

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 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 September 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

Overall, candidate performance was better than in recent June sessions, which is to be commended. There are still a substantial number of candidates who do not understand the basics of civil litigation and have not considered previous examiner reports and exam papers.

The Case Study materials are sent out in advance of the examination and candidates need to consider the areas which are likely to be examined. The Case Study is the starting point to discern what types of question will come up in the examination, although not all questions can be discerned from it. To be successful, candidates will need to have a full understanding of civil litigation and an over reliance on the Case Study in respect of the types of question which will come up in the question paper is likely to lead to disappointment 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 as to the level of depth required.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

Fairly straightforward question, which most candidates were able to get the majority of the marks. Where candidates failed to gain marks, it was mainly due to not recognising the correct protocol or because they only had a limited knowledge of the protocol.

(b)

This area is regularly tested and candidates should be familiar with what is required. Most candidates gained full marks with a minority mixing up directions with the pre-trial checklist.

(c)

This was a more challenging question and this was reflected in the limited marks achieved by most candidates. The question concerned an interim application and it was clear from the responses of the majority of candidates that they had not made this connection – instead they focused on disclosure of documents or requesting the information from the Defendant, failing to recognise that the question specifically stated that they denied that such documentation existed. This question is fully within the specification, candidates need to read the question carefully and answer the that was question asked.

(d)

The majority of candidates gained the maximum marks on this question. Those who did not do particularly well on this question were ill prepared for the paper as a whole.

Question 2(a)

A relatively new area was considered in this question, however it was also considered in the January 2020 paper. It was good to see that candidates were able to discern from the pre-released materials that the protocol would apply in this situation. It seemed however, that their knowledge of the area was limited at best – where questions of this nature are signposted in the pre-released materials, it would be expected that candidates would have revised thoroughly to ensure that they had a good knowledge of the subject.

(b)

This question was again sign-posted in the pre-released materials, however not many candidates were able to get good marks. Candidates should have realised that firstly, the claim has been made, therefore writing to the Claimant was not appropriate, secondly, from the Case Study materials the Defendant had paid a deposit, which she would want returned.

(c)

A standard question from which the majority candidates were at least able to gain some marks. Those who did not confused the stage with Directions. Note that to get the mark candidates were required to state parties/witnesses and expert/legal representatives – many just put one.

(d)

This was a straightforward question. Candidates generally got reasonable marks. A small number of candidates seemed to confuse civil procedure with criminal procedure.

Question 3(a)

No issues with this question, most candidates gained full marks. This was to be expected as it had been fully signposted in the pre-released materials that the Limitation Act 1980 would be examined.

(b)

A good number of candidates were able to get high marks on this question on funding. Candidates were not awarded a mark if they did not specifically (and accurately) write the correct form of funding e.g. Damages Based Agreement.

(c)

A well done question on burden of proof. A minority of candidates thought it was a criminal case and therefore received no marks.

(d)

Most candidates were able to replicate the statement of truth.

Question 4(a)

Candidates need to read the question carefully – it clearly stated the method for issuing proceedings and candidates were expected to respond with through the court or online. A number of candidates did not know what issuing proceedings entailed.

(b)

The majority of candidates gained full marks on this question, where candidates failed to achieve marks, it was because they failed to mention 28 days and instead stated a further 14 days.

(c)

Candidates either knew it was Default Judgment, or they did not. Some confusion with Summary Judgment meant that candidates either did well or very poorly.

(d)

Most candidates performed well on this question.

(e)

The final question on costs budgets is an area of the syllabus that is regularly tested. Candidate responses were variable, with some excellent answers and others where it was clear that candidates had limited knowledge about how costs in a Multi-Track claim are treated.

SUGGESTED ANSWERS

LEVEL 3 - UNIT 9 – CIVIL LITIGATION

Question 1(a)

The amount involved (£24,000) 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)

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.

(c)

Under Part 31 (CPR 31.12 (1)), the court may make an order for specific disclosure or specific inspection. This would be an interim application and would involve an application notice specifying the order for the specific disclosure sought and will be supported by evidence. The grounds for the application must be set out in the application notice or in the evidence. The court will take into account all the circumstances of the case and, in particular, the overriding objective. The court will usually make such order as is necessary to ensure that obligations are properly complied with, subject always to proportionality.

(d)

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 and are to some extent fixed.

Question 2(a)

The Pre-Action Protocol for Debt Claims will apply where a business is claiming payment of a debt from an individual. In this case, Fay Burling is an individual, therefore the Protocol will apply. The letter does not contain the relevant information e.g. a breakdown of the outstanding debt together with interest and any other charges which have accrued, and it should provide 30 days to reply from the date of the letter. Sunny Days Caravan Park Ltd can issue, but the court has the power to consider breaches of the Protocol and impose sanctions.

(b)

As Fay Burling has paid a deposit of £3,000 to Sunny Days Caravan Park Ltd, she should enter a Defence and Counterclaim.

(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.

(d)

The usual procedure at trial is firstly, the Claimant will give an opening speech and the Claimant's witnesses will be called. They will be examined in chief, cross examined and re-examined. The Defendant's witnesses will then be called, and they will go through the same process. The Defendant will then give a closing speech, followed by the Claimant. The judge will then deliver his or her decision.

Question 3(a)

The Limitation Act 1980 requires potential Claimants to bring a personal injury claim within three years of the date on which the cause of action accrued or the date of knowledge (if later) of the person injured. Where the person injured is a minor, the limitation period will not start to run until the Claimant reaches eighteen. Therefore, as Rabbah Zaki is only 20 years of age he is within the limitation period for bringing a claim.

(b)

Rabbah Zaki could pay privately on a retainer basis. Qualified one-way costs shifting will alleviate the issue of having to pay the Defendants costs should the claim fail.

He could also enter into a Conditional Fee Arrangement (CFA), although we would then bear the risk of the costs if he is unsuccessful in the claim, we would be able to include a success fee if he was successful in the claim.

Another alternative could be a Damages Based Agreement (DBA) which is a privately funded arrangement between a representative and a client where the representative's agreed fee is 'contingent' upon the case being successful, therefore they are also known as contingency fees.

(c)

In civil claims the standard of proof ('the balance of probabilities'), is on the Claimant. Therefore, Rabbah Zaki must satisfy the burden of evidence.

(d)

I believe that the facts stated in these particulars of claim are true.

Rabbah Zaki

Date of exam

Question 4(a)

The options available are either to send the Claim through the post or online to the County Court Money Claims Centre.

(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)

Should the Defendant fail to reply in the time required then an application should be made for Default Judgment under Part 12 CPR. The application is made to the Court and there would be no need for a hearing on liability or quantum.

(d)

The appointment and use of experts is regulated by Part 35 CPR. There is a duty to co-operate under 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 must be exchanged and filed by all parties with directions questionnaires. The agreed budget discussion report must be filed no later than 7 days before the case management conference. 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 the Court thereafter controls the budget in respect of recoverable costs.