

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2020

LEVEL 3 – UNIT 9 – CIVIL LITIGATION

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the January 2020 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers 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 by the suggested answers.

Candidates and learning centre tutors should review the suggested answers 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

There are still a substantial number of candidates who do not appear to understand the basics of civil litigation and have not considered previous examiner reports and exam papers.

Up-to-date knowledge is vital to ensure that candidates are fully aware of how the procedure changes and evolves. The vast majority of candidates identified such changes, however they then failed to develop their answers. Awareness of a change is not sufficient at this level to ensure candidates can answer a question, application is also required. Future candidates are strongly advised to look at past papers to understand both the style of questions and the extent of answers.

The Case Study materials are published at least six weeks in advance of the examination and candidates need to consider the areas which are likely to be examined. Even though the Case Study is obviously the starting point for revision, not all questions can be identified from it. To be successful the candidate will need to have a full understanding of civil litigation. An over-reliance on the Case Study in respect of the types of question that will be

asked is likely to limit the candidates' ability to achieve good marks in the exam.

Exam questions need to be read carefully to ensure that marks are maximised. Candidates need to understand what is required of them. Where candidates failed to maximise marks, it was mainly because they did not understand the procedure, rather than what the question was asking. A substantial minority of candidates were unable to develop their answers any further than a brief statement or sometimes a single sentence on the subject. The number of marks awarded for each question gives a good indication of how much content and detail a particular question requires.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1

(a) A substantial number of candidates were unable to explain what a disbursement was. There was a great deal of confusion on when payments were made and to whom. Most candidates understood that the payment would be made to someone other than the solicitor acting for the client.

(b) The majority of candidates were able to identify the correct times for service. Note there were a minority of candidates who confused this with the time period required for the Pre-Action Protocol for Debt Claims.

(c) Many candidates were able to obtain two marks on this question, focusing on the amount being claimed and the complexity of case. Candidates were not so confident on the other points contained in Part 26.8 CPR.

(d) This should have been a fairly straightforward question concerning the use of experts. Candidates were able to gain marks illustrating their knowledge of the expert's role. A minority of candidates clearly knew a great deal about the subject and wrote more than was required for the six marks allocated.

(e) Candidates generally did well on this question. Candidates who lacked understanding of costs and funding were not able to achieve good marks. A number of candidates wrote about how the case would be funded and subsequently gained no marks.

Question 2

(a) This question concerning a valid Part 36 Offer caused a number of issues. Candidates were required to comment on the letter provided in the Case Study as to its validity. Where candidates failed to gain marks, it was due to a failure to apply to the letter. Writing about what makes a Part 36 in general terms, rather than applying it to the actual letter, will only gain limited marks. Learning information by rote does not illustrate understanding.

(b) A limited number of candidates were very well informed and subsequently did very well on this question. A substantial minority could not grasp the concept that the Part 36 was sent by the Claimant and not the Defendant and subsequently gained very few marks.

(c) A question on standard directions that, on the whole, was well answered. A small minority of candidates confused this with the Pre-trial Checklist.

(d) Generally, this question was poorly done. It is vital that candidates understand the consequences of not complying with directions, as they are likely to have to deal with such a situation in practice.

Question 3

(a) Candidates were able to ascertain that the Pre-Action Protocol should be used but provided no reasoning as to why. Many candidates assumed that just because it was a debt claim that meant the protocol should be used, which is not the case.

(b) Another poorly done question, due to the majority of candidates focusing on the 'advantages' of using arbitration, rather than focusing on what the question required. Some candidates also compounded the problem by writing about everybody being required to enter into ADR and that they were contractually bound to do so. Such answers gained no marks.

(c) Candidates were, on the whole, able to differentiate between the types of cost question on the paper and so did very well on this question, with the majority gaining full marks. Again, where candidates struggled it was because they could not differentiate between costs and ways in which fees can be paid.

(d) Many candidates failed to identify the method to be adopted to gain the information and wrote a great deal about how they would enforce the judgment. That was not what the question required and subsequently those candidates gained no marks.

Question 4

(a) A minority of candidates failed to recognise that the Pre-Action Protocol for Low Value Personal Injury (Employers Liability and Public Liability) would be used. Others who performed less well mixed up the procedure with other protocols.

(b)(i) It is a concern that so many candidates were unable to correctly write the statement of truth and apply it to a situation. Some candidates for example put their own name, purporting to sign on behalf of their client – something which should never be done in relation to statements of case.

(b)(ii) Generally this was well done. Marks were not awarded for statements such as 'you could be sent to prison', this is not sufficient and is too vague.

(c) Candidates on the whole gained good marks on this question. Where candidates did less well, it was due to their failure to understand the litigation process as whole – in other words they confused at what stage the proceedings were.

Question 1

- (a) A disbursement is a payment made by a lawyer to a third party and then claimed back from the client e.g. payment for an expert report.
- (b) The answer will depend upon whether an Acknowledgement of Service is used. If an Acknowledgement of Service is not used the period for filing the Defence is 14 days, this will be extended to 28 days if the form is used.
- (c) In reaching the decision as to the appropriate track, the Court will take into account a number of points contained in Part 26.8 CPR. A starting point will be the financial value of the claim, as there are limits imposed for each track. The Court will also consider the nature of the remedy sought, the likely complexity of the case, the number of parties involved, the value of any counterclaim, as well as the amount of any oral evidence that will be required at the trial which will directly impact on the length of the trial. It should also be noted that in respect of the wider importance of precedent, the Court will also look at the importance of the claim to others who are not parties to the proceedings.
- (d) The appointment and use of experts is regulated by Part 35 CPR. There is a duty to co-operate under the Civil Procedure Rules (CPR) and a presumption that experts will be appointed from the Court panel with the Court's permission. The Court can control which experts give evidence and limit the issues that they should address. The first duty of the expert witness is to the Court. In Multi Track cases the parties may well have their own expert, however the court still encourages joint appointment where possible. 'Hot-tubbing' is the name for the court process of calling expert witnesses to give evidence and be cross-examined concurrently. It also involves the parties' experts engaging in discussion together while in the witness box. The parties can make written questions to the expert to clarify the report. The expert must be qualified in the area of their expertise.
- (e) Costs should be agreed if possible. Budgets should be filed and exchanged at the same time as Directions Questionnaires, or in other cases no less than 21 days before the Case Management Conference (CMC). The agreed budget discussion report must be filed no later than 7 days before the CMC. The budget will detail costs already incurred and estimate future costs by stage and type of work. Reasonable and proportionate budgets should be agreed by the parties. The Court can make a costs management order which would mean that the Court thereafter controls the budget in respect of recoverable costs.

Question 2

- (a) The letter will not be considered to be a valid Part 36 offer as it must:
- (i) make clear that it is made pursuant to Part 36 (which it does not);
 - (ii) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs if the offer is accepted (the letter refers to a 10 day period);
 - (iii) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue (which it does not);
 - (iv) state whether it takes into account any counterclaim (which it does not).
- (b) If the judgment against the defendant is at least as advantageous to the Claimant as the proposals contained in a claimant's Part 36 offer, then the Part 36 offer will not have been beaten by the defendant. In these circumstances, unless the court considers it unjust to do so, the court will order that the claimant is entitled to include:
- interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
 - costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;
 - indemnity basis is more generous than the standard basis;
 - interest on those costs at a rate not exceeding 10% above base rate; and
 - an additional amount up to 10% of the amount awarded.
- (c) This is a Fast Track case and consequently it is likely that Standard Directions will be adopted. The directions will deal with disclosure and inspection, the use of experts, the exchange of witness statements and preparation for the trial, which will include the Pre-Trial Checklist and setting down for trial. If appropriate, proceedings could be stayed while potential settlements are discussed.
- (d) The failure of a party to comply with a direction will entitle the other party to apply for an order to enforce compliance or for a sanction to be imposed. Such a failure will not lead to postponement of the trial unless the circumstances of the case are exceptional. Any postponement or adjournment would be ordered as a last resort. The sanctions that the Court can impose may deprive a party of the right to raise or contest an issue or to rely on evidence to which the direction relates. Where an issue cannot be dealt with at the trial, the Court may order a later trial with costs to be paid by the party in default.

Question 3

- (a) Peter Chimes is a sole trader and the Pre-Action Protocol for Debt Claims applies to any business claiming payment of a debt from an individual (including a sole trader).
- (b) Legal proceedings are a step of last resort and Alternative Dispute Resolution (ADR) is actively encouraged by the courts. It should be noted

that ADR is not compulsory, and an individual cannot be ordered by the court to undertake it, although the court may require some evidence that the parties have at least considered ADR. Where a party has declined ADR, then only when it can be shown that the declining party acted unreasonably in the circumstances are there likely to be any consequences. If the declining party wins the case, then the Court may disallow some or all of the costs awarded. If the declining party loses the case, they could also be penalised through indemnity costs.

- (c) Costs are at the discretion of the Court, there is no right to costs. In most cases, costs will follow the event and therefore costs will be granted to the winning party. At the conclusion of the trial, the judge will normally summarily assess the costs of the claim. Fast track costs are controlled through the proportionality test.
- (d) As the judgment debtor is an individual, the application is made on Form N316 to get an Order to Obtain Information. The court will draw up an order to attend for questioning. The judgment debtor must attend at the time, date and place given and must answer, under oath, the questions asked by the court officer. The judgment creditor can attend and ask questions of the judgment debtor's finances. Failure to do what the order states may result in imprisonment.

Question 4

- (a) The amount involved (£5,000) makes it suitable for the Fast Track and therefore the claim would go through the Pre-Action Protocol for Low Value Personal Injury (Employers Liability and Public Liability).

There are three stages to the procedure, with fixed costs being payable at each stage. Should the claim fall out of the protocol, the fixed costs regime will still be used.

Stage 1 is concerned with submitting the claim and the Defendant's liability response. At Stage 2 the parties exchange evidence which only relates to quantum. Stage 3 is concerned with court assessment of damages or the approval of a settlement.

- (b) (i) I believe that the facts stated in these particulars of claim are true.
Signed: Gavin Holiday
Dated: Date of Exam
- (ii) The Statement of Truth highlights the importance of telling the truth at court. Once the document has been signed the signatory is effectively confirming that the contents of the document are true. Where a statement is found to be untrue the maker can be held in contempt of court and subsequently committal proceedings may take place. In respect of the case itself, the court may exercise any of its powers under the rules and can for example, decide to impose cost sanctions or strike out the Statement of Case.
- (c) The information contained in the Listing Questionnaire (Pre-Trial Checklist), includes:
- ensuring that all directions have been complied with;
 - checking the availability of parties/witnesses;
 - and information concerning experts and legal representation;

- the trial itself is also considered, with a trial date being set;
- and the documents and fee checklist completed.