CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JUNE 2018

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 June 2018 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

General comments

It is clear that candidates perform best when they are asked to repeat knowledge and that they perform least well when they have to consider appropriate steps to progress a claim or appropriate advice to be given to the client. There is a marked lack of awareness about costs and QOCS. It is also clear that many candidates are process-driven and find more open questions very difficult to approach even though such questions are intended to replicate professional practice. Repeating memorised learning is no substitute for careful thought and planning of the answer to the question asked. The marks which are available respond to the crux of the question and the candidates should think carefully as to what aspect of their knowledge is relevant to the specifics of the question and not digress, in some instances, over multiple pages.

Overall, there was a full spectrum of responses from outstanding to very weak.

Strong candidates respond well and with confidence, showing contextual awareness and understanding, to the more open questions which are intended to replicate professional practice. It is a concern that weaker candidates are unable to engage sensibly with these type of questions and substitute relating every procedural detail which comes to mind without thinking of its relevance or application.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

This question expected candidates to address, with reference to the SRA code of conduct, whether Melanie should have conduct of Ania's claim. 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. While no candidate was expected to recollect the specific references within the code, all are reasonably expected to know and understand the scope and application of the Principles and standards of service to be expected. It is hoped that learners and candidates will take 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.

(b)

This question tested candidates' ability to separate out different causes of action and the identification of appropriate defendants and to display appropriate knowledge of how liability arises both under a statutory and common law duty of care in order to determine to whom a letter of claim should be sent. Many candidates responded to this question very well and clearly had an appreciable insight into how liability might arise and applied their thinking well to the facts of the scenario and showed proper deliberation. Over-rehearsed answers, which possibly anticipated a different question being asked, led to candidates failing to secure reasonable marks. Candidates should approach questions using the knowledge of the facts as they are presented and not to second-guess the possible outcome at trial or to assume that the value of the claim was low when it had not crystallised. Not one candidate considered the relevance of the principle of res ipsa loquitur which readily fits the facts. Understanding the law should not be a lesser priority than knowing procedure.

(c)

This question required a careful application of PD7 (to which direction had been given in the advance materials). Candidates were expected to understand that, unless it is inappropriate to do so, a claim must be brought against the name under which a partnership carried on business at the time the cause of action accrued. Therefore, the correct answer was to identify the intended defendant in accordance with the practice direction. Credit was given to all candidates who recognised that provision would need to be made in the description of the defendant in the claim form to account for the fact that the partnership had now dissolved.

Question 2(a)

Those candidates, who did well overall on the paper, clearly recognised that the immediate action which would be required in order to progress the claim for the client, was to take steps in accordance with the practice direction on pre-action conduct and protocols and send a letter of claim to the intended defendant. Credit was also given to candidates who mentioned peripheral matters, for example, the need for compliance with regulatory matters, i.e. sending a client care letter, agreeing funding, and also to investigating the issues but they were unable to take full advantage of the scope of the question if they had not identified that progressing the claim would entail recognition of, and compliance with, the practice direction requirements.

(b)

Candidates should immediately have recognised that the claim to be made by Jacob Hodgetts Ltd, was founded on contract for the supply of goods or services and that both claimant and defendant were acting in the course of a business and that, therefore, the Late Payment of Commercial Debts (Interest) Act 1998 applied. Without this knowledge, candidates were not able to access the scope of the available marks although credit was given for those who recognised that interest was also payable, subject to the court's discretion.

(c)

Most candidates recognised that a valid and appropriate part 18 request has been made and were able to state adequately the further action required in those circumstances by making an application to the court, which need not be on notice, and should properly seek an unless order. Credit was also given to those candidates who suggested that an application for summary judgement might also be considered. Again, candidates must develop an appropriate awareness of what to do next as they would be required to do in professional practice. Applying for default judgment was one of the suggestions made and which was clearly wrong although credit was given to those who suggested that an application for summary judgment might be made.

Question 3(a)

Many candidates regarded this question as an opportunity simply to list the relevant factors for either fast-track or multi track allocation without any application to the claim. The question was intended for candidates to demonstrate their understanding of the relevant factors and how they applied to the facts of the matter. Many candidates also failed to address the entirety of the question and did not identify a useful step to take at this stage which should have led to a discussion about a stay of proceedings and options for settlement in line with the overriding objective.

(b)

The majority of candidates recognised that Gillian's evidence could be received as hearsay evidence and that as witness statements have been exchanged a notice, which would ordinarily be given at the same time as service of the

witness statement, should still be given informing the parties that the witness would not be called to give oral evidence and the reason why.

3(c)

Those candidates who had a good grasp of the Civil Evidence Act 1995 were able to access the full range of available marks and most of those provided sound discussion of the relevant factors to be taken into account in determining the weight to attach to hearsay evidence at trial and, rather than listing the factors without application, took care to consider the same relevant to the facts of the scenario.

Question 4(a)

This question allowed candidates to show their flair for advising the client how best to proceed. A perennial issue, however, is a lack of understanding of Qualified One-Way Costs Shifting. Candidates should understand that QOCS applies in a personal injury matter. If appropriate, a costs order can still be made against a claimant following the general rule. However, QOCS affects the defendant's ability to enforce the costs order. Costs should always inform any discussion about any step in any action and not least when considering options for settlement including discontinuance. In order to accommodate creative options, credit was given to a variety of options provided that they could be reasonably recognised as a sensible suggestion to settle or dispose of the claim in the client's best interests.

(b)

This question concerned the implications of accepting a part 36 offer after the expiry of the relevant period (not the offer itself as many candidates noted). It was a straightforward question requiring candidates to recognise that, in those circumstances, the claimant would only be entitled to recover costs up to the date upon which the relevant period expired. The claimant would be likely (subject to the possibility of agreeing a different order with the defendant by negotiation) to be responsible for payment of the defendant's costs for the intervening period from that date to the date of acceptance of the offer. As QOCS applies, such a costs order could be enforced against such damages as are recovered. The client would need to be aware of this as it contrasts with the position had he accepted the offer within the relevant period thereby recovering his costs in total.

SUGGESTED ANSWERS

JUNE 2018

LEVEL 6 UNIT 15 CIVIL LITIGATION

Question 1(a)

Melanie has a duty to act in accordance with the Principles of the SRA Code. Specifically, she should act with integrity and in the best interests of each client (principle 4) and provide a proper standard of service to the client (principle 5) and behave in a way that maintains the trust the public places in her and in the provision of legal services (principle 6). Set against these requirements, Melanie's comment that she has not dealt with a claim in this area of law for many years may put her in difficulties in showing compliance

with the Code as a number of Outcomes may be compromised as follows as she may not achieve the required outcomes or meet the indicative behaviours. She should ensure that she provides services to the client in a manner which protects their interests in their matter, subject to the proper administration of justice (O1.2) and that she has the resources, skills and procedures to carry out the clients' instructions; (O1.4) and that the service she provides to clients is competent, delivered in a timely manner and takes account of the clients' needs and circumstances(O.5). As it seems possible that Melanie cannot meet these requirements, she should have in mind Indicative Behaviour (IB1.7) and decline to act if she cannot act in the client's best interests. Overall, Melanie should reconsider whether she would be acting professionally by continuing to act for this client and should pass the matter to Douglas Olubisi. Should she fail to adhere to the Code, it is possible that she may face disciplinary action and also a professional negligence claim.

1(b)

It would not be sensible to do as Melanie suggests as, in order to act in the client's best interests, and optimise the chance for the client to recover compensation, a letter of claim should be sent both to Violet Grainger and also to Blink Deliveries although the nature of the claim against both is different. Violet has a duty as an occupier at common law and a statutory duty under s(2)(2) Occupiers' Liability Act 1957 to keep lawful visitors such as Ania, safe as far as is reasonably practicable for the purpose of the visit. There is nothing on the facts to suggest that Ania was anything other than a lawful visitor. Violet, although not the owner of the premises, had control over the shop area at the time of the incident (Wheat v Lacon (1966)) unlike Shia Khalil, the owner of the shop itself. Therefore, Violet should have taken reasonable care to ensure that lawful visitors were reasonably safe when using those areas to which they were permitted access. Violet had had time (around twenty minutes) to remove the boxes to eliminate a foreseeable risk of tripping. Ania's claim against Blink Deliveries would lie in negligence and Blink Deliveries would be vicariously liable for the actions of their delivery man. A duty of care to Ania can be shown upon application of the neighbour principle (Donoghue v Stevenson (1932)). That duty has been breached by leaving the parcels in a place where they presented a tripping hazard and damage has been caused. Ania may also rely upon the principle of *res ipsa loquitor* against both Violet and Blink Deliveries. This would raise a presumption of negligence which places the onus upon them both to show that the incident arose by reason of a cause other than negligence.

(c)

Practice Direction 7 applies in circumstances where proceedings are to be brought against a partnership. Fearn and Warren were in partnership at the time when the cause of action arose and the partnership had a name (Blink Deliveries). Ordinarily, a partnership should be sued in the name of the partnership. Therefore, unless it is inappropriate to do so, the claim must be brought against the name under which that partnership carried on business at the time the cause of action accrued, that is, Blink Deliveries and not against the individual partners or against Fearn as a sole trader. It may be considered inappropriate here as, although correct by the letter of the Practice Direction to issue against the partnership, the partnership has been dissolved. Therefore, it might be sensible, whilst still identifying the original partnership name, to make clear that the partnership has now dissolved.

Question 2

The immediate action to be taken in order to progress the claim for the client, and aside from any internal regulatory matters and other sensible enquiries, for example, in relation to solvency of the proposed defendant and limitation, is to write a letter to the defendant. This is a contract case and so is not covered by a specific protocol. However, the Practice Direction Pre-Action Conduct and Protocols applies and the court will expect that the parties conduct themselves in a way which meets the overriding objective and if possible avoid the need to issue proceedings. Therefore, although Jacob has been trying to resolve the matter informally since last September, attempts should still be made to reach resolution. To that end, the parties should exchange correspondence and information to comply with the objectives in paragraph 3 of the PDPAC, bearing in mind that compliance should be proportionate. We should write formally to the defendant setting out concise details of the claim. The letter should include: the basis on which the claim is made, a summary of the facts and, as our client wants money, how the amount is calculated. We should also disclose key documents even though KDL may already have them, for example, the terms of contract and the delivery note. A reasonable time should be provided for the defendant to reply on liability, although we could ask them to acknowledge within 14 days. It is appropriate to indicate that, in the event that no reply is received, proceedings can be issued. As this appears a relatively straightforward case a reply might be expected sooner that within 3 months which might be the case if the matter were more complex. We might also suggest a form of Alternative Dispute Resolution (ADR), for example, mediation, to assist with settlement with the aim of reducing the costs of resolving the dispute. Proposing ADR also has the advantage of putting the defendant at risk of an adverse costs order if they unreasonably refuse to consider ADR.

(b)

This is a commercial case as it is a contract for the supply of goods or services and both parties are acting in the course of a business. Therefore, the Late Payment of Commercial Debts (Interest) Act 1998 applies. Although there is no express term, it is nonetheless an implied term in a contract that any qualifying debt created by the contract carries simple interest. Statutory interest starts to run on the day after the relevant day for the debt. The relevant day for a debt is where there is an agreed payment day (here 5 October 2017) so interest begins to run on 6 October 2017. Interest can be claimed at 8% over the Bank of England base rate from 6 October 2017 and ongoing. As the debt is for more than £10,000, a compensation sum of £100 can also be claimed. The claim for accrued interest should be stated in the claim form and in the particulars of claim (if served separately). In addition, interest may be claimed pursuant to the Court's inherent jurisdiction under the Senior Courts Act 1981, section 35A or the County Courts Act 1984, section 69.

(c)

A request for further information (Part 18) has been made by letter. It accords with Practice Direction 18 requiring a preliminary request to be made as it is a: written request for clarification or information and states a date by which a response should be served; the date allows a reasonable time to respond and it is concise and strictly confined to matters which are reasonably necessary

and proportionate to enable understanding of the case to be met.

Therefore as no response has been received, an application can be made to the court (Part 23) requiring the defendant to provide the particulars and pay costs. It would be appropriate to seek an unless order and the application may be heard without notice. In addition, it may also be appropriate to make application for summary judgment or to strike out the claim.

Before taking action, it may be sensible in the first instance, to write again to the to the defendant's solicitors by way of reminder before issuing an application as this will assist an argument on costs should an application be issued.

Question 3(a)

In deciding to which track a matter should be allocated, CPR26.8 is relevant. In particular, the court will have regard to the financial value of the claim, including any counterclaim, and the likely complexity of facts law or evidence. In this case, the following are factors which suggest the suitability of the multi-track. The matter is not as straightforward as first thought as a counterclaim has now been filed and, therefore, the trial is likely to go over one day. The value of the counterclaim appears to take the overall claim value outside the usual remit of fast-track (£25,000). However, PD27 provides that normally the larger of the two claims determines the track. Expert evidence is a possibility (although very unlikely to be necessary on the facts). If expert evidence is deemed necessary, it will also increase costs for the parties. However, the fast track might be more suitable for the client as there is likely to be minimal lay evidence and it would be preferable for the claim to remain in fast-track as the client's costs exposure is likely to be less especially as the length of any trial is likely to be increased with a likely increase in costs. In the circumstances, it would be sensible to seek a stay of proceedings for one month to attempt to settle the claim. Appropriate methods of settlement would be ADR or by making a Part 36 offer which, if made at this stage, potentially provides a longer period of costs protection.

(b)

A hearsay notice should be served upon the defendant as Gillian is now resident in Canada. The notice does not have to take a particular form but should comply with the requirements of CPR 33. Had witness statements not been exchanged, a notice would be given at the same time as serving the witness statement in accordance with the directions. The notice must inform the parties that the witness is not being called to give oral evidence and give the reason why the witness will not be called. Here the reason will be that Gillian has a long term condition and is not permitted to travel. As witness statements have been exchanged, no notice is required but the parties must still be informed that the witness is not being called and the reason. It may be possible for Gillian to give evidence by video-link as Gillian appears only to be medically unfit to travel and is not generally unfit to give evidence, unless her condition deteriorates. The defendant can object to the evidence being called as hearsay.

3(c)

Gillian's evidence will be received as hearsay evidence as s1 CEA 1995 provides that evidence shall not be excluded in civil proceedings on the grounds that it is hearsay. s4 CEA 1995 sets out the factors to be taken into account in determining the weight to attach and includes such factors as whether it would have been reasonable to call the person (obviously not here as she is in Canada) and whether the statement was made contemporaneously to the incident (not here as made several months later). This may impact upon the credibility of her evidence but there is no obvious reason on the facts, as given, for her to conceal or misrepresent matters. Overall, the weight to be given to the statement is likely to be less than if the witness attends the trial and can be cross-examined on their evidence. If she had been permitted to give evidence by video-link, the weight to be attached to the evidence will be as for a witness in court.

Question 4(a)

In the circumstances, it may be appropriate to seek counsel's advice and it would always be sensible to evaluate the strengths and weaknesses of the claim. Morgan could consider discontinuing his claim (Part 38). This may be done in the circumstances without permission and a notice must be served. The effect of this would be to bring the matter to an end. Morgan would then be liable for the defendant's costs. It may be possible to negotiate an agreement with the defendant's solicitors that there should be no order as to costs, however, it is still possible that the defendant may seek a costs order. A consent order is likely to be necessary as the matter will have settled without liability being admitted. Given the tone of the defendant's solicitors' letter, it is possible or even likely that the defendant may want to recover costs. However, it should be noted that, as this is a personal injury matter, the operation of QOCS will prevent the defendant from enforcing the costs order as there are no damages against which the costs order can be enforced. On balance discontinuing is not the best option as Morgan loses the potential of a successful outcome at trial (which is mentioned). Morgan might also consider making a Part 36 offer which would perhaps encourage settlement as it would put the defendant at risks on costs. However, even though the evidence is concerning, Morgan does not face a costs risk at present as the defendant has not made a Part 36 offer. And so, on the present facts, if Morgan continues to trial and loses, he is in no worse a position (as the operation of the QOCS rules will mean that, although a costs order might be made against him, the defendant cannot enforce it). On balance, the most appropriate advice in order to secure some benefit for the client in damages, would be to make a Part 36 offer and, thereafter, open negotiations if necessary. It may be sensible to apply for a stay of proceedings to allow negotiations to take place. Alternatively, options for ADR might be explored.

(b)

Morgan should be told that the costs position has changed to that set out in the Part 36 offer from the defendant's solicitors. This is because Morgan's instructions are given on 10 August. The offer can still be accepted providing that it has not been withdrawn. However, if Morgan (or the firm) attempts to accept the offer on or after 10 August, this will be after the expiry of the 21

day relevant period specified in the Part 36 offer (Part 36.5). Had he accepted within the time specified, he would have recovered his costs to the date of acceptance and would have received payment of the sum offered within 14 days. In these circumstances of late acceptance, as provided for by Part 36, Morgan is only entitled to recover costs up to the date upon which the relevant period expired (Part 36.13). Liability for costs after the date of expiry of the relevant period for acceptance of the Part 36 offer will need to be agreed with the defendant's solicitors. Morgan will also be responsible for payment of his own costs from the date upon which the relevant period expired.

Although the QOCS provisions apply, as this is a personal injury matter, the defendant is likely to seek some costs provision as they would be able to enforce the order for costs without permission but only to the extent that costs do not exceed the amount recovered by the client. Therefore, to protect the client's interests, agreement on costs should be sought with the defendant's solicitors, preferably before the offer is accepted. It may be that the defendant may agree to waive their entitlement to costs as only a relatively short period has expired. Alternatively, a counter Part 36 offer might be considered which puts the defendant at risk on costs.