

**CHIEF EXAMINER COMMENTS WITH
SUGGESTED ANSWERS**

JANUARY 2021

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 2021 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

On the whole, candidates did better than in previous January sessions. 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. It essential that candidates are prepared for the examination, especially as there is great deal to be gained from the Case Study Materials in respect of potential questions that may come up in the examination.

It should of course be noted that the Case Study Materials is only the starting point, as not all questions can be discerned from it. To be successful the candidate will need to have a full understanding of civil litigation and an over reliance on the Case Study Materials in respect of the types of question which will come up in the exam paper is likely to mean that the candidate has little or no knowledge of particular areas of civil litigation. In a number of cases, in this examination, candidates produced an excellent answer to a question which was signposted in the examination, only to write a sentence (or sometimes nothing at all) for a question which they had not prepared for.

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. An example of where this happened was where candidates were asked to consider the procedure for making an application for Summary Judgment. Here a large number of candidates instead wrote about the potential outcomes and gained few, if any marks.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

A very straightforward question which should have been signposted by the Case Study Materials. Most candidates were able to recognise the appropriate protocol and the procedure to be adopted. A limiting consideration of some candidates was not recognising the correct protocol or only having a cursory knowledge of it.

(b)

The majority of candidates gained full marks on this question, where the candidate only gained a single mark, it was because they failed to mention 28 days and instead stated a further 14 days. A very small number of candidates mentioned 30 days, confusing the question with the protocol considered under 1(a).

(c)

A potential six marks were available for this question, however very few candidates attained full marks. Candidates must link the number of marks available to the number of points to be made. The majority of candidates were able to state that it would be a Part 18 Request and would be in the form of a letter sent to the Defendant. Unfortunately, most candidates did not go further and consider the layout of the letter and in some cases, candidates thought that the application should be made directly to the court in the first instance. No marks were awarded in such cases.

(d)

Sometimes merely looking through previous exam papers will not be enough to answer a similar question in the actual examination. This question is 'standard' in terms of the issue of costs in a Fast-Track matter, apart from the fact that it was a personal injury case where the Claimant was unsuccessful and as such the QOCS will apply. Only a minority of candidates recognised this and therefore only a minority of candidates gained good marks on this question.

Question 2(a)

Generally, a well done question, with candidates being able to show their knowledge of the various different funding opportunities available to the client. In respect of the types of funding options, it should be stressed that there is no such thing as a 'Damage' Based Agreement, it is 'Damages' Based Agreement and no mark was given for the incorrect naming of the same.

2(b)

This question was not very well answered by some candidates. Most only gained one or two marks, being able to state that a witness summons would be required. Unfortunately, that seemed to be the extent of their knowledge. For example, they were not aware that in the County Court a failure to comply would result in a fine.

(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 and therefore were not awarded a mark.

Question 3(a)

Most candidates were able to get at least half marks for this question. Where there was a failure to gain more marks, it was due to not applying it to the situation e.g. would be quicker (1 mark), so would get his compensation quicker (1 mark).

(b)

Most candidates were able to gain a couple of marks on this question, however, were unable to gain the full marks available. This was mainly due to a failure to have a depth in knowledge of this area. A small number of candidates thought that the court could order parties to engage in ADR, which is incorrect.

(c)

A standard question from which the majority of candidates were at least able to gain some marks. Those who did not, confused the stage with Listing Questionnaires.

(d)

Most candidates only had a 'working knowledge' of what happens if there is a failure to comply with Directions and therefore gained very few marks. In practice this is very important and consequently more consideration should be given in teaching to ensure understanding.

Question 4(a)

There are a very limited number of opportunities for drafting in this paper and the Defence provides such an opportunity. There were some good examples produced by some candidates and there were some very poor answers as well. Practice is very important to ensure drafting skills are up to an appropriate standard.

4(b)

Candidates really must read the question – it clearly states the process for making an application for Summary Judgment – not the potential outcomes of the hearing. No marks were given for the outcomes and therefore a substantial minority of candidates gained very few marks.

(c)

This question is 'standard' in terms of the issue of costs in the Multi Track and the majority of candidates did well. Where some candidates failed to gain marks was due to either confusing costs with funding or considering detailed assessment of costs – neither of which were relevant.

SUGGESTED ANSWERS

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Question 1

- (a) The amount involved (£11,000) 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 and only relates to quantum. Stage 3 is concerned with court assessment of damages or the approval of a settlement.
- (b) The Defendant will have 14 days in which to file a Defence. If an Acknowledgment of Service is filed, 28 days in total will be allowed to file the Defence.
- (c) The Claimant should make a Part 18 Request for Further Information. This is a formal request made directly to the Defendant in this case, in the form of a letter. The receiving party should reply, answering the points raised by the other party. Both the letter and the reply should identify themselves as a Part 18 Request or Reply. The Reply should only deal with matters raised in the Request and it may take the form of an answer or an objection. If the responses are not satisfactory, or there is no reply, then an application for a court order can be made without the need for a court hearing.
- (d) Costs are always at the discretion of the Court, there is no right to costs even if you win. In most cases costs will follow the event and, therefore, costs will be granted to the winning party. This will not be the case here due to the effect of qualified one-way costs shifting and the losing claimant will not have to pay the defendants costs, as there is no evidence that the claimant was fundamentally dishonest. Note the claimant may still have to pay their own costs, depending on funding option.

Question 2

- (a) Peter Armitage 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.

Other alternatives could be, for example, 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, hence they are also known as contingency fees. It is possible that Peter may have some form of Before the Event insurance as he is self-employed.

- (b) To ensure that the witness attends, we would apply for a witness summons on form N20. Money must be paid to cover travelling expenses to and from court and includes an amount by way of compensation for loss of time. If the witness does not comply with this summons, they will be liable, in county court proceedings, to a fine. In the High Court, disobedience of a witness summons is a contempt of court and the witness may be fined or imprisoned for contempt. They may also be liable to pay any wasted costs that arise because of non-compliance.
- (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 and 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.

Question 3

- (a) There are a number of advantages in Harry Bridges making use of arbitration rather than going to court. Firstly, arbitration is considerably quicker than going to court, meaning that Harry will receive compensation much more quickly. In the present case, it is also likely to be considerably cheaper, as the arbitration scheme is run by a trade body and it is likely that any fees associated with the process (if any), will be less than those required by the court.
- (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) 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 4

- (a) Defence:

1. The Defendant admits that they contracted with the Claimant for the delivery of two rare matching James Purdey & Sons 12 bore shotguns.
2. The Defendant denies that the said guns were delivered on the 7 August 2020 but were in fact delivered on the 9 August 2020.
3. The Defendant denies that the said guns were of satisfactory quality and that in the circumstances it was reasonable to reject delivery.
4. The guns have been available since 25 August 2020 to be collected by the Claimant.
5. By reason of the matters aforesaid the Claimant is not entitled to the sum claimed.

- (b) An application for summary judgment requires an Application Notice together with a statement in support. The statement may well be a witness statement or the Statements of Case could be relied on. This must be served at least 14 days before the summary judgment hearing on the Claimant who can, if they wish, produce a statement which should be received no less than 7 days before the hearing. The Applicant can serve a further statement if they wish, 3 days before the hearing. The hearing is before a District Judge.

- (c) Costs should be agreed if possible. Budgets must be exchanged and filed by all parties at the time of requesting directions. 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 that the Court thereafter controls the budget in respect of recoverable costs.