CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2022

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 January 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

There were a number of pleasing aspects to the manner in which candidates dealt with this paper. Most candidates were well prepared and had a good knowledge of core elements of the curriculum. In addition, candidates applied their knowledge reasonably well and made some good practical points in their answers.

It was clear that some centres had considered the Case Study Materials in a thorough way and so identified some of the key topics in the paper and how those matters would be dealt with. This was particularly evident for questions 1(a) and 4(c) which were two out of the three questions which were dealt with best on the paper.

In question 1(a) nearly all candidates correctly identified the need for an application to set judgment aside. Most candidates then identified the right test and applied this by discussing the possible defence(s) that could be raised. The better candidates identified the deemed date of service and therefore the need to rely on CPR 13.3 rather than 13.2. Some candidates also correctly referred to the Denton criteria.

With respect to 4(c), there were a number of very strong answers. Most candidates showed a good knowledge of the different methods of enforcement and applied them well to the facts that were given in the Case Study Materials. This gave the strongest candidates the basis for a reasoned answer to the second part of the question, which was to identify which method would be most appropriate in this case.

Candidates did also show a good knowledge of the core elements of the curriculum. This was exemplified by their answers to question 2(b) which was the question in which candidates scored the highest marks. Here the majority of candidates were able to identify some, if not all, of the documents that would need to be sent to the court in order to commence court proceedings. In a similar vein, in 2(a) most candidates correctly stated that the case would fall out of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. The better candidates also showed a good knowledge of allocation and the standard directions on the Fast Track in question 4(a).

The level of knowledge and preparation meant that even on the most technically challenging questions, such as 3(a) and (b) candidates were able to identify the relevant issues even if they weren't able to fully exploit the knowledge that they had. Candidates were also able to make some good practical points which might not have addressed the main issue in the question but were nonetheless relevant and so gained them credit. For example, in question 4(a), when discussing the future progress in the case, some candidates discussed how making a part 36 or pursuing ADR might affect this.

In general terms, for candidates to gain higher marks they do need to think broadly about the question so that they touch on all the relevant points. Quite often candidates lost marks by not considering all of the relevant issues or not fully exploring the conclusions that they had reached.

In question 2(c), for example, quite a number of candidates discussed the need to amend the Particulars but did not refer to provisional damages and vice versa. In a similar manner, in 2(a) whilst most candidates noted that the claim would now be dealt with under the Pre-Action Protocol for Personal Injury Claims, they didn't go on to discuss the steps required under this protocol in a systematic way.

Indeed, as a whole, candidates needed to build up their answers in a more logical and systematic way in order to obtain higher marks. This would particularly have helped candidates in question 3(b) were some candidates touched on the question of the weight the judge would have given to the evidence but didn't go any further. What was needed was to identify the factors referred to in section 4 of the Civil Evidence Act 1995 and to run through them one by one commenting on how they applied to the case at hand.

More generally, such an approach would have helped candidates bring out all the relevant points even where if they didn't form the main topic of the answer. In question 1(a), for example, some candidates would have benefitted from discussing the deemed date of service, in 2(b) candidates could have outlined in more detail the reasons why the case would be issued in the County Court Money Claims Centre and in 4(c) more consideration could have been given to the response to the Defence and Counterclaim and the process of allocation.

That being said there were some candidates who weren't on the right lines in their answers or were confused on core elements of the curriculum. The most worrying aspect of this came in 2(b) where some candidates confused the process of tracking with the question of whether the case would be issued in the County Court or High Court. In addition, some candidates seemed to lack knowledge of the fixed cost regime in fast track trials (see question 4(b) and the manner in which courts would

deal with conflicting expert evidence (see question 1(b). Candidates need to ensure that they are conversant with all aspects of the relevant law/Civil Procedure Rules that are referred to in the Case Study Materials.

Aside from lack of knowledge, some candidates didn't properly read or analyse the questions. In question 3, for example, some candidates referred to wife of the witness dying when it was the witness himself, whilst in question 4(c), there were a number of references to a company rather than a partnership. Whilst, very few candidates incorrectly identified the main topic of the question, some candidates had clearly prepared an answer in advance on a particular topic and then simply copied that out even if it wasn't relevant to the question. A variant of this approach came for those candidates who identified the relevant topic but then wrote all they could on the topic without relating what they said to the question. Correct application of the law is an important element of the paper and candidates need to ensure what they say is relevant if they are achieve high marks.

Finally, some candidates seemed to be answering questions from previous papers. This meant they were simply writing out points which would have been credited for examinations that had taken place before but were not relevant here. Whilst candidates should consider previous papers as part of their preparation, this is so that they are familiar with the style of question and the best approach to answers. Although some core topics will appear on most papers, they might not do so in the same way as before and over the different examination sessions the full extent of the curriculum will be tested. As a result, the content of the question papers will change.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

Candidates performed well on this question. This was not surprising as a reasonable analysis of the Case Study Materials would have suggested that this was a topic that was likely to be examined. That being said, in order to gain higher marks, candidates had to apply their knowledge in a systematic way.

(b)

Although this wasn't one of the questions that candidates performed less well in, they should nonetheless probably have done better than they did. The question did not involve a great deal of application and instead to achieve higher marks candidates simply needed to show their knowledge of the rules relating to expert evidence. Although this is not an area that candidates have done well with over the years, it is nonetheless a core part of the curriculum and the practice of Civil Litigation.

Question 2(a)

This was one of the questions that candidates did well in, although again, they could perhaps have performed better than they did. Most candidates spotted the key initial point which was that the facts meant that the claim would have fallen out of the Low Value Protocol for Road Traffic Accidents. They were weaker, however, on what that would that would lead to with respect to the steps that would be taken under the Personal Injury Protocol.

2(b)

Unsurprisingly, this was by some way the best answered question on the paper. This was because the second half of the question essentially required candidates to simply list the documents to be sent to the court in order to start proceedings. This is something that all candidates should know.

That being said, some candidates performed less well on the first part of the question which dealt with the court in which proceedings should be started. Even the better candidates didn't fully discuss the factors which would justify their decision. More worryingly, amongst the less strong candidates there were quite a few who discussed tracking rather than the venue for proceedings. Again, this should be core knowledge for all candidates.

(c)

Whilst candidates performed reasonably well on this question, quite a number of them didn't provide sufficiently full answers to gain higher marks as they tended to focus on one aspect of the question rather than the question as whole. Some candidates therefore spotted the need for an amendment to the Particulars of Claim but did not refer to provisional damages and vice versa.

Question 3(a)

As noted earlier in this report, this was the most challenging of the questions and so candidates generally performed less well on this question although not unduly so. Most candidates correctly identified this as a question concerning hearsay and showed some knowledge of the requirements for adducing such evidence. Candidates did, however, lose marks as their answers weren't always as thorough as they could have been.

(b)

This was the second poorly answered paper on the question. In part this might have arisen from a lack of familiarity with the material as in order to answer the question, candidates had to apply the factors set out in section 4 of the Civil Evidence Act 1995. It is an important area of the law and is mentioned at two points in the Unit Specification (6.4 and 8.2). Candidates were also asked to consider the Civil Evidence Act 1995 as part of their preparation.

That being said, most candidates recognised that this question related to the weight that the court would attach to the evidence and some referred to the relevant factors. What lost candidates marks was that they didn't always apply this knowledge in a sufficiently systematic way.

Question 4(a)

This was one of the better answered questions, but this was perhaps not surprising as it tested a core part of the curriculum relating to allocation and directions. Candidates showed a reasonable knowledge of the key elements of the law, particularly the standard timetable on the fast track. Some candidates also made some good practical points about ADR and Part 36. As with other questions, candidates lost marks by not building up their answers in a logical way.

4(b)

This was the answer where candidates performed least well. This question dealt with a specific point in the rules concerning costs in a fast track trial. Candidates would therefore lose marks if they weren't aware of the specific point. This could, however, have been mitigated if candidates had referred to obvious practical points such as the court's normal attitude to awarding costs. It might also have been that candidates answered this question more quickly in order to get on to 4(c) where higher marks were available on a topic that most candidates would have known well.

(c)

This was one of the three best answered questions on the paper. Candidates showed a good knowledge of the relevant law and applied it well. This was perhaps not surprising as a reasonable consideration of the Case Study Materials would have indicated to the candidates that the topic might appear on the paper and what the relevant facts were that needed to be considered in the answer.

As a whole therefore, consideration of the individual sub questions reinforces the conclusion elsewhere in the report that this was an appropriate test of the candidates' knowledge and ability.

SUGGESTED POINTS FOR RESPONSE

LEVEL 6 – UNIT 15 – CIVIL LITIGATION

Question Number	Suggested Points for Responses	Max Marks
1(a)	• As judgment in default has been entered against our client, • we will have to apply to have this set aside under Part 13. • The facts establish that proceedings were issued and served on 6th December. • The date of deemed service would therefore be 8th December (see CPR 6. • Judgment was therefore entered correctly and so we will have to rely on rule 13.3 rather than 13.2 • We would therefore have to show that our client has a real prospect of successfully defending the case (see 13.3(1)(a) • Here it appears that the cause of the lost production was the flour supplied by the claimants and so we have an arguable defence • We should also address the promptness point in r13.3(2) and could argue that judgment was only entered on 6th January • And the matter has been dealt with as soon as JB returned to the country. • With regard to the Denton criteria we should also explain the reason for the delay was that JB was out of the country. • Credit for candidates who mention 'some other good reason' criterion provided for in 13.3(1)(b)	**12**
1(b)	• The court will normally expect the parties to have raised questions of the experts pursuant to CPR 35.6 and may have made a direction to that effect	**8**

	• It's quite possible that the parties might not resolve the issues and so the court would order a joint meeting of the experts • The court could also make directions as to the issues that the experts discuss at the meeting • At the end of the meeting the experts would be expected to produce a note outlining where they agree or disagree and the reasons for any disagreement • They should also detail any steps that might be taken to resolve the disagreement • Credit can also be given for mention the possibility of concurrent evidence ("hot tubbing")	
	Question 1 Total:	***20 marks***

Question Number	Suggested Points for Responses	Max Marks
2(a)	• The claim will have been taken under the Protocol for Low Value Personal Injury Claims in Road Accidents but will have exited the process when the insurers alleged contributory negligence (see paragraph 6.15 of the Protocol) • The matter will therefore proceed under the Pre Action Protocol for Personal Injury Claims • From paragraph 6.3 • This indicates that the insurers have three months in which to fully investigate the claim (if they need to do so) • Once they have conducted their investigations, they should give their full views on liability • which might well be more detailed than their response to the CNF • The parties should also deal with medical evidence by agreeing which expert to select • The claimant would then instruct the expert • As the defendant had accepted primary liability the claimant should disclose the medical report and schedule of special damages to the defendant insurance company • And give them 21 days to settle the claim before commencing proceedings. • Credit can also be given for reference to ADR and conducting a stocktake	**11**
2(b)	• We are told that the case is worth £10,000 • This would put it under the £50,000 threshold for personal injury claims • And so, we would issue in the County Court (see PD7A.2.2) • As this is a claim for money in the County Court it would go to County Court Money Claims Centre (see PD7A.4.1) • We would send the following documents to the court: – The Claim Form – The Particulars of Claim – The medical report – Schedule of losses and expenses – Credit for reference to the fee	**9**

2(c)	• The report suggests that there is a chance that the claimant will develop epilepsy in the future. • We would therefore make a claim for provisional damages under s51 County Courts Act 1984 • as he would suffer some serious deterioration in his physical condition as a result of the accident • Such a claim would have to be included in the Particulars of Claim – see PD16.4.4 • As the Particulars of Claim have been served • we will therefore have to amend them under CPR 17.1(2) • We would firstly send the amended Particulars and medical evidence to the defendant to seek their consent to the amendment. • If they did not agree to this, we would have to apply to the court for them to give permission for the amendment.	**10**
	Question 2 Total:	***30 marks***

Question Number	Suggested Points for Responses	Max Marks
3(a)	• As Mr Stech will not be able to attend the trial any evidence you produce from him will be hearsay evidence • Although S1(1) of the Civil Evidence Act 1995 indicates that hearsay evidence can't be excluded • You should nonetheless comply with the notice requirements • As set down in s2 of the Civil Evidence Act 1995 and Part 33 • In particular, under CPR 33.2 you would serve on the other side the witness statement that you have obtained from Mr Stech • At the same time as serving the witness statement, • You must inform the other side that Mr Stech won't be called to give oral evidence • You must also explain to them that he won't be attending trial as he has died. • Credit for saying that even if you don't do this, the statement would still be admissible but the court would attach less weight to it. • There might also be costs consequences under s2(4)(a) of the Civil Evidence Act if notice is not given	**11**
3(b)	• The court will have to assess the weight and reliability of the evidence • In keeping with s4 of the Civil Evidence Act 1995 • In particular, the judge would bear in mind that Mr Stech can't attend the trial as he has died • That the statement was made shortly after the accident • That it would appear that there is no multiple hearsay as he witnessed the accident himself • That no one had any motive to conceal anything • As Stech is an independent witness • And that in the circumstances there is no attempt to prevent proper evaluation of the evidence.	**10**

	• It is therefore likely that the court will attach some weight to the evidence though less than they might have done if Mr Stech had attended trial and been cross examined.	
	Question 3 Total:	***21 marks***

Question Number	Suggested Points for Responses	Max Marks
4(a)	• As we have just received the defence and counterclaim the case won't have been allocated as yet • We will therefore have to complete and return the directions questionnaire • We will have at least 28 days after it was sent to us to do this (See PD26.6) • The court will then allocate the case • This matter will probably go on to the fast track given its value and complexity • As a result, the court will most likely follow the standard timetable in PD 28.3.12 • Credit can be given to students who run through the details of the timetable • But the key point is that the trial should take place within 30 weeks of being allocated • This is the maximum time that the case will take as it could settle before then • Credit should therefore be given for reference to discussion of ADR or Part 36 to promote early settlement • Credit for reference to the need for us to prepare a defence to the counterclaim	**10**
4(b)	• As this is a fast track matter • We can reassure the clients that the costs of the trial are fixed • Under Table 9 in CPR 45.38 • They would come to £1650 • Although their actual costs would exceed this figure • But we would also advise the clients that if, as appears likely, they were successful at trial the fixed costs would be paid by Alex Charleston and Sons	**6**
4(c)	• We know that Alex Charleston and sons are a partnership • As a result, we can seek to enforce the debt against either the assets of the partnership or those of the individual partners • With respect to the partnership our clients have details of their bank account as they would have needed this to set up the standing order. • As the firm appears to be doing well, (see what Alex said during the row) we could therefore seek a third party debt order relating to the bank account (see Part 72) • This would allow us to recover the debt from the bank account we know about or any other account that the partnership has with the bank	**13**

	• If this doesn't cover the money claimed we have the option to proceed against the assets that we know that Alex holds in particular, we could seek an order to take control of his goods • This might allow us to possibly seize and sell his Rolls Royce • We also know that Alex owns a large house in Kempston • We could therefore get a charging order against this property • And then force a sale • Credit for reference for a statutory demand • Credit for a reasoned conclusion as to what the most appropriate methods might be	
	Question 4 Total:	***29 marks***