required, it should be have been relatively straightforward for candidates to prepare well for this question. The Case Study Materials referred to the defendant's conviction and candidates were pointed to the Civil Evidence Act 1968 and Practice Direction 16. The candidates and centres were therefore given quite a clear pointer that this sort of question might feature on the paper. It is right to say that a fair number of candidates did show a reasonable knowledge of the relevant procedure and the effect of the conviction, but a large number of candidates didn't do as well as they could have done here. This was largely because they didn't provide sufficient detail on the steps required by the rules.

(b)

In a similar manner to the previous question, the candidates and centres were given clear signals that this could be a question on the paper. The Case Study Materials referred to the injured party turning 18 in October and directed candidates to Part 21 and Practice Direction 21. Candidates simply needed to recite what the relevant requirements were to score highly on this question. Most candidates referred to Part 21 but some didn't deal with what the rules required when a party turned 18. Those who did refer to the relevant requirements didn't always provide sufficient detail on them to do well.

(c)

This should have been a very straightforward question, as the candidates were simply required to outline the normal process for a trial in a civil case. It was therefore a bit disappointing that candidates didn't do particularly well on this as the answer didn't require a detailed knowledge of the law. Again, candidates needed a more systematic and logical approach to do well on this question.

Question 4(a)

This was the question in which candidates achieved the highest marks. This was a question which needed a good knowledge of the rules and the ability to apply them well to the facts. A lot of candidates were able to do this by providing well structured and logical answers. That being said, there were still some basic errors on this question which betrayed a lack of knowledge of core elements of civil procedure.

4(b)

This question was dealt with reasonably well although, in truth, this was another question where an appropriate analysis of the Case Study Materials would have led the candidate to the question. Most candidates identified that the defendant would make a Part 20 Claim and discussed whether permission would be required to make such a claim. However, candidates needed to be more precise about the rules and explain why such a claim would be made.

(c)

This was one of the questions that was deal with least well on the paper. This is an issue which is referred to in the unit specification and in the Case Study Materials. Candidates were pointed to Practice Direction 3E. This Practice Direction deals with nothing other than cost budgeting and so a well-prepared candidate would know that a question on this topic would appear on the paper. They could therefore easily have prepared a high scoring answer to this question which simply required candidates to outline the relevant procedure for dealing with costs in a situation such as this. This is a process which is used extensively in practice and so candidates should be aware of it.

(d)

This was a more challenging question and dealt with an area of the rules that wouldn't feature in every case. However, this would come up in practice and again the candidates were directed to Part 18 in the Case Study Materials which was the relevant rule. Most candidates were able to identify the relevant steps to take but needed to be more precise about the procedure that was required.

SUGGESTED POINTS FOR RESPONSE LEVEL 6 - UNIT 15 - CIVIL LITIGATION		
Question Number	**Suggested Points for Responses**	**Marks (Max)**
1(a)	• Here we would advise the client that we have only just been instructed by them and therefore to start court proceedings would be premature/in breach of the relevant protocol • Here there is no specific protocol and so we would have to abide by the Practice Direction – Pre Action Conduct and Protocols • At paragraph 6 this requires the following steps to be taken before proceedings are commenced • Firstly, we would write to the defendant/Protec with concise details of the claim • Secondly, we should allow them a reasonable period within which to respond to the claim • The protocol indicates this should be between 14 days and 3 months. Here, this wouldn't need to be a lengthy period as there have already been discussions between the parties about the case and this isn't a complex matter • Thirdly, the protocol requires that there should be disclosure of key documents. Again, this is unlikely to be a major step here. • If we didn't comply the steps required under the Protocol, we would have to justify to the court why we hadn't done so – see box C on the directions questionnaire. The court would impose costs or other sanctions on us – see Part 3 which specifically requires the court to take into account compliance with the relevant protocol and Part 44 on costs.	**9**
Question Number	**Suggested Points for Responses**	**Marks (Max)**
(b)	• As we have missed the date given by the court for exchange, we would not be able to rely on our witnesses at trial • We would therefore have to apply for relief from sanctions under CPR 3.9 • And for the court's permission to rely on the witness statements under CPR 32.10 • Whether or not we would be successful in our application would essentially depend on whether we satisfied the test laid down in Denton v TH White Limited [2014] EWCA Civ 906 • The first limb of the test is the seriousness and significance of the breach • Arguably this was not a serious or significant breach but we could not rely on this point alone and should address the other limbs of the test	**12**

	• The second limb is the reason for the breach. • Here the fee earner with conduct of the file had to leave the office suddenly and the other members of the department were engaged on other matters. The facts also suggest this a small department where it would be difficult to arrange immediate cover. • The third limb is for the court to consider all the circumstances of the case including CPR 3.9(1)(a) and (b) • Here the claimant would be disproportionately prejudiced by the failure to be able to rely on their statements • As we are following the standard fast track timetable there are still several months before the trial which would not therefore need to be adjourned. • The case can therefore still be conducted efficiently as this is a relatively minor breach which will have little impact • Ask the defendant if consent to application	
Question Number	**Suggested Points for Responses**	**Marks (Max)**
1(c)	• The immediate effect of withdrawal of the offer is that it can no longer be accepted by the defendant under CPR 36.11(2). This means that our clients will not have to settle the case for a lower amount than their losses • At the same time, such an offer will arguably place less pressure on the defendant as the withdrawal of the offer means that it will no longer have the normal part 36 consequences (see CPR36.17(7)(a) if SFSC were awarded more than £12,000 but less than £15,000 at trial • The offer could still, however, be taken into account on the question of costs under Part 44, particularly if Protec had unreasonably rejected it	**6**
	Question 1 Total: 27 marks	
Question Number	**Suggested Points for Responses**	**Marks (Max)**
2(a)	• There are several options that you could discuss with Neelam to allay her fears about funding (No mark) • Firstly, you could check whether she has any before the event insurance either through her road traffic or home insurance policies. • Secondly, you could discuss with her funding the case by way of a conditional fee agreement which would mean that they would only have to pay our fees if the case was successful. • We would, of course, have to explain the success fee • Although we would reassure her that in a personal injury case this would be capped at 25% of the damages (excluding future loss) • We could also mention a damages based agreement and what this meant although this is less common in practice.	**12**

	• Again, would explain how the fee was calculated and the limits on it. • She could, of course, privately fund the case but she has indicated that the family aren't wealthy • It is unlikely to be relevant but some institutions offer support for members and their families in such cases • We should also warn Neelam that if she becomes the litigation friend she will have to sign a statement of truth on the certificate of suitability • Under which she would undertake to pay any costs that might be ordered against Mohinder in the case • However, we would also mention Qualified One way Costs Shifting (QOCS) • Which would mean that if Mohinder lost the case he would only have to pay the other side's costs in limited circumstances.	
Question Number	**Suggested Points for Responses**	**Marks (Max)**
2(b)	• With regard to the SRA Principles we should primarily have in mind Principle 7 – acting in the best interests of our client • We should, however, also have regard to Principles 2 (public trust and confidence), 4 (Honesty) and 5 (Integrity) • With respect to the Code of Conduct, the key consideration would be para 8.7 under which you should ensure that the clients receive the best possible information about the costs of the case • As we are dealing with a minor, we might also have regard to para 1.2 – not taking unfair advantage of our client and para 3.4 taking account of their attributes and needs. • In practical terms this would mean ensuring that we advised Neelam and Mohinder about the funding options which would be most appropriate to them even if that meant they had to go to another solicitor.	**8**
		Question 2 Total: 20 marks
Question Number	**Suggested Points for Responses**	**Marks (Max)**
3(a)	• As we are seeking to rely on the conviction in evidence under s11 Civil Evidence Act 1968 • We would have to state that we are doing so in our Particulars of Claim see PD16.8.1 • We would also have to give details of the type of conviction and its date • The court which made the conviction and • The issue to which it relates – here this would be liability/negligence • If necessary, we would also have to prove the conviction by obtaining a certificate of conviction and including it in our list of documents	**12**

	• As to the effect of the conviction, S11 provides that the conviction is admissible in evidence against the defendant and that the person concerned shall be taken to have been convicted of the offence unless they can prove otherwise. In effect this reverses the burden of proof on this point and would be useful evidence to show that Lesley Ellis was negligent. It might therefore lead to the other side admitting liability	
Question Number	**Suggested Points for Responses**	**Marks (Max)**
3(b)	• Here we would need to follow the requirements of Part 21 (see CPR 21.9 and PD21.4) • The litigation friend's appointment would cease and Mohinder would have to decide if he wished to pursue the claim • If, as seems likely here, he did so, he would have to serve a notice on the other driver's solicitor stating • The appointment of the litigation friend has ceased • Giving his address for service • Whether he wishes to carry on with the proceedings • If he doesn't do so within 28 days of his birthday • The defendant could apply to have his case struck out	**8**
Question Number	**Suggested Points for Responses**	**Marks (Max)**
(c)	Response is appropriately structured • As this will be a trial on quantum only the hearing might be less lengthy than normal but nonetheless it will follow the standard procedure • There could be opening speeches although the judge might dispense with these if the dispute merely relates to quantum • Mohinder will then give evidence. As his witness statement has been served this will stand as evidence in chief. His evidence will therefore be confined to cross examination on his symptoms and how they have progressed • We can reassure Mohinder that he will have his own advocate in court who will re examine him if there is anything that needs clarifying • If the court has given permission for the experts to appear at trial, they will then give their evidence. • Both advocates will conclude their cases with a closing speech summarising their arguments. As Mohinder is the claimant, his advocate will be the last to speak and so we will have the final word. • The judge will then give their view on how much the award should be in this case	**7**
		Question 3 Total:27 marks

Question Number	Suggested Points for Responses	Marks (Max)
4(a)	• The starting point is to calculate the date of deemed service • Here this would the second business day after the claim form and particulars were served • This would be 3rd June • The defendant then has 14 days to either serve their Defence or acknowledge service • This would take us to 17th June • If the defendant did acknowledge service, they would have an extra 14 days in which to serve proceedings • This would take us to 1st July	**6**
Question Number	**Suggested Points for Responses**	**Marks (Max)**
(b)	• It seems that here LDL are laying blame on the suppliers of the paint, Gilbert Rosslaw Limited • They would therefore seek to issue a Part 20 Additional Claim against Gilbert Rosslaw Limited • For a contribution/indemnity • Under CPR20.7 • In respect of any damages LDL has to pay to ECA • They could do this alongside their defence without the court's permission	**5**
Question Number	**Suggested Points for Responses**	**Marks (Max)**
(c)	• Here the parties would have to produce costs budgets using Precedent H (see CPR 3.13) • The budgets should set out the costs to date together with an estimate of future costs • As the claim seems to be worth in excess of £50,000 this should be filed with the court and exchanged with the other party/ies at least 21 days before the hearing • The parties would then be expected to discuss their respective budgets • And prepare a budget discussion report on Precedent R indicating • Which figures are agreed and which figures are disputed and • A summary of the grounds of dispute • This should be filed with the court at least 7 days before the hearing	**9**

Question Number	Suggested Points for Responses	Marks (Max)
4(d)	Response is appropriately structured • You could simply ask the defendant solicitors but it would be best to make a request for further information so that any response was verified by a statement of truth. • PD 18.1 indicates that the first step is to make a written request for such information indicating a reasonable date by which a response should be received • This should be in a separate document or letter which deals only with the Part 18 request • If no response is received within the time set out above, we should make an application to the court specifying what response we received, if any, from LDL	**6**
		Question 4 Total: 26 marks