LEVEL 4 – UNIT 11 – TACTICS AND COSTS IN COMMERCIAL LITIGATION
SUGGESTED ANSWERS - JANUARY 2017

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2017 examinations. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on student performance in the examination.

Question 1

(a) The terms and conditions might assist Ainslie because they include a term as to mediation, which is a form of ADR. There is a requirement to consider ADR under the Practice Direction - Pre-Action Conduct and Protocols (paras. 8, 9 and 10) and costs may be disallowed in subsequent litigation if parties unreasonably refuse to attempt ADR e.g., Halsey v Milton Keynes (2004).

Mediation would be suitable here as it would not rule out litigation, as it is non-determinative. As Memorable Marquees (MM) wish to preserve its reputation and minimise adverse publicity, mediation could maintain confidentiality and might break the deadlock in the matter as it involves a neutral third party and minimises costs to the parties to the dispute.

(b) Krishnan would not wish to write to the claimant's solicitors in a 'without prejudice' letter as he may wish to refer to the letter on the issue of conduct and costs to show his client's reasonable attitude. If it were marked 'without prejudice' it means that it cannot be referred to for any reason as it is privileged from disclosure.

(c) (i) If MM made a valid offer, it would be a defendant Part 36 offer. If Stridewell Hall (SH) are successful at trial but do not beat the Part 36 offer by failing to obtain a judgment more advantageous than the Part 36 offer, SH can expect a split costs order. Costs are subject to the court's discretion and, unless the court considers it unjust, SH are likely to recover costs up to the date of expiry of the relevant period for accepting the offer. Costs will be recoverable on the standard basis. However, SH may be required to pay MM's costs on the standard basis from the expiry of the relevant period up to and including the costs of trial, plus interests on those costs. In addition, they will need to pay their own lawyers' costs.

Therefore, if the offer is made pre-proceedings, SH's risk on costs would be significant and there is a potential to achieve significant costs protection for MM at this early stage of proceedings by making a Part 36 offer.

(c) (ii) It would not be appropriate to include any Part 36 offer in the letter requesting that the matter be referred to mediation, as that would mean that the offer is contained in an open letter, that is, one that is not written 'without prejudice'. A letter which is not marked 'without prejudice' could be referred to by the claimant e.g. in evidence. Although MM could argue that any offer of settlement is made without prejudice and cannot be referred to, it is far better that the offer is written in a letter which is headed 'Without prejudice save as to costs'. This will preserve the right to refer to the offer after judgment has been given and it can then be used in context of costs arguments but cannot be referred to for any other reason.

Question 2

(a) (i) Although an application to strike out the claim could be made under CPR 3.4, it is unlikely to be successful as it would be very difficult on the facts for MM to establish the grounds of the application. They would need to show that the claim discloses no reasonable grounds for bringing the claim, that the claim is an abuse of process or there has been a failure to comply with a rule, PD or court order. As it is, the claimant looks to have a triable claim as it is a factual dispute as to what capacity marquee was ordered.

(a) (ii) An application under Part 24 for summary judgment could be made. The grounds for such an application are that the claimant has no real prospect of succeeding on the claim or issue, and there is no other compelling reason why the case or issue should be disposed of at a trial. Here, it is unlikely that the court could be persuaded that the claimant has no real prospect of succeeding on the claim given the allegations raised, and the matter is one which will require evidence from both sides to be determined.

(b) Ainslie should think carefully about costs before making any application as, if an application is made and is unsuccessful; the general rule is that the loser pays the winner’s costs. Therefore, MM would be at risk of paying the claimant's costs of and occasioned by the application in any event. Those costs would be assessed on the standard basis at summary assessment and would need to be paid within the time prescribed by the court.

Question 3

(a) The claimant's solicitors are incorrect that they are not under a duty to disclose documents just because they are no longer in the claimant's possession. An order for standard disclosure has been made. This requires a party to disclose the documents on which he relies, and the documents which adversely affect his own case, adversely affect another party's case or support another party's case, and the documents that he is required to disclose by a relevant practice direction.

Although SH say that the document no longer exists and/or is no longer in their possession, they must serve a list in which they should disclose that the document existed but is no longer in the claimant's control and what has happened to the document.

(b) (i) The court should be asked to strike out the claim or to make an order striking out the claim, unless proper disclosure is provided by a certain date.

(b) (ii) The court is being asked to make such an order, as the claimant has failed to comply with a court order by failing to serve list of documents. Therefore, under CPR 3.4, the court can strike out the claim or exercise its case management powers under Part 3.

(c) Krishnan's proposed action does not comply with the rules. The application must contain a statement of truth (CPR 22) that the party believes the facts stated in the document are true. Whilst Krishnan can sign the application notice as the defendant's legal representative, the statement must refer to the client's belief, not Krishnan's own. If Krishnan signs it without discussing it with his client, he will not have been authorised by the client to do so and cannot give the statement of truth that the facts stated in the document are true.

(d) (i) In order that the court might make a summary assessment of costs, the parties must prepare a written statement of costs which must be signed by the party or the party's legal representative and filed at court, and copies must be served not less than 24 hours before the time fixed for the hearing.

(d) (ii) As the rule is that the loser pays the winner's costs, the likely costs order will be that the claimant (SH) pay the defendant's (MM's) costs of the action. Summary assessment is likely to take place or, if not, costs will be subject to detailed assessment if not agreed.

Question 4

(a) The Results Determination Panel identified significant issues with question 4 (a). This Question was removed and the candidates' marks were adjusted accordingly to ensure that candidates attempting this Question were not disadvantaged.

(b) The judge has a discretion when considering what costs order to make and how much to allow. Although the rule is that the loser pays the winner's costs, the judge may take into account whether the winner had succeeded on all the issues and make a limited costs order. It is likely that the court

will order costs to be paid on the standard basis and only costs that were proportionately and reasonably incurred will be allowed, as the court will not allow costs which have been unreasonably incurred or unreasonable in amount. Here, the numerous witness statements and time spent may be considered unreasonable and disproportionate and, therefore, impact on costs recovery.