CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 2020

LEVEL 6 - UNIT 15 – 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

There were some pleasing aspects to the manner in which candidates performed on the paper. It was clear that Centres and candidates had worked hard on analysing the Case Study Materials. This meant that they had identified a number of the key issues and had prepared well for a number of the questions (see in particular question 4(c) which was answered well).

As a result of their preparation, candidates demonstrated a good knowledge of many of the core principles that were tested in the paper, particularly provisional damages, interim payments and enforcement. At the same time, candidates showed a good appreciation of the practical aspects of Civil Litigation. There was therefore some good advice for the client concerning their damages claim in question 1(c).

That being said, candidates didn't always apply their knowledge to the facts as well as they could have done, for example, relatively few candidates identified the actual date of deemed service and thus the date when the acknowledgement of service/defence was due in question 4(a).

There was also a certain inflexibility in the manner in which candidates answered the questions. Thus, for example, candidates spent a lot of time writing all they could about litigants in person in the second scenario when this was just one issue amongst many. Indeed, across the paper candidates tended to fix on one or two issues per question and write all they could about those issues. This led to some very detailed answers which unfortunately contained a lot of irrelevant material.

Candidates need to think carefully about what the question is asking for and tailor what they say to the specific points that are required and the facts of the case at hand. Thus, for example, in question 3(a) a lot of candidates focussed heavily on enforcement but ignored issues relating to remedies and costs which were also dealt with in the question.

This latter point did contribute to candidates doing less well generally in the questions which attracted more marks. These questions tended to deal with more than one topic and required candidates to consider different areas in conjunction with each other and to thus build up a more rounded view of the issues in the case (see question 4(a)).

That aside, although candidates tended to identify the right area of law they didn't always really capitalise on their knowledge and build up their answers in a way that would attract the most marks. After candidates identify the area, they should explain the law and then apply it in a systematic way. Thus, for example, specifying the dates in 4(a) (see above) was a key part of the process of identifying that the defendant was outside the time limit for serving their acknowledgement of service/defence.

There was one area of law that was dealt with in a rather disappointing way: the pre-action protocols – particularly the Practice Direction – Pre-Action Conduct and Protocols. Knowledge of the protocols and how they work is a key element to Civil Litigation as is reflected in the Unit Specification. This problem affected two questions in particular:

1(a) where most candidates did reasonably well but quite often didn't show an appreciation of where the protocol fitted with respect to the case as a whole; and

3(b) where candidates lost a lot of marks by not linking their answers more closely to the requirements of the Practice Direction – Pre-Action Conduct and Protocols.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

In general candidates dealt with this reasonably well. Most were able to identify that the claim would come out of the portal and so would be dealt with under the Personal Injury Protocol with the Claim Notification Form standing as the letter of claim. Candidates were less strong on the steps after the claim entered the Personal Injury Protocol.

Question 1(b)

This was dealt with reasonably well with a lot of candidates identifying the provisional damages point and the need to amend the particulars. Some of the attention to detail and the application to the facts was, however, not as strong as it could have been.

Question 1(c)

This question was one of those that was dealt with best on the paper. Thus, most candidates applied their knowledge of the principles relating to the recovery of damages and gave good advice on this issue. The interim payment was also dealt with well.

Question 2(a)

In contrast, this question was dealt with very poorly. Whilst most candidates referred to Part 14 and the admission they dealt rather superficially with the issues and so answered the question on the basis that judgment could be entered. This was not the case.

Candidates needed to identify what type of admission and had been made and what the position was under the CPR with respect to such an admission. There also needed to be more discussion of the potential application for summary judgment/strike out.

Question 2(b)(i)

This part of the Part 36 question was dealt with reasonably well. Most candidates identified the difficulty our client would have in accepting the offer now that the time limit had passed. There was, however, a fair bit of confusion about Part 36 along with a failure to deal with the issues in a systematic way.

Question 2(b)(ii)

This question was dealt with very poorly. Candidates didn't show sufficiently detailed knowledge of Part 36 and its application. Part 36 is, of course, a fundamentally important element to Civil Litigation and so candidates must have a strong grasp of its provisions.

Question 3(a)

The answers to this question were generally reasonable but slightly uneven. Candidates showed a good knowledge of enforcement as well as the practical issues concerning who to pursue and the potential viability of the claim. Candidates did, however, need to think more broadly given the phrasing of the question and so should have spent more time on remedies and costs than they did.

Question 3(b)

As mentioned above this question was something of a missed opportunity for many candidates. The better candidates demonstrated their knowledge of the Practice Direction – Pre-Action Conduct and Protocols and how that would have influenced the content of the letter. They then applied this knowledge to

the facts of the case when discussing the legal and evidential content of the letter.

That being said, a number of candidates failed to refer to the Practice Direction properly or at all. This meant that their description of what should be contained in the letter was often rather patchy and didn't consider all of the relevant points.

Question 4(a)

As with 3(a), candidates tended to give rather partial answers to this question and so didn't give a full analysis of the position concerning the defendant's claim. Most candidates did identify that the defendant was out of time and the point about him being a litigant in person. Some candidates could, however, have dealt with these issues more systematically in order to get higher marks.

The significance of the summary judgment application was also dealt with quite well. There was, however, little mention of the claimant's options and what her approach/tactics might be in this situation.

Question 4(b)

This question was generally handled well. Most candidates understood the points about the need for the court's permission and what might be required to obtain permission. The analysis of whether or not an expert would be allowed, was, however, much weaker with many candidates reaching the wrong conclusion.

Question 4(c)

This was the question on which candidates performed the best across the paper. This is a testament to the manner in which candidates prepared for the exam as this is not an issue that would be regularly dealt with. Nonetheless, most candidates showed a good knowledge of the law and how to apply it.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 15 – CIVIL LITIGATION

Question 1(a)

As the defendant's insurers have responded admitting primary liability but alleging contributory negligence, this will result in the claim leaving the portal. The claim will continue with the Pre-action Protocol for Personal Injury Claims given the value of the claim. In this circumstance, the CNF will be adopted as the letter before claim and the defendant has three months to respond. In due course, if the claim is not settled, proceedings will be commenced in the usual way under Part 7 with service of a claim form, particulars of claim and medical evidence and a schedule of loss.

Question 1(b)

Since the date of the initial medical report, Milan has suffered an epileptic seizure which is now considered likely to be attributable to the accident. There

is a risk of further episodes over the next ten years. Milan is entitled to general damages for the extent of his injuries sustained in the accident including the occurrence of the epileptic seizure. They can be evaluated in the usual way. However, to protect Milan's interests, a claim must be made for provisional damages pursuant to CPR 41. In an action for personal injuries, where there is a chance that at some time in the future the claimant will develop some serious disease or deterioration in his mental or physical condition, the court can award provisional damages. Here Milan has a 12% chance of having further epileptic seizures over the next 10 years and the court can award him damages on the assumption that that risk will not materialise. Milan will be entitled to apply for further damages at a future date if the risk does materialise. The claim must be pleaded in the particulars of claim and the disease or deterioration must be specified. The proceedings have been served and so Kempstons will need to amend Milan's particulars of claim under Part 17. This may only be done with the written consent of the defendant or with the permission of the court.

The defendant's solicitors should be asked to agree to this, as the report is prepared by a single joint expert and this may avoid the need for a hearing. The defendant may wish to serve an amended defence.

Question 1(c)

Milan seems to be under a misapprehension with regard to the recovery of loss of earnings. This needs to be corrected to be sure that the client has advice which is in his best interests. Milan assumes that he will be able to recover from the defendant in these proceedings his loss of earnings (£8,000) relating to his proposed career move. He cannot do so as to be recoverable the loss must be reasonably foreseeable as a consequence of the breach of duty. He may be able, for example, to claim for loss of earnings/loss of bonus between the accident date and his return to work in May. A voluntary change of employment (which is said to be advantageous to the claimant) and which is unconnected with the effects of the accident would not be considered to be reasonably foreseeable. Milan may also be advised that, if required, Kempstons could seek an interim payment on his behalf. A request could be made to the defendant for a voluntary interim payment but if they did not agree to this an application could be made to the court. The court may award such sum as is reasonable but will take into account the contributory negligence which is alleged. A request might be made of the defendant for a voluntary interim payment which may avoid the need for an application.

Question 2(a)

Part 14 does provide that an admission may be made as to the truth of the whole or any part of another party's case, and in such circumstances a claimant has a right to enter judgment. In the present circumstances, however, Milan is not in a position to make an application for judgment as the rules provide (CPR14.3.4) that in a negligence action the defendant must have admitted both that they were negligent, and that as a result of this the claimant suffered damage. An admission as to negligence only is not sufficient. Here, the defendant has admitted that there is a duty between the parties which is the first component of negligence. It was appropriate to make this admission to save costs by eliminating the need to call evidence to prove it and to remove it as an issue for deliberation. At the same time, whilst they have admitted that that duty has been breached to the extent alleged regarding the sufficiency of the warning given, they deny the cause nature

and extent of the injury loss and damage caused by that breach and have raised allegations that the claimant has caused or contributed to the accident or injury. Therefore, Milan cannot obtain judgment on an application under admission of liability. Milan may consider an application for summary judgment (Part 24) but would need to establish that the defendant has no real prospect of successfully defending the claim or under Part 3.4 that the defence discloses no reasonable grounds for defending the claim which on the facts seems unlikely to be unsuccessful.

Question 2(b)(i)

The original offer of £18,000 is no longer automatically available for Milan to accept. A Part 36 offer can be withdrawn or its terms changed provided the offeree has not served notice of acceptance; Milan has neither accepted or rejected the offer and, the relevant period for acceptance, which will have been a minimum of 21 days of service of the Part 36 offer, has automatically expired. Milan is not entitled simply to accept it but may seek the court's permission to do so, however, this is unlikely to be given as the offer has also now been changed to a less advantageous offer (£14,000) which Milan may accept or upon which he may wish to negotiate in the hope of being allowed to accept the original offer.

Question 2(b)(ii)

Although written notice of the change in the terms of the Part 36 offer has been served there is no new 21-day relevant period within which to decide whether to accept the offer as r36.9(5) is silent where the terms are varied to make the offer less advantageous referring only to where the terms are varied to make the offer more advantageous. The rationale is that having not accepted the greater sum (here £18,000), the claimant needs no extra time to consider whether to accept a lesser sum (here £14,000). Milan might seek to negotiate in the hope of being allowed to accept the original offer of £18,000 but it will be subject to reaching agreement with the defendant as to payment of costs. The less advantageous offer of £14,000 may be accepted now but it will be a late acceptance and subject to reaching agreement with the defendant as to payment of costs. The defendant may seek costs incurred between the date of expiry of the relevant period from the date of the original offer and the date of acceptance of the lower offer and which may be enforced against damages received.

Question 3(a)

Agatha's claim against SS is for pecuniary damages, that is, it is a money claim for an, as yet, unspecified sum. Other contractual remedies, such as specific performance, are not relevant on the facts as the contract has been performed albeit, as it now appears, in a substandard way. If Agatha is successful in her claim, SS will have to pay her such damages as are awarded or are agreed. Costs follow the event and the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but the court may make a different order as costs are discretionary and much depends on the conduct of the parties. Costs are likely to be agreed or summarily assessed and added to the judgment order. Any award for damages and costs is usually specified to be payable within a stated period or by a stated date. If the amount is not paid, Agatha will want to enforce the judgment against assets belonging to the partnership. There may not be any insurance in place to meet any damages and costs liability. The claim should

be brought against the partnership as this is not a limited company and any judgment can be enforced against partnership property or the assets of individual partners. A range of enforcement methods can be used such as execution against goods, a charging order against property, and winding up of the business. Therefore, financial checks should be made against the name of the partnership and against the individual partners to verify the position pre-issue as there is no point in pursuing litigation if there is no prospect of recovering the amounts that have been awarded. This can be done through enquiry agents and through a search of the CCJ register.

Question 3(b)

The Practice Direction – Pre-Action Conduct and Protocols applies to the claim as there is no specific protocol for Agatha's claim. In the spirit of the protocols, the court will expect the parties to have exchanged sufficient information to allow them to understand each other's position and to try to settle the issues without proceedings. The letter should provide concise details of the claim and a summary of the facts , for example, that SS are in breach of contract and/or negligent as they failed to fit the shower correctly as it leaked and caused damage to the wall and (consequently) the tiles, and failed to advise Agatha that the mirror tiles were not suitable for a ceiling unless the ceiling was reinforced or a dummy ceiling installed. The letter should also include what remedy Agatha wants from SS. Here this is money which cannot yet be quantified in full. An indication should also be given of how any amount is calculated. Here, this is likely to be the cost of repair, for which a quote has been received, and a new ceiling for which no quote is yet available but could be estimated. Key documents relevant to the issues in dispute should be disclosed e.g. the contract, the receipted invoice and quotations for repair work to be done. An offer of negotiation or some other form of ADR might be proposed to enable the parties to settle their dispute without commencing proceedings; this will be relevant to costs and would show that Agatha has conducted her claim reasonably which will be taken into account by the court should proceedings be issued. Agatha may wish to inform SS that proceedings will be commenced if a reply is not received within a reasonable time, e.g. 14 days, especially as SS have not been returning her calls. Agatha might suggest details of possible joint expert to comment on the work done and the cause of the shower leak and the use of the mirrors.

Question 4(a)

It is clear from the timeline that SS has not filed a defence within the requisite time period. The general rule is that the period for filing a defence is 14 days after service of the particulars of claim. The deemed date of service here would be the second business day after posting assuming first class post was used, i.e. 4 June 2020. The defendant has also not filed an acknowledgement of service. The acknowledgement must be filed with the court 14 days after service of the claim form i.e. by 18 June 2020. The court notifies the claimant and so here the defendant has not adopted the correct procedure. Ordinarily on those facts the claimant might apply for judgment in default under Part 12 as the conditions are satisfied as the relevant time limits for either acknowledging service or filing the defence have expired. However, Agatha may not obtain a default judgment as the defendant has made an application for summary judgment under Part 24 which has not been disposed of. Agatha should first of all consider the substance of the application and prepare to oppose it, if she believes that she can show that she has a real prospect of succeeding on the issue. It might be worthwhile her making a cross-

application for summary judgment on the grounds that the defendant has no real prospect of successfully defending the claim. This application could be heard at the same time as the defendant's application and save costs and court time. On the facts, however, neither party appears to have a strong argument on the issue about the discussion with regard to the mirror tiles. The issue does not appear to be one which is suitable for summary disposal as much may depend upon evidence at trial and who is believed. The court are also likely to treat the defendant more leniently as they are a litigant in person. Agatha can try to persuade the defendant to withdraw the application and, if this is not successful, she can simply oppose the application. If she is successful, then she is likely to be awarded the costs of the application in any event. Agatha might also consider a Part 36 offer to put the defendant at risk on costs. The sooner this is done, the greater the costs risk for the defendant. The client may also be advised to give some consideration to the offer of £5,000. Even though it is not a Part 36 offer and would not have the Part 36 costs consequences if she lost at trial, it may still be taken into account when costs are considered.

Question 4(b)

The starting point is that expert evidence shall be restricted to that which is reasonably required to resolve the proceedings and to help the court on matters within their expertise. This overrides any obligation to the person who has instructed them. No party may call an expert or put in evidence an expert's report without the court's permission. Although it is possible for the parties to ask for permission to obtain a report from a single joint expert, here the issue with regard to the leaking shower is no longer in dispute, and the remaining issue is not about the underlying suitability of the mirror tiles as the parties seem agreed that the mirror tiles are not suitable in all the circumstances. It seems to be a matter of fact as to what was and was not said and which form the basis of the contract and whether there was any misrepresentation by Shelley Showers. Therefore, it is unlikely that the court will agree that it needs assistance from an expert and evidence will then be confined to lay evidence i.e. witness statements and documentary evidence.

Question 4(c)

The general rule is that a hearing is to be in public (r.39.2). A hearing may not be held in private, irrespective of the parties' consent, unless the court decides that it must be held in private. In deciding whether to hold a hearing in private, the court must consider any duty to protect or have regard to a right to freedom of expression which may be affected, for example, matters relating to national security. None of the exceptions apply to this trial as Dev Shelley is keen only to minimise adverse publicity for his business. Therefore, the trial will be held in public.