CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2019

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 January 2019 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

The release of the advance materials and the guidance given as to the likely areas of the syllabus to be tested continues to raise concerns that centres are attempting to second-guess specific and narrow questions and provide guidance to candidates which is unsuitable to respond effectively to the actual question asked. All questions should be anticipated – if it is on the syllabus it might, potentially, be assessed. It is not intended that any assumptions should be drawn that the elements of the CPR and SRA Code set out in the guidance is exhaustive of all areas of questioning on the paper. There is a risk in guessing as to the questions which might arise and the only way to address this and to prepare as fully as possible is to understand the syllabus and pay specific attention, where appropriate, to the rules mentioned.

This issue will continue to be addressed by stressing that candidates must fully understand the syllabus content as a whole and that revision, which prioritises only the rules within the advance case study materials, risks disadvantaging the candidate. Depth and breadth of understanding are expected at this level as well as the ability to respond to an open question which replicates the need to be able to respond to a client who seeks advice.

Very few candidates did not attempt all of the questions and most appeared to have plenty to write in the time available.

All candidates appear to have engaged with the progressive nature of the question paper which replicates the conduct of a litigation matter from inception through to resolution.

CANDIDATE PERFORMANCE FOR EACH QUESTION

General comments

This was a pleasingly attempted paper overall. As always, candidates appear more confident when repeating knowledge and perform less confidently when required to apply that knowledge and to consider appropriate steps to progress a claim or provide appropriate advice to a client. The topic of costs remains the least well understood and yet underpins all litigation. Even an awareness of the principles of the award and assessment of costs would assist the candidates in building confidence in this area.

Open questions are intended to assess higher skills and replicate professional practice. Considered and sensible advice in the client's best interests is what is sought from the answer. On this occasion, most candidates had thought through what the question was asking and were able to respond well. It was particularly pleasing to see that the drafting question was well-attempted as it required recognition of the relevant issues and points which might form the particulars of negligence against the defendant.

As expected, there was a full spectrum of responses from very well done to fair attempts albeit not at pass standard. All candidates, even if not successful, should be credited on their efforts to respond to a Level 6 paper. As always, it was a pleasure to see how well the strongest candidates responded and gave confident and polished answers showing contextual awareness and understanding. Weaker candidates rely overly on process and rules which, whilst clearly having a place, are no substitute for tailored advice.

Question 1(a)

This question expected candidates to address, with reference to the SRA code of conduct, the issue of confidentiality. Those candidates who had carefully reviewed the SRA Code of Conduct performed best in answering this question and were able to respond to the specific issues of professional conduct raised. It was good to see how well candidates understood the duty which is imposed and recognised that the duty had been breached. Regulatory awareness is fundamental to professional practice and it is rewarding to see that candidates have taken advantage of the advance indication of those areas of the Code which are likely to be of specific assistance although, as ever, this is no substitute for a thorough understanding of the Code.

Question 1 (b)

This question tested candidate's ability to recognise when default judgment might be obtained and how default judgment might be set aside and what the court will take into account. Where appropriate, candidates were cross-credited in their responses to parts 1(b) and 1 (c)(i) and 1(c)(ii) so that

maximum credit could be achieved. Overall this was well done and clearly had an insight into what should be established.

1(c)(i)

This question required candidates to demonstrate that they understood what might be of relevance in making application to set aside judgment. It was encouraging that, for an open question, many candidates recognised the key points to be included in the witness statement.

1(c)(ii)

This question was less well done. It required candidates to make assumptions as to the grounds upon which a claimant might oppose the application to be made to set aside judgment. Stronger candidates made correct assumptions and readily accessed the marks available whereas weaker candidates found it difficult to anticipate in the required way.

2(a)

Most candidates made a very good effort to consider the particulars of negligence which might be relevant here. Candidates were credited even where the particulars were not presented as if contained within the particulars of claim.

2(b)

Despite very clear markers within the materials, including that the matter was outside the scope of the relevant portal, some candidates addressed only the likelihood of the claim being allocated to fast track. Knowledge of the relevant rule would have assisted candidates but understanding of its application was key here.

2(c)

Candidates attempted this question reasonably well and the strongest candidates understood that there was issue of both primary liability and causation to consider dependent on factual and medical evidence. Most appreciated and reasoned that Calum would be held primarily liable and the best understood that there might nonetheless have been some criticism of Sasha' speed and her distracted behaviour. The majority of candidates discussed that the failure to wear the seatbelt was causative to some degree of the injuries sustained and applied relevant case law.

2(d)

Following on from the consideration required in 2(c), most candidates recognised that Sasha would be best advised to make a Part 36 offer and the advantages to her of having made a claimant Part 36 offer should it be accepted or should she recover an amount at least as advantageous at trial. A few considered that she should discontinue her claim which was clearly poor advice.

3(a)

This question required a careful consideration of the duty relating to standard disclosure and consideration of whether the conviction might be relevant. Candidates were cross-credited between questions 3(a) and 3(b) for discussion of similar fact evidence and the s.11 Civil Evidence Act 1968. Most candidates were able to identify the rules relating to the continuing duty of disclosure and privilege and to reason a conclusion that Sasha might be able to argue that the conviction was not relevant to the issues.

3(b)

This question required consideration of the s.11 Civil Evidence Act 1968 specifically that the conviction might be regarded as a subsisting conviction relevant to the issues but that it was an arguable point.

3(c)

CPR39 was the focus of this question and most candidates had clearly read the rule and were therefore able to recognise that the trial might proceed in the absence of a party hence showing the need to maintain close contact with the client to ensure attendance. Most understood that the claimant would be at risk of her claim being struck out but that she might have to apply for the judgment to be set aside provided certain grounds were met. Some candidates confused such application with an application to have default judgement set aside.

4(a)

The crux of this question and the candidates' success in responding to it depended on their appreciation that Dennis' business was a limited company. The best candidates recognised this and were able to state that Dennis would not personally be liable for the judgment debt and provide appropriate reassurance to him. Generally, methods of enforcement were well considered and appropriate, and it was pleasing that many candidates considered that a sensible recommendation would be to endeavour to secure an agreement with the claimants to provide for payment by instalments rather than immediately apply for a stay of execution.

4(b)

This was least well done of all of the questions. The best candidates were able to separate the answer into the step to be taken and the reason for that step. Very few candidates appreciated that the bill had been served late or that it would be sensible to make an offer in respect of costs (which most recognised to be overstated) and to follow that with an interim payment in respect of costs in order to protect the client's interests and to minimise interest. Candidates were cross-credited across 4(b) and 4 (c) to maximise their possible score.

4(c)

This was better attempted than 4(b) as candidates were able to consider the relevant factors and suggest how the conduct of the matter fell short of that expected by the court. The best candidates used examples from the case study to apply the relevant principles relating to the assessment of costs and many grasped that the last costs budget was relevant and that it was more than 20% greater.

SUGGESTED ANSWERS

JANUARY 2019

LEVEL 6 – UNIT 15 - CIVIL LITIGATION

Question 1(a)

AH's conduct has not been professional as he has breached client confidentiality by divulging information about another client to Heath College.

This is contrary to chapter 4 Outcome 4.1. AH should keep the affairs of clients confidential unless disclosure is required or permitted by law or the client consents. On the facts, Seamus wants things kept private and confidential. Andrew Haynes' comments about Digby Chapman's matter appear not to fall into any of the exceptions and were unjustified. Moreover, it is a breach of Principle 2 to act with integrity and Principle 6 to behave in a way that maintains the trust the public places in you and in the provision of legal services as the client may well think that Haynes will gossip about their affairs to others.

1(b)

As a judgment in default of acknowledgment has been entered, an application must be made for Judgment in Default to be set aside. Judgment cannot be set aside as of right and the court has a discretion (CPR 13.3(1)). It will be necessary to show that Heath College has a real prospect of successfully defending the claim or that there is some other good reason why it should be set aside or that Heath College should be allowed to defend the claim. The application must be made promptly as soon as the proceedings issue noticed - it will be here if actioned promptly. The court will also consider that this is an application for relief from sanction and apply the relevant case management principles (Denton v TH White (2014)). Although the claimant can be asked in the circumstances whether they consent to setting aside, this seems unlikely and would waste time and so be contrary to the overriding objective.

1(c)(i)

In order to apply to have judgement set aside, Heath College must show that it has more than a "merely arguable" case but a real prospect of successfully defending the claim. Real means real and not fanciful. Heath College should state that the materials were not of good quality and not comparable to other material which they had seen, that Imagine Images did nothing to resolve the issues and that the amount of the judgment is wrong as the invoice was for a larger sum than agreed as the 10% discount was not applied. If this is not

enough, the court may consider that there is nonetheless a good reason why Heath College should be allowed to defend the claim e.g. that Imagine Images do not appear to have complied with the Pre-action Protocol For Debt Claims or otherwise as no letter of claim appears to have been sent given the timescales. It is also relevant to state that the proceedings were not willingly ignored but simply overlooked and it might be stated that, if the judgment is allowed to stand, it may result in greater prejudice to the defendant if it cannot defend the claim.

1(c)(ii)

Imagine Images is likely to oppose the application as the debt remains outstanding and they might argue that Heath College made little attempt to resolve the issue/contact the company other than in the initial stages and ignored reminder letters regarding the invoices and the letter saying that the matter was being referred to the debt collection department. Imagine Images might also argue that it correctly served the proceedings and that the judgment was correctly entered. It could also make use of the fact that Heath College made use of the welcome packs in any event. Although Imagine Images may refer to the prejudice caused to it if judgment is set aside, such as delay, cost or uncertainty, these are weak arguments on the facts.

Question 2(a)

The collision was caused by the negligence of Caleb Robertson.

PARTICULARS OF NEGLIGENCE

The Defendant was negligent in that he:

- drove his vehicle at a speed that was too fast in the circumstances;
- failed to keep any or any proper lookout or to observe or to heed the presence of the claimant's vehicle;
- failed to stop, turn swerve or otherwise manage and control his vehicle so as to avoid the collision;
- overtook a vehicle when it was unsafe to do so;
- drove on the wrong side of the road;
- drove into the path of oncoming traffic;
- drove into collision with the claimant's vehicle;
- overtook on a bend;
- failed to give an audible warning of his approach.

2(b)

The court is likely to allocate the matter to the multi-track. The value of the claim by the description of the injuries sustained (that she has only just returned to work, has required plastic surgery, and is at an employment disadvantage) and that it is described as not an RTA protocol matter indicate a value in excess of £25,000. However, the value is not the only relevant factor as the court will take into account a range of factors when deciding to which track the matter should be allocated. Most relevant here are complexity of facts, law, medical evidence and need for oral evidence. The trial may also be over 1-day if multiple medical experts are required to give oral evidence which would also indicate that multi track is the most suitable track.

2(c)

Sasha must be given advice which is in her best interests. The medical evidence goes to causation and quantum. The evidence is addressed to the court and will be accepted by the judge as opinion evidence on the cause nature and extent of the injuries. The factual evidence goes to liability for the cause of the accident. There are several reasons to be concerned that Sasha will struggle to establish liability and causation at trial. The medical evidence weakens her case on the cause of her injuries and in any event her damages will be reduced by at least 25% for failure to wear a seat belt (Froom v Butcher (1976)). Nonetheless she would still have sustained some injury but failure to wear a seatbelt did not cause the accident. However, even in this respect Sasha is on weak ground because she may be found to have been wearing inappropriate footwear (sandal stuck between the pedals) and she was driving too fast as she was late for work and may have braked too heavily. It is also possible that she was not concentrating on the road as she was concerned about her sandal. Overall the risk of proceedings to trial is significant and Sasha is at risk of losing her case.

(d)

In order to protect her interests, Sasha should aim to negotiate a settlement of her claim and it would help to make a Part 36 offer. This must be very carefully pitched to put the defendant at risk on costs, so counsel's advice might be sought. An offer could be made in respect of both liability and quantum. The general rule is that, if the court decides to make an order about costs, the unsuccessful party will be ordered to pay the costs of the successful party; but the court may make a different order. If the claimant makes a Part 36 offer which is not accepted by the defendant and the claimant at trial recovers an amount which is at least as advantageous as the offer made the court must, unless it considers it unjust to do so, order that the claimant is entitled to interest on the sum awarded, at a rate not exceeding 10% above base rate starting with the date on which the relevant period expired; costs on the indemnity basis from the date on which the relevant period expired; interest on those costs at a rate not exceeding 10% above base rate; and an additional amount (likely to be 10% of the amount awarded).

Question 3(a)

An order for standard disclosure will have been made which requires the parties to disclose the documents on which he relies, and which adversely affect his case or the opponent's case or supports the opponent's case. Therefore, the conviction, although it is a potentially damaging document, may need to be disclosed if it is shown to be relevant. The document is in Sasha's control and is not privileged. The fact that disclosure has already taken place is no bar as disclosure is a continuing duty. However, Sasha could argue that it is not relevant not least because it was after the incident date and is not relevant to the incident facts and that she may withhold disclosure. She should write to the defendant's solicitors resisting disclosure on the grounds that it is not relevant and asking them to state why they consider it to be relevant to which facts.

3(b)

Although the conviction does not arise from the accident involving Caleb, it may be possible to rely relied upon as a subsisting conviction under s11 CEA 1968 if it is relevant to the issues arising in her claim. This is concerning because it will allow the defendant to suggest that Sasha frequently drove without due care and attention which is exacerbated by the fact that she received an FPN for driving without a seatbelt.

(c)

A trial may proceed in the absence of any of the parties. However, as Sasha is the claimant and has not attended the trial, the court is likely to strike out the claim unless it receives an explanation for her non-attendance so hasty efforts should be made to contact Sasha. Even if prepared to adjourn the hearing, the court is likely, in any event, to make a wasted costs order in favour of the inconvenienced party to ensure recovery. If it transpires that Sasha had a good excuse an application can be made to restore the proceedings. Such application must be made promptly but she must show a reasonable prospect of success at a reconvened trial which is in some doubt hence the importance of ensuring good preparation in the run up to trial and ensuring the attendance of the parties/witnesses.

Question 4(a)

For the purposes of enforcement, it is irrelevant that Dennis has a house and a car as his business is a limited company and he is not personally liable for the judgment debt. However, he risks the possibility that assets of the company will be enforced against by the judgment creditor e.g. warrant of control. He also risks a winding up petition being presented. It would be sensible to suggest writing to the claimant to seek time to pay/vary the order so that sum is paid by instalments to address Dennis's immediate concern an application for a stay of execution should be made. This would allow him to vary the date of payment or to ask for the judgment sum to be paid in instalments. He should be warned that judgment rate interest will be applied to the debt after the 14 days.

(b)

Step - Note and record date for points of dispute i.e.21 days after the date of service of the notice of commencement and ensure points of dispute filed by that date.
Reason/s - if points of dispute are not served within the timescale, client will not be able to take part in detailed assessment proceedings without the court's permission and the claimant will be able to apply for a default costs certificate entitling them to costs as drawn on the bill. Also, there is here a prime point of dispute in that the receiving party is out of time to serve the bill and so will be sanctioned.
Step - Make an offer under Part 47.20 and Part 36.
Reason – if the offer is not accepted and the claimant receives less than the offer the claimant may be penalised in costs.
Step - Make an interim payment on account of costs.
Reason – this would support the offer made under CPR 47.20 and Part 36 to settle costs and would limit the amount of interest payable on outstanding costs.
Step –instruct costs draftsperson

Reason – a costs draftsperson has specialist expertise to maximise opportunity to restrict costs recovery.

4(c)

CPR Part 44.4 sets out the factors which the court will take into account in deciding costs which must be proportionately and reasonably incurred and proportionate and reasonable in amount. Here, the costs can be argued to be disproportionate and unreasonably incurred contrasted with the actual amount recovered against an unrealistic claim. The conduct of all the parties including conduct before, as well as during, the proceedings and efforts made, if any, before and during the proceedings in order to try to resolve the dispute will also be considered. The claimants appear to have made no effort to try to resolve the dispute either by considering ADR or by proposing any settlement offers and may be penalised in costs especially if the solicitors also struggled to get instructions. The bill has been served late and so some costs may be disallowed. The bill was not served informally to allow the parties a chance to negotiate. The costs order would have been to proceed to detailed assessment if agreement not reached. The last costs budget is relevant, and an explanation is required as the amount now claimed is more than 20% greater.