

**LEVEL 4 – UNIT 11 – TACTICS AND COSTS IN COMMERCIAL LITIGATION
SUGGESTED ANSWERS - JUNE 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 June 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 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 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.

- (b) Litigation can be a long and drawn out process, as well as being costly to both parties in relation to costs. Mediation can be arranged quickly and is usually dealt with on a fixed fee basis, therefore the clients will save both money and time on settling the dispute. The clients have expressed the need for a quick resolution, to enable them to sell the houses and improve cashflow. The sum involved is relatively low, £39,000 and litigation may result in disproportionate costs.

Unlike litigation, mediation is private and therefore problems do not enter the public domain, something which will be particularly important in respect of a business which is customer orientated, such as building and selling

houses. Finally, it may be possible to continue a working relationship with Sparks & Johnson Electrical Installation Ltd, if that would be beneficial to the client.

- (c) Legal proceedings are a step of last resort and Alternative Dispute Resolution (ADR) is actively encouraged by the courts. It should be noted that ADR is not compulsory and an individual cannot be ordered by the court to undertake it, although the court may require some evidence that the parties have at least considered ADR. Where a party has declined ADR, then only when it can be shown that the declining party acted unreasonably in the circumstances, are there likely to be any consequences. If the declining party wins the case then the Court may disallow some or all of the costs awarded. If the declining party loses the case they could also be penalised through indemnity costs.
- (d) As well as the mediation agreement, other documentation would also be useful to assist in the mediation process. Two bundles are often prepared, being a bundle of agreed documents and one of non-agreed documents. The mediator and the parties will see the agreed bundle but the non-agreed documents are seen by the mediator and not the other side. In the agreed bundle the terms and conditions of the original contract between the parties would be included, as would any report from the electricians who have been employed to put right the mistakes. A position statement from both parties would assist the mediator, supporting them in reaching an outcome. Other relevant documents would be documentation demonstrating the degree of defect and the cost of the remedy. Cost Statements would of course be important to disclose.

Question 2

- (a) An application for Default Judgment under Part 12 CPR can only be made when the defendant has failed to either acknowledge service or to file a defence. The defendant has 14 days from the date of service of the claim form and particulars of claim to serve a defence, or where the defendant files an acknowledgment of service, 14 days from that date. Deemed service is the second business day after posting. The first date an application can be made for default judgment is 19 May 2017.
- (b) (i) If the Part 36 offer is accepted, the proceedings are stayed and the matter will not progress to trial. The Claimant is entitled to the costs of the proceedings. The acceptance sum must be paid within 14 days of the notice of acceptance. Failure to pay the sum and/or costs can be enforced, with judgment being entered for the amount accepted. Judgment rate interest would then be recoverable.
- (b) (ii) If the Part 36 offer is declined or ignored, the case will continue to trial. If Callington Homes Ltd receive less at trial than £32,000 then the Part 36 offer will not have been beaten. There are unlikely to be any sanctions in respect of not beating the offer, but it is likely that there will be a split costs order. Subject to the courts discretion, Callington Homes Ltd are likely to recover costs up to the date of expiry of the relevant period for accepting the offer, but have to pay the costs of Sparks & Johnson Electrical Installation Ltd on the standard basis from the expiry of the relevant period up to and including the costs of trial, as well as interest on those costs. Callington Homes Ltd will have to pay our costs for the same period.

- (c) Under Rule 25.13 CPR, the court may make an order for security for costs under Rule 25.12 if –
- the court is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
 - the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so.
- (d) Under Rule 44.2 CPR, the court has discretion as to how costs are to be treated. It is likely that the unsuccessful party will be ordered to pay the costs of the successful party on the standard basis and, due to the nature of the application, the defendant will likely be required to pay the claimant's costs in any event. Costs will be assessed summarily. This will relate only to the failed interim application.

Question 3

- (a) Under Rule 24.2 CPR, the applicant must show that the defendant has no reasonable prospect of successfully defending the claim and that there is no other compelling reason why the matter needs to go to trial.
- (b) The application is unlikely to succeed or succeed only in part. Rule 24.6 CPR, entitles the court on determination of a summary judgment to give directions as to the filing and service of a defence and give further directions about the management of the case. Rule 3.1(3) provides that the court may attach conditions when it makes an order. As Daniel Forth is representing himself and he has stated that he has not paid the remaining money because the storage unit is faulty, the court is likely to provide a further period of time for a proper defence to be filed.
- (c) Rule 44.4 CPR sets out the factors the court take into account when carrying out detailed assessment of costs. The main emphasis is on costs being proportionate and reasonably incurred. This will mean considering the amount claimed, the complexity and the need for specialist knowledge or skill. The amount claimed must also be proportionate and reasonable. The work undertaken must be charged at an appropriate rate. The conduct of the parties will always have a bearing on the amount of costs awarded.
- (d) Practice Direction 47 contains the procedure to be followed for detailed assessment. 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 4

(a) (i) Order:

UPON the parties having agreed terms of settlement and BY CONSENT IT IS ORDERED THAT:

- 1) All further proceedings in this action shall be stayed upon the terms set out in the attached schedule except for the purposes of carrying those terms into effect.
- 2) Each party shall be at liberty to apply to the court if the other party does not give effect to the terms set out in the schedule.
- 3) The defendant shall pay the claimant's costs on the standard basis to be subject to detailed assessment, if not agreed.

Dated ...

We consent to the making of an order in the above terms

Claimant's solicitors

Defendant's solicitors

(a) (ii) Schedule:

- 1) The defendant shall pay to the claimant the sum of £22,000 in full and final settlement of all claims arising in this action inclusive of interest.
- 2) The settlement payment is payable in two equal instalments of £11,000. The first payment to be made on the 1 July 2017 and the second on the 1 August 2017.
- 3) In the event that the whole or part of any instalment remain unpaid upon the due date, the whole of the remaining balance shall become payable with interest at 8% from the due date and the stay shall be removed and the claimant shall be free to enforce payment of the sums outstanding plus interest.

(b) Under Rule 44.3 CPR, where the amount of costs is to be assessed on the standard basis, the court will:

- only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred;
- resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.