LEVEL 4 – UNIT 11 – TACTICS AND COSTS IN COMMERCIAL LITIGATION
SUGGESTED ANSWERS - JANUARY 2018

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide candidates and tutors with guidance as to the key points candidates should have included in their answers to the January 2018 examinations. 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 tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate performance in the examination.

Question 1

(a) The failure of Walking on the Moon Ltd to serve a defence entitles Banks & Horrace Ltd to obtain judgment in default (under CPR 12), provided the relevant time for the defence to be filed has expired. A request is filed on the standard form for a specified amount, as no other remedy is claimed. It should specify the date by which judgment is to be paid, or the times and rate at which it is to be paid. Provided a claim for interest was made in the particulars of claim, interest can be included. The request for judgment should include a calculation of the interest claimed.

(b) If Walking on the Moon Ltd wish to defend the matter, they will have to make an application to the court to set aside the judgment. The application must be made on notice using Form N244. The application will set out the grounds on which the application is made together with provision for costs. A witness statement, or other evidence in support of the application, must accompany it. The court can exercise its powers under CPR 3.9 in favour of the defendant, but it is not required to do so.

(c) The factors that the court take into account when carrying out detailed assessment of costs are set out in Rule 44.4 CPR. Costs must be proportionate and reasonably incurred. This will mean considering the amount claimed, the complexity and the need for specialist knowledge or skill. The work undertaken must be charged at an appropriate rate, reflecting the time spent on the case. The conduct of the parties before and during proceedings, including efforts made before and during proceedings to try to resolve the dispute, will always have a bearing on the amount of costs awarded. The court will also have regard to the place and circumstances of work done and the receiving party's last approved or agreed budget.

(d) Should initially consider an informal schedule of costs. The procedure should be started within three months of judgment or the order. The receiving party serves notice of commencement with accompanying documents, including the bill of costs, on the paying party. The paying party serves concise points of dispute within 21 days of service of notice of commencement (47.9 CPR). If points of dispute are not served, the receiving party can file a request for a default costs certificate. Replies to points of dispute should be served within 21 days of receiving the points of dispute (47.13 CPR). A request for a detailed assessment hearing should be made within three months of the expiry of the period for commencing detailed assessment (47.14 CPR and 47.13 PD).

Question 2

(a) For an application for summary judgment, Part 24 CPR requires the applicant to show two things. Firstly, that the defendant has no reasonable prospect of successfully defending the claim and, secondly, that there is no other compelling reason why the matter need to go to trial.

(b) The defendant has admitted that it has received payment under the contract i.e. it has been paid to provide a service which has not been provided. The defendant has no evidence to show that the tickets were posted. The defendant has therefore not fulfilled its obligations under the contract and it is arguable that there has been a fundamental breach of contract as to a key term. In the light of the admissions and lack of evidence, there are no reasonable grounds to defend the claim for breach of contract and no other compelling reason why the claim should be dealt with at trial.

(c) There are no guarantees that Cross & Core Partners LLP will be successful in their application, something which should be made clear to the client. If the application is made then there will be cost implications. The general rule is that the loser pays the winner's costs, however, costs are at the discretion of the court; there is no right to costs. Should our client be granted judgment, then Happy Times Tickets Ltd will pay costs, however, should the application not be granted, then Cross & Core Partners LLP would be at risk of paying the defendant'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.

(d) The letter is just an offer to settle, which does not provide enough detail about the terms of settlement. The letter does not detail whether the sum includes interest, nor when the sum is to be paid, whether by instalments, and how it will be paid. Detail is required as to whom the money is to be paid to and, perhaps most importantly, the letter does not detail how the matter of costs is to be dealt with. Costs will be subject to detailed assessment on the standard basis if they could not be agreed by negotiation. If the paying party breaches the order, detail needs to be provided as to what the next steps will be.

Question 3

(a) The first point to note is that there is an Alternative Dispute Resolution (ADR) clause in the contract which the parties have freely entered into. The

clause obliges both parties to use mediation and, if not successful, arbitration to determine the matter. If litigation is begun without entering ADR, the other party is likely to apply for a stay of proceedings. The cost of doing so will be met by our client, who would still have to participate in ADR.

(b) The selection of a mediator is an important consideration in ensuring that the outcome benefits both parties. The mediator clearly needs to be independent of both parties, however, like other important roles within the ADR process, the person has to have other skills. Relevant factors would be the amount of mediation experience the individual has had in respect of the building industry in this case. Also of relevance would be their level of legal experience and their 'people' skills.

(c) The documents for the mediation meeting will include:

- mediation agreement;
- court documents;
- the terms and conditions of the original contract;
- a position statement from both parties;
- case summary;
- documentation demonstrating the degree of defect and the cost of the remedy;
- cost statements.

(d) The main difference between arbitration and mediation is that in arbitration the arbitrator hears evidence and makes a decision. Arbitration is like the court process, as parties still provide testimony and give evidence, similar to a trial, but it is usually less formal. In mediation, the process is a negotiation with the assistance of a neutral third party. The parties do not reach a resolution unless all sides agree.

Mediators do not find fault or make a determination, they help the parties reach a settlement by assisting in developing options. Often mediators will meet each party separately, as well as together, and explore ways the issue can be resolved. It is common for a mediator to go back and forth between the parties before an agreement is made. The parties can control the result and be part of the resolution. Arbitration is more formal than mediation, with a binding decision being made by the arbitrator. The arbitrator is often a senior lawyer or a professional, such as an engineer. The process is likely to be similar to that of court, with witnesses being questioned and evidence being provided. The arbitrator will render a legally binding decision and the award is enforceable by the courts.

Question 4

(a) The defendant is under a duty to disclose documents as an order for standard disclosure has been made. The duty exists, even if the documents are no longer in the possession of the defendant. The order for standard disclosure requires a party to disclose documents upon which he or she relies, those documents which adversely affect his or her case, adversely affect another party's case or support another party's case, and those documents required by a relevant practice direction. The solicitor acting for the defendant should serve a list whereby the missing documents are stated as having existed but are no longer in the defendant's control, as well as indicating what has happened to the documents.

(b) For the court to make a summary assessment of costs, both parties must prepare a written statement of costs. The statement must be signed by the party or the party's legal representative and filed at court. Copies must be served not less than 24 hours before the time fixed for the hearing.

(c) Costs are at the discretion of the court, however, the general rule is that the loser pays the winner's costs. The likely costs order will be that the defendant pays the claimant's costs of the application, regardless of the outcome of the case. Summary assessment is likely to take place, or if not, agreed by detailed assessment.