

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2022

LEVEL 3 - UNIT 9 – 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 fewer candidates for this sitting, due mainly to the current qualification coming to an end. In considering this cohort it is clear that there are some excellent candidates who have a very good grasp of civil litigation and have considered previous examiner reports and exam papers. Unfortunately, there is also evidence in this sitting that there are still a substantial number of candidates who do not understand the basics of civil litigation and who struggled with even the most basic of questions.

The starting point for practice papers are the Case Study materials, which are sent out many weeks in advance of the examination. Candidates will need to consider the areas which are likely to be examined from the materials, but also be aware that not all questions can be discerned from it. The best way to make use of the materials is to map out the potential elements of each set of facts.

It is apparent in respect of some of the answers provided that candidates have a prepared answer to a question they expect to come up in the examination. Obviously this will work for some questions, but a failure to take into account the individual facts of the scenario will ultimately mean that the candidate misses out on important marks. Where the candidate has not applied their knowledge to the facts, they have often only gained half the marks available.

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. A substantial minority of candidates were unable to develop their answers any further than a brief statement or sometimes a single sentence on the subject. The number of marks awarded for each question, gives a good indication as to the level of depth required.

As the examinations have moved online it has ensured that all scripts are legible, a problem which was apparent with some written scripts in the past. Instead, the problem is one of grammar and spelling. Some answers provided were so poorly written that little credit could be given because the sentence did not make any sense. Candidates are reminded to proof work before they submit to ensure that they have communicated their answer effectively.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

Most candidates gained at least two marks on this question. It was clear that a very large percentage of candidates had learned the 'list' of ways of checking the credit worthiness of a potential defendant but had not fully considered the context of the question here. The defendant was a sole trader and so Companies House was totally irrelevant. Candidates are reminded to apply their knowledge to the facts they are provided with.

(b)

Generally candidates did well on this question concerning the pre-action protocol for debt claims. Where marks were dropped it was due to the fact that candidates did not understand that a specific protocol was required to be considered, rather than general considerations about the benefits of ADR.

(c)

Most candidates gained at least two marks on this question concerning bundles. Candidates are reminded not to list documents (often at length) as to what is in the bundle when it is all written material to be relied upon at trial. One mark was provided for long lists of documents provided by some candidates.

(d)

A minority of candidates failed to gain any marks on this question concerning an order to obtain information. This was either due to not providing an answer at all or confusing the answer with Part 18 requests.

Question 2(a)

Where candidates did not do so well, it was because they only mentioned a couple of factors, rather than all those that applied.

2(b)

The majority of candidates did well on this question, gaining both marks. Where candidates did not gain marks it was due to thinking that the burden was on the defendant – something which clearly showed their lack of understanding of civil litigation.

(c)

This question caused a great deal of difficulty for some candidates. Although the question is clear on what is required to be done by the candidate, because it was not signposted in the pre-seen materials, some candidates struggled.

(d)

Candidates generally did okay on this question, although note, even though in all past Chief Examiner report's, candidates have been told that they need to get both parties/witnesses and experts/legal representatives, to get a mark for each, they are still just writing parties or experts.

(e)

Some candidates have no idea about how QOWCS operates and consequently did not score as well on this question as well as they should have done. This is an issue for providers.

Question 3(a)

A funding question on which most candidates were able to gain full marks. Areas of concern related to the failure to consider the scenario and just write a list relating to funding.

(b)

A question which is asked on most civil litigation papers. Virtually all candidates were able to gain full marks here. Those who did not, clearly had little understanding of civil procedure.

(c)

Candidates do not always read the question carefully. Here some candidates wrote about the potential outcomes for summary judgment. This did not attract any marks – the question is clear, it requires the candidate to write about the procedure to gain marks.

(d)

A fairly straightforward question, however a proportion of candidates listed some of the factors, but did not apply them to the scenario. This meant that they gained half marks. (It should be noted that in total there were 12 potential marks for this question).

Question 4(a)

Surprisingly this question was answered poorly by the majority of candidates. The question was clearly signposted in the pre-seen materials, yet a number of candidates failed to gain more than two marks.

4(b)

Candidates were fairly evenly split on this question relating to disclosure. Candidates either did very well or they had no knowledge of how disclosure worked and hence wrote in very general terms and gained very few marks, if any.

(c)

Good consideration here with virtually all candidates gaining at least 3 marks. The question was very general and allowed candidates to write 'all they know' about experts.

(d)

A standard question on costs, which provided the candidate understood related to the Multi Track, provided the opportunity to gain good marks. Some candidates confused this with summary assessment and so received no marks.

SUGGESTED POINTS FOR RESPONSE

LEVEL 3 - UNIT 9 – CIVIL LITIGATION

Question Number	Suggested Points for Responses	Max Marks
1(a)	<ul style="list-style-type: none"> • Credit rating company • Private investigator • Search at the Land Registry • Search of the Register of Judgments • Information from the client 	3
1(b)	<ul style="list-style-type: none"> • Pre-Action Protocol for Debt Claims • The Protocol applies to any business claiming payment of a debt from an individual • In this case Peter Trent is an individual, therefore the Protocol will apply. • Need to write to Peter Trent and include the relevant information • e.g. A breakdown of the outstanding debt together with interest and any other charges which have accrued • Should be given 30 days to reply from the date of the letter. 	5
1(c)	<ul style="list-style-type: none"> • Prepared by the Claimant • contains all the relevant written material which will be referred to at the trial. • It must be paginated and indexed with a description of each document and page number. • It must be the same in each copy of the bundle. • A copy will need to be provided for the Court, each of the parties, and one for use by witnesses at the trial. 	4

1(d)	<ul style="list-style-type: none"> • Order to Obtain Information • As the judgment debtor is an individual, application made on Form N316. • The court will draw up an order to attend for questioning. • The judgment debtor must attend at the time, date and place given • must answer, under oath, the questions asked by the court officer. • The judgment creditor can attend and ask questions of the judgment debtor's finances. • Failure to do what the order states may result in committal. 	4
	Question 1 Total:	16 marks

Question Number	Suggested Points for Responses	Max Marks
2(a)	<ul style="list-style-type: none"> • The type of injury sustained is of the type covered by the protocol. • It is an employee matter. • The protocol only covers situations where the claim falls within the Fast Track, • the damages sought are not too high (£9,000). • Liability cannot be disputed, in the present case it is disputed. • In the alternative, considered contributory negligence. 	4
2(b)	<ul style="list-style-type: none"> • The burden of proof is on the Claimant (Louise Allard) • She will need to show on the 'balance of probabilities' 	2
2(c)	<ul style="list-style-type: none"> • The innocent party may 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. • 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. 	4
2(d)	<ul style="list-style-type: none"> • Ensuring that all directions have been complied with, • checking the availability of parties/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. 	4
2(e)	<ul style="list-style-type: none"> • Costs are always at the discretion of the Court • In most cases costs will follow the event, • However qualified one-way costs shifting will apply • As a personal injury case, • Losing Claimant will not have to pay Defendants costs, • As there is no evidence that claimant was fundamentally dishonest 	5
	Question 2 Total:	19 marks

Question Number	Suggested Points for Responses	Max Marks
3(a)	<p>Two marks for each explained option (1 mark for correct name, 1 mark for info about method of funding)</p> <ul style="list-style-type: none"> • 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. • Enter into a Conditional Fee Arrangement (CFA), • we would be able to include a success fee if he was successful in the claim. • 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. 	4
3(b)	<ul style="list-style-type: none"> • The Defendant will have 14 days in which to file the Defence. • If the Defendant files an Acknowledgment of Service they will have up to 28 days. 	2
3(c)	<ul style="list-style-type: none"> • 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. • Must be served at least 14 days before the summary judgment hearing on the Claimant. • Claimant can 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. 	5
3(d)	<ul style="list-style-type: none"> • Points contained in Part 26.8 CPR. • Financial value of the claim, as there are limits imposed for each track • Here the claim is for £23,000 so would indicate fast track. • Court will also consider the nature of the remedy sought • Here damages. • The likely complexity of the case • Here could be a complex case because of the evidence. • The number of parties involved • Here only two • The amount of any oral evidence that will be required • Here there may well be a number of potential witnesses. • The views and circumstances of the parties will also be taken into account. 	5
Question 3 Total:		16 marks

Question Number	Suggested Points for Responses	Max Marks
4(a)	<ul style="list-style-type: none"> • Under Part 13.3 CPR the Court may set aside or vary a judgment entered under Part 12 • Provided the Defendant has a real prospect of successfully defending the claim, • or it appears to the Court that there is some other good reason why the judgment should be set aside/varied • or the defendant should be allowed to defend the claim. • Wide discretion in the interests of justice. • In the present case it is likely that the Defendant not having had any notice would be sufficient to set the Default Judgment aside 	4
4(b)	<ul style="list-style-type: none"> • Standard Disclosure is by List contained in Form N265. • The first of which are those documents that are in your possession and are willing to disclose. • The second section generally lists those documents that you have but are not willing to disclose. • This is due to the nature of the documents being privileged. • The final section lists those documents that you would disclose but you no longer have in your possession. 	5
4(c)	<ul style="list-style-type: none"> • The appointment and use of experts is regulated by Part 35 CPR. • The Court can control which experts give evidence and limit the issues they should address. • The first duty of the expert witness is to the Court. • In the Multi Track it is usual for there to be individually instructed experts who will write a report. • Still aim to have witnesses appointed jointly to save costs and on the basis that all experts should have the same opinion with regard to the same outcome or event. • The parties can make written questions to the expert to clarify the report. • The expert must be qualified in the area of their expertise. 	5
4(d)	<ul style="list-style-type: none"> • Costs should be agreed if possible • Budgets must be exchanged and filed by all parties with directions questionnaires. • Agreed budget discussion report must be filed no later than 7 days before the CMC. • 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 • Court can make a costs management order, so the court controls recoverable costs 	5
Question 4 Total:		19 marks