

**CHIEF EXAMINER COMMENTS WITH
SUGGESTED POINTS FOR RESPONSES**

JANUARY 2021

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 2021 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

In general, candidates had a much better approach to this paper than was the case in September 2020.

In particular, it was clear that the better candidates and centres had used the advanced materials to good effect. This was particularly the case with question 3 where candidates had clearly prepared for a question on interim injunctions and were able to produce strong answers showing good knowledge of the law and how to apply it.

At the same time, candidates took a more focussed approach to answering the questions. This meant there were far fewer answers where candidates wrote all they knew about a particular subject and many more which dealt with the points that the question was asking for.

That being said, there were a couple of disappointing aspects to the answers that candidates gave. Firstly, there were a noticeable minority of candidates who referred to the old version of the SRA Code of Conduct. As the new Code of Conduct has been in place since November 2019 all centres and candidates should be aware of it.

Secondly, the question that was dealt with least well was question 4(c) relating to expert evidence. This dealt with a mainstream area of civil litigation

which is covered explicitly at point 6.4 on the Unit Specification. Centres and candidates should anticipate that questions can arise on all aspects of the Unit Specification particularly in areas which would be encountered on a regular basis in practice.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

This question was dealt with reasonably well as most candidates showed a good knowledge of the potential methods of funding. Candidates should, however, tailor their answers to the facts. Several answers made reference to trade union funding which was clearly inappropriate here. In addition, not all candidates mentioned the relevant elements of the SRA Principles and Code of Conduct

(b)

This question was dealt with very well with the majority of candidates explaining the rules and applying them correctly to the facts. Quite a few candidates got most of the points but did not mention the actual date by which the Particulars should be served.

(c)

This was a more difficult and open-ended question. Most candidates did, however, get the basic legal points and showed some familiarity with the structure of a particulars of claim.

There were, however, some basic errors with respect to the legal requirements. Quite a few candidates indicated that the claim should go into the High Court but then referred to the County Court Act when claiming interest. There were also a number who quoted the old version of the statement of truth.

Question 2(a)

This was a question that was dealt with well. Most candidates showed a good knowledge of the tracks and where a case would be placed on them. Candidates were less strong on where the claim would be issued but overall, there were no great concerns arising from this question.

(b)

This was another question which was handled appropriately. Most candidates recognised the need for a specific disclosure application. Candidates could, however, have gained more marks by not going straight to the specific disclosure and instead discussing the possibility of making a request first and the impact on costs of such a request not being complied with.

2(c)

This question was generally dealt with well as candidates showed a good knowledge of the procedure at trial. That being said not all candidates recognised that witness statements stand as evidence in chief.

(d)

This question was dealt with appropriately but again this was an area where candidates could have made more of their knowledge. It was relevant here to discuss finding out more about the debtor's financial position. Candidates could also have considered more of the possible options for enforcement.

Question 3(a)

As noted above, this question was dealt with very well as most candidates identified the need for an interim injunction and what that meant. Candidates were less strong on the procedural requirements but not unduly so.

(b)

This was a question which tended to divide the candidates. Those who had prepared well for the assessment scored very highly on this question as they went through the limbs of the American Cyanamid test and applied them clearly to the facts.

Candidates who had prepare less well gave very general answers and did not focus on the key arguments to make in favour of granting an injunction.

Question 4(a)

This was a practical question which was dealt with reasonably well. The better candidates considered both the practical points concerning the gathering of evidence and how this case might be dealt with under the protocol.

The less strong answers tended to focus on either evidence gathering or the protocol rather than both. These answers also needed to be more systematic in their approach.

(b)

This was one of the better answered questions on the paper. Most candidates clearly understood their duty to the court and how this might affect the manner in which they dealt with the client in this situation. The only disappointing aspect of this was the references to the old version of the SRA Code of Conduct – see above.

(c)

As noted above, this was by some way the question that was dealt with least well on the paper. Most candidates made some reference to asking questions of the expert but showed little knowledge of how this issue might be dealt with beyond this.

4(d)

Overall, this question was dealt with well. Most candidates did show a knowledge of Part 36 and the consequences of a claimant's offer. That being said, some answers didn't cover all the relevant consequences and some answers were not as clear on this as they could have been.

SUGGESTED POINTS FOR RESPONSES

LEVEL 6 - UNIT 15 - CIVIL LITIGATION

The purpose of this document 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 Points for Responses 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.

Candidates and learning centre tutors should review this document in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate's performance in the examination.

Question Number	Suggested Points for Responses	Marks (Max)
Q1a	<p>Explanation of the following</p> <ul style="list-style-type: none">• Unless the client has legal expenses cover in place, or after the event insurance in place, they are likely to be privately paying.• As a privately paying client, the costs of the litigation will have to be funded by the client during the course of the case, with initial money on account, and regular payments of monies throughout the case.• Pursuant to SRA Principle 7, there is a duty to act in the best interests of the client, which involves not only analysis of the case itself, but also discussion of the funding options and to advise what is in the client's best interests• Under paragraph 8.7 of the Code of Conduct a solicitor should also ensure that their client given the best possible information about how their matter is priced.• Interim billing only permitted if expressly provided for.• Reference could also be made to Conditional Fee Agreements and Damages Based Agreements	7

Q1b	<p>Identification and explanation of the following</p> <ul style="list-style-type: none"> • CPR 6.14 and CPR 7.5(1), first class post then it is deemed served 2 business days after posting • Deemed date of service would be – 15th January 2021 • Claimant needs to serve particulars of claim • This must be done within 14 days of service of claim form CPR 7.4(1)(b) • This would be 29th January 2021 	5
Q1c	<p>The following should have been stated/incorporated</p> <ul style="list-style-type: none"> • The heading needs incorporating – IN THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION (or alternatively the Chancery Division as this case is Contract, Tort and land) • Refer to the express term. This clause might be drafted as follows – 'It was an express term of the Retainer that Mr Jacobs (on behalf of the Defendant) would provide advice to the Claimant relating to the purchase and development of land and the Restrictive Covenant and would advise it of any circumstances and risks of which the Defendant was aware or considered to be reasonably foreseeable that could affect the outcome of the matter'. • A copy of the retainer/contract should be attached to the Particulars • Mention of the implied terms. This clause might be drafted as follows – 'It was an implied term of the Retainer that Mr Jacobs (on behalf of the Defendant) would, at all material times, exercise the reasonable care and skill to be expected of a reasonably competent solicitor specialising in commercial property'. • The duty in tort. This clause might be drafted as follows 'Further, or alternatively, Mr Jacobs (on behalf of the Defendant) owed the Claimant a like duty of care in tort. • Preparation of relevant allegations • Details of the particulars of loss (i.e. 9 million for difference in value of the land and the cost of the additional land) • Interest – pursuant to s.35 A Senior Courts Act 1981 • Prayer • Statement of truth 	13
Total: 25 marks		

Question Number	Suggested Points for Responses	Marks (Max)
Q2a	<p>Explanation of the following</p> <ul style="list-style-type: none"> • 7A PD 2.1 – for cases other than personal injury, you cannot generally commence proceedings in the High Court unless you expect to recover more than £100,000. • Here the claim is worth £35,000 • It would therefore be a County Court matter • With respect to the track consideration should be given to the factors in CPR 26.8 including the financial value of the claim, the complexity of the facts or legal issues, the nature of the remedy sought, the number of parties and the importance of the claim to the public in general. • The above factors should be applied to the facts of the case • CPR 29 deals with multi-track cases, claims over £25,000 and this case will be allocated to the multi-track 	7
Q2b	<p>State the following</p> <ul style="list-style-type: none"> • Write to the solicitors acting for the defendant and state that the minutes of the meeting should be part of standard disclosure. • Give the Defendant's solicitors a reasonable period to respond to the request such as 7 days explaining that in the absence of this you will apply to the court. • Failure to comply with written request, then issue an application for specific disclosure and inspection pursuant to CPR 31.12, supported by evidence • At the interim application seek an order for costs against the Defendant. 	6
Q2c	<p>Explanation of the following</p> <ul style="list-style-type: none"> • This would have been a case in the fast-track had the value been £24,000, and would be a one day trial • Settlement should be attempted if possible, prior to the actual start of the trial • If no settlement then the witness statements would stand as evidence in chief • The witnesses for both parties would therefore be cross examined and then re-examined. • The Defendant, then the Claimant, would make closing submissions • Judgment on the case and summary assessment of costs by the judge 	5
Q2d	<p>Explanation of the following</p> <ul style="list-style-type: none"> • Instruct an enquiry agent • Apply under CPR 71 for information about the judgement debtor's assets • A company search could also be carried out • Other options that could be pursued include • A charging order • Serving a statutory demand on behalf of the Claimant against the Defendant. • Issuing a winding up petition against the Defendant company if it does not pay. 	7

	<ul style="list-style-type: none">• Costs could be high for the winding up petition issue fee and deposit for the official receiver.• Third party debt order is an option in view of the assets and potentially value in bank accounts• Consideration could also be given for taking control of goods	
Total: 25 marks		

Question Number	Suggested Points for Responses	Marks (Max)
Q3a	State the following: <ul style="list-style-type: none"> • Our Love of Pets should make an application for an interim injunction pursuant to CPR 25.1(1). • This will restrain Bedford Council and its workers from carrying on the building works in such a way as to continue to cause a nuisance. • Draft and issue a claim form <u>or</u> • Give an undertaking to file the proceedings • N16/N244 application notice plus witness statement from Michael, draft order and appropriate fee. 	6
Q3b	The following submissions would be made in support of the application <ul style="list-style-type: none"> • Reference to s.37 Senior Courts Act 1981/s.38 County Courts Act 1984 • Guidelines from American Cyanamid Case (1975) • Serious question to be tried – a claim for noise nuisance which is having a serious effect on Michael and Petula's business. It is not frivolous or vexatious. • Damages are not an adequate remedy - Michael and Petula's loss is not purely financial as they are in danger of losing the business, the reputation and the stock, if the work continues in its current way. • Damages are an adequate remedy for Bedford Council as their only loss would be financial, namely the cost of the different equipment and the increased labour • Financial position to give any required undertaking – Michael and Petula have savings of £60,000 to give the necessary undertaking in damages to ensure Bedford Council is adequately compensated for loss suffered during the currency of the interim injunction should it be subsequently stated that it was wrongly granted. • Balance of convenience – this favours the granting of the interim injunction. Michael and Petula accept that Bedford Council will incur some additional cost in order to complete the work differently if the injunction is granted, but this is far outweighed by the harm Michael and Petula will suffer if the injunction is not granted, as they are likely to lose their stock and their business. • It is in the interests of justice and necessary to give effect to the Overriding Objective (CPR 1) that the injunction sought should be granted. 	14
Total: 20 marks		

Question Number	Suggested Points for Responses	Marks (Max)
Q4a	<p>Explanation of the following</p> <ul style="list-style-type: none"> • Contact the Bedford police for a copy of the police accident report. • Contact the witnesses (information from police accident report) to take statements • Obtain a witness statement from the claimant • Obtain insurance details of other driver • Check if there was any CCTV in operation or dashcam footage • Obtain Sana's medical records from the Bedford Hospital • Obtain Sana's medical records from the GP and the physiotherapist • Obtain full details and documentary evidence from Sana of her special damages, including evidence from her employers of loss of earnings • For claims exceeding £25,000 the personal injury pre-action protocol applies. • The spirit, if not the letter of the protocol, should still be followed for claims which could potentially be allocated to multi-track • Sana's solicitors will prepare and send a letter of claim to Xavier Quinn, the opponent, and will attach a copy for sending to his insurers as well. • It will specify a claim for damages for personal injuries citing the date and time of the accident. The letter will allege that the opponent was at fault and the accident was caused by his negligence. The letter will also state the injuries sustained by Sana and will also set out the specified losses. 	13
Q4b	<p>Explanation of the following</p> <ul style="list-style-type: none"> • Solicitors Code of Professional Conduct – Principle 1 upholding the rule of law and Principle 2 – maintaining trust and confidence in the profession • CCS Para 1.4 - you must not attempt to deceive or knowingly or recklessly mislead the court, and you must not be complicit in another person deceiving or misleading the court. • You should refuse to continue acting for a client if you become aware they have committed perjury or misled the court or attempted to mislead the court in any material matter unless the client agrees to disclose the truth to the court. • Advise Sana of this duty, and what her actions constitute, and advise that we will have to cease to act unless the information is disclosed • Consider also 2.1, 2.4 and 2.5 in terms of not tampering with evidence, only putting forward statements/representations to the court which are properly arguable and you do not place yourself in contempt of court and comply with court obligations placed upon you. 	5

Q4c	<p>Advise the client of the following</p> <ul style="list-style-type: none"> • In accordance with directions/CPR 35.6, written questions may be put to the experts on their reports within 28 days of the report being served. • The expert must then respond to the questions in writing usually within 28 days of the questions being served. • The reports are to be agreed if possible, and if not the experts hold a without prejudice meeting for the purpose of identifying the issues. • The experts must file at court a statement showing what has been agreed and what has not been agreed. • If the court has given an order that the experts give oral evidence at the hearing, then this is the opportunity to cross-examine the expert of areas of disagreement/that are unfavourable. 	5
Q4d	<p>Explanation of the following</p> <ul style="list-style-type: none"> • Send a Part 36 offer letter to the opponents. • It must comply with CPR 36.5 so in writing, pursuant to Part 36, specify period for acceptance, relates to whole or part of claim and takes into account any counterclaim • If Sana's offer is accepted within 21 days, the opponent's insurers will pay the £15,000 offered to settle her claim and in addition will pay Sana's legal costs. • If Sana's offer is not accepted, then her case will continue. • In the event that Sana recovers in excess of £15,000 at trial CPR 36.17 will have effect. Sana may be awarded interest on her damages at up to 10% above base rate from the end of the relevant period (ie 21 days after her Part 36 offer was made), and an additional amount of 10% of damages awarded. She can also claim costs on an indemnity basis for the same period, and interest on those costs at up to 10% above the base rate. 	7
Total: 30 marks		