Introduction

The primary aim of this report is to help candidates who are to sit an ILEX Equity and Trusts examination in the future. It is therefore intended to be a useful document that does the following:

- comments on overall performance by candidates in the Autumn 2008 Equity and Trusts examination;
- advises on how performance might be improved;
- indicates what should be contained in successful answers to the questions in the examination paper;
- provides comment on performance in individual questions.

Comment on Overall Performance

This is a Level 6 paper and was, consequently, appropriately demanding. Successful candidates are therefore to be congratulated on passing their Higher Level Professional Diploma in Equity and Trusts. However, performance at this sitting was disappointing overall and worse than in previous sittings.

The most common weaknesses were:

1. Poor legal problem solving skills;
2. Lack of adequate skills for tackling essay questions;
3. Poor structure and inadequate understanding of how to use the law to answer questions;
4. Lack of knowledge of the law of Equity and Trusts.

Poor Legal Problem Solving Skills

Common weaknesses included:

- failure to identify all the key issues raised by the problem questions;
- failure to identify the particular principles of law relevant to the problem;
- failure to state the law accurately and cite cases appropriately;
- failure to apply the law to the facts of problem questions in an appropriate manner or (in the case of a number of candidates) to apply it to the facts at all.

Lack of Adequate Skills for Tackling Essay Questions

Many candidates fail to appreciate that it is just as important when tackling essay questions, as it is with problem questions, to target the answer to the actual issues raised by the question. There was a common tendency to write a narrative on the whole law relating to a topic, instead of selecting relevant points and using those to address the actual question set. Answers often lacked
sufficient depth and detail appropriate to an examination at this level, with some candidates producing very short answers to essay questions.

**Poor Structure and Inadequate Understanding of How to Use the Law to Answer Questions**

This was a particular issue with answers to problem questions. Some candidates started their answers with several pages of law, set out in the abstract with no reference to the facts of the problem and often no attempt to pick out the principles that were actually relevant. This was followed by a cursory discussion of the facts of the problem, often making only scant reference back to the previous explanation of the law. Some candidates followed their explanation of the law with a mere recital of the facts and then gave a brief conclusion, without demonstrating how it was reached. A proper conclusion can only be arrived at after a careful application of relevant principles of law to the facts of the problem. Some answers failed to reach any conclusion or give the advice asked for.

A number of candidates failed to use case law appropriately. What is required is a statement of the relevant legal principle from a case, not a recitation of the facts. Candidates will not gain credit for merely reciting the facts of a case, although a brief comparison with the facts in a problem question may sometimes be useful when applying the law; similarly, in essay questions, a candidate may legitimately use the facts of a case to illustrate a particular point that is being made.

**Lack of Knowledge of The Law of Equity and Trusts**

An inadequate knowledge of basic principles and/or case law was shown by a number of candidates, meaning that they were unable to reach the standard required to pass the examination. A few candidates failed to mention any case law in their answers.

A number of candidates appeared not to have revised sufficient topics to enable them to answer four questions fully.

**General Advice to Candidates**

Candidates are strongly advised to develop the skills of analysis required for the practical solution of problems. They should develop the skills of diagnosis of legal problems. They should learn the skill of stating the rules of law succinctly. They should learn how to apply the law to the facts of a problem in order to arrive at a reasoned answer.

The best way to develop these skills is to practise using the law in addressing problem questions. When doing so, candidates are advised to use problem questions from ILEX past papers in this subject.

With regard to essay questions, candidates are strongly advised to analyse the law and to be critical. They should pay particular attention to the wording of the question and discuss the relevant law, connecting their arguments to the actual issues raised by the question. Candidates should also avoid copying or reciting large sections from their statute books. An explanation of relevant sections
should be given and then applied to the facts of a problem or discussed critically in relation to an essay question.

Candidates should do these things as part of their initial study of the subject and as part of the examination preparation process. A planned and rigorous revision process is strongly recommended. Candidates should use past papers and examiner’s reports when doing this.

Candidates should be familiar with how many questions are on the paper and how many they are required to answer. They should know how much they are able to write in three hours. If they discover that it is not very much, they should try to develop the skill of writing fuller, more detailed answers within the set time.

When sitting the examination, candidates would do well to take a common sense attitude. Where they are required to answer four questions it is not only vital that they attempt four answers. It is also of great importance that they allocate time and effort effectively, so that they produce four full answers.

Candidates should only attempt a question where they are able to tackle all parts. If this is not the case, they should choose a different question.

Candidates should read the questions carefully. Thought should be given to structure when planning any answer, whether to a problem or essay question, before a candidate actually begins writing the answer.

**Question 1**

**Suggested Answer:**

In order to advise William and Wendy on the entitlement to the various items of Jessie's property, a consideration was required of formalities and constitution.

Candidates should have begun by explaining that Jessie was attempting to set up a trust of the shares for Barry. No formalities were required for the declaration and the trust would be constituted and complete when title passed to William and Wendy as trustees. This required passing a completed stock transfer to them with the share certificate so that they could obtain registration of themselves as owners of the legal title. As title passes on registration, which did not happen before Jessie's death, the trust was incomplete and the general rule is that equity will not assist a volunteer such as Barry, who gave no consideration - Milroy v Lord [1862]. Candidates should then have gone on to see whether any exception could save the gift. This required a brief consideration of the principle from Re Rose [1952] and whether Jessie had done all in her power. Clearly she had not, as she did not sign a stock transfer form and this is more like Re Fry [1946] where there was more for the settlor to do. (Pennington v Waine [2002] would also be unlikely to assist as there is nothing on the facts to suggest that it would have been unconscionable for Jessie to change her mind.) As William and Wendy were appointed as Jessie's executors, they would have acquired legal title to the shares in that capacity. Candidates should, therefore, have explained that the rule in Strong v Bird [1874] can perfect gifts to someone who becomes executor provided an immediate gift was intended – Re Freeland [1952] - and that this intention remained unchanged until death - Re Gonin [1979], Re Wale [1966]. As Jessie later cashed a dividend cheque and put the money towards the
purchase of a car, the latter requirement would not be met. Re Ralli [1964] extended the rule by analogy to constituting trusts but the need for continuing intention was not referred to in that case.

The cottage, 'The Oaks', involved a declaration of trust for Ann with William and Wendy as trustees. Candidates needed to deal with both the transfer of legal title and the declaration of trust. Legal title to land must be transferred by deed - s52(1) Law of Property Act (LPA) 1925. Handing the deeds to William and Wendy would not be sufficient to transfer title to them but again, the rule in Strong v Bird as applied in Re Ralli might be relied on. However, candidates also needed to explain and apply the provisions of s53(1)(b) LPA 1925. As this was a trust of land, the oral declaration would need to be evidenced in signed writing. As there is no mention of any later writing referring to this declaration, the trust of 'The Oaks' would be unenforceable and so the trust would fail.

In relation to the interest under Jessie's father's will trust, candidates needed to discuss s53(1)(c) LPA 1925, as Jessie had only an equitable interest under an existing trust. s53(1)(c) requires a disposition of a subsisting equitable interest to be in signed writing. Grey v IRC [1960] held that instructing trustees to hold on trust for another person is attempting a disposition and so the instructions should be in signed writing. Jessie's instructions were oral and the disposition would be void. However, her letter in August to William and Wendy refers to them holding her interest under her father's will trust for Catherine. This is similar to the later confirming deed in Grey v IRC which was held by the House of Lords to pass the equitable interest as it was signed by the person transferring it and so complied with the requirements. Provided Jessie signed the letter, it would fulfil the requirements of s53(1)(c) and William and Wendy would be holding on trust for Catherine.

As far as the uncashed cheque is concerned, an unendorsed cheque is not a form of property but merely a mandate to the bank which is cancelled on the death of the person who wrote the cheque. As the cheque had not been cashed or cleared at the time of Jessie's death, the bank would refuse payment and the money would not pass to William and Wendy to hold on trust for Catherine (eg Re Gonin).

Any property not effectively disposed of in Jessie's lifetime would pass to David under her will.

**Key Issues to Consider:**

The question was not particularly well answered, although there were a number of reasonable answers. A number of candidates dealt well with formalities but poorly with constitution or vice versa. As these topics are frequently examined together, it is essential to be able to deal with both aspects.

In relation to the shares, most candidates recognised that the transfer of legal title failed for lack of a transfer form signed by Jessie. Few then went on to state the general principle from Milroy v Lord that equity will not assist, before considering whether any exception would apply. A good number of candidates referred to Re Rose but many failed to state that Jessie had not done all in her power as she had not signed a transfer form. A surprising number failed to consider the rule in Strong v Bird either here or for the cottage. Of those who recognised its relevance, few referred to Re Ralli as extending the principle to
trusts and a worrying number did not explain that it was relevant because the trustees had obtained legal title as executors. Most candidates who identified the rule as relevant stated the requirements for an immediate intention which continued until death but not all went on to apply this to the dividend cheque.

The cottage 'The Oaks' involved an initial declaration of a trust of land with W & W as trustees. A number of candidates confused the different statutory requirements - s53(1)(b) was relevant to the declaration of trust and s52(1) was relevant to the transfer of legal title to the trustees.

A number of candidates clearly did not understand when s53(1)(c) was relevant - some wrongly discussed it for the shares, where there was no subsisting equitable interest as there was no existing trust. It should have been discussed in relation to the interest under Jessie's father's will trust and not elsewhere. Of those who correctly applied s53(1)(c) to the father's will trust, many failed to discuss the August letter in this context.

Very few candidates dealt correctly with the cheque as most failed to appreciate that the bank would refuse to honour it after Jessie's death.

**Question 2**

**Suggested Answer:**

Candidates were asked to consider the validity and enforceability of provisions in Jack's will. This required a discussion of non-charitable purpose trusts including legacies to unincorporated associations and the difficulties over validity.

Candidates first needed to explain the beneficiary principle from *Morange v Bishop of Durham* [1804] - that non-charitable trusts need beneficiaries who can enforce them. This would cause problems for provisions (i) and (ii) but candidates should then have considered whether they fall within the limited exceptions recognised as existing in cases like *Re Astor* [1952] and *Re Endacott* [1960] which stressed that they would not be extended.

Provision (i) should have been considered in the light of the exception for monuments and graves established in cases such as *Mussett v Bingle* [1876] and *Re Hooper* [1932]. As in the former case, the gift for maintenance would be void for perpetuity but the erection would not as the money would be spent immediately. However, *Re Endacott* suggests that this trust is likely to fail as a 'practical memorial' is too uncertain and not within the limited exception.

Provision (ii) should have been considered in the light of the exception for animals established in cases such as *Pettingall v Pettingall* [1842] and *Re Dean* [1889]. The trust should be limited to the perpetuity period. This was overlooked in cases such as *Re Dean* but it was stressed in *Re Kelly* [1932] that animal lives could not be used to measure perpetuity, suggesting Jack's trust would be void. However, in *Re Haines* [1952], the court took judicial note that a cat could not live more than 21 years. If this were applied, it might save the trust for Lightning, the cat, but would not assist with Slowcoach, as tortoises have very long life expectancy. Candidates should also have explained that, even if valid, it is a trust of imperfect obligation and Bert could not be compelled to carry it out.
Provision (iii) involved a gift to a club. As unincorporated associations are not legal persons, they cannot be beneficiaries and so a gift to them is liable to fail as a purpose trust and may also contravene the perpetuity rules – Leahy v A G for New South Wales [1959].

Candidates should then have gone on to consider other possible interpretations and the extent to which they overcome the difficulties. This required a discussion of the different ways of interpreting gifts as being to members of the association, discussed in cases such as Neville Estates v Madden [1962], Re Recher [1972] and Re Grant [1980].

The court would be unlikely to interpret this as a gift to members individually so that each may claim a share – Leahy. The favoured interpretation is that the gift is to members subject to the rules of the association – the contractual analysis - under which individual members cannot claim a share but the members as a whole could vote to divide the gift between them. This interpretation can be applied as, unlike in Re Grant, the members control the club's assets and this would mean that they are free to use the money for practice facilities and coaching rather than for relaying the pitch. Re Lipinski [1976] suggests that they are free to use the gift for the stated purpose or to vote to use it for something else.

Candidates also needed to consider the case of Re Denley [1969] which held that, although trusts for abstract non-charitable purposes are void, a trust for a purpose which benefits identifiable people is valid - applied to a gift to an unincorporated association in Re Lipinski. The trust in Re Denley was, unlike Jack's gift, limited to the perpetuity period but Re Lipinski suggests that perpetuity is not an issue if the club is free to spend all the money at once, which would appear to be the case here.

Key Issues to Consider

A few candidates produced good answers to this question but there were also quite a lot of weak answers. Some suffered from faults discussed under 'Comment on Overall Performance’, such as setting out the law on all the anomalous exceptions (whether relevant or not) in the abstract at the beginning of the answer and then failing to apply it or to apply it in sufficient detail. Some answers failed to discuss perpetuity or only mentioned it briefly. Many failed to explain that the exceptions, whilst valid, have no beneficiary to enforce them (they are trusts of 'imperfect obligation') and, therefore, Bert could not be compelled to look after Lightning or Slowcoach.

A common failing was to discuss provisions (i) and (ii) in reasonable detail but then barely discuss provision (iii), making it unlikely that a pass mark would be achieved. In (iii), far too many answers discussed only either Re Denley or the contractual analysis and did not deal with all the possible interpretations.

There were also several candidates who discussed the rules on charitable trusts instead of non-charitable purposes. Whilst a good answer might have briefly explained why these trusts were unlikely to be charitable (insufficient public benefit) it was then necessary to consider their validity as non-charitable purpose trusts.
Question 3

Suggested Answer:

Candidates were asked to advise Romeo in relation to claims by Juliet that she is entitled to the whole ownership of a studio in her sole name and to at least a half interest in a cottage in his sole name. This required a discussion of beneficial interests in a family home, where there is no written declaration of trust and entitlement is determined by reference to the principles of resulting or constructive trusts, which are exempt from the formality requirements as a result of s53(2) Law of Property Act 1925.

In relation to the studio, candidates should have considered the presumption of a resulting trust, in favour of a person (Romeo) who contributes to the purchase price of a property, in proportion to the contribution made, and referred to cases such as Bull v Bull [1955], Cowcher v Cowcher [1972] Tinsley v Milligan [1993], Curley v Parkes [2004]. They should also have discussed the fact that the presumption can be rebutted if the evidence suggests that Romeo intended a gift or loan. A resulting trust of the cottage in Juliet's favour is unlikely as Curley v Parkes suggests that resulting trusts require initial rather than later contributions and dicta in Stack v Dowden [2007] suggest that they are not appropriate in relation to shared homes.

Candidates should, therefore, have gone on to consider the principles of constructive trusts in relation to the cottage. Reference should have been made to Lloyds Bank v Rosset [1990] and Lord Bridge's view on how an interest could arise under two different categories of constructive trust. Candidates should then explained and applied the requirements for express common intention constructive trusts - express discussions about sharing ownership followed by detrimental reliance - with reference to cases such as Eves v Eves [1975], Grant v Edwards [1986]. Consideration was needed as to whether any conversation between Romeo and Juliet could satisfy the discussion requirement and whether anything Juliet did could count as detrimental reliance on this. As for an inferred common intention constructive trust, Lord Bridge insisted on direct contributions, for which a payment off the mortgage would count. As far as Juliet's indirect contributions were concerned, any of a number of cases could be referred to as suggesting that paying for food or work around the property would not suffice to infer an intention to share - possible examples are Rosset itself, Pettitt v Pettitt [1970], Gissing v Gissing [1971], Burns v Burns [1984]. Candidates might also have discussed the dicta from Stack v Dowden suggesting that Lord Bridge may have set the bar too high by insisting that only contributions to the initial price or mortgage would do and indicating that substantial improvements which increased the value of the property might suffice.

As far as calculating the size of an interest under a constructive trust is concerned, possible cases to mention were Drake v Whipp [1996], Midland Bank v Cooke [1995], Oxley v Hiscock [2004] Stack v Dowden. Again, candidates needed to apply the principles to the facts to determine whether Juliet's claim to a half share was likely to succeed.

For those candidates who had followed recent developments, there was also the possibility of mentioning cases since Stack such as Abbott v Abbott [2007], Holman v Howes [2007], James v Thomas [2007] or Morris v Morris [2008].
Key Issues to Consider:

This question was not particularly well answered by many of those who tackled it. However, there were some good answers which explained and applied the principles of resulting and constructive trusts well, with good reference to case law, including a pleasing number who referred in some detail to Stack v Dowden and some who mentioned some of the subsequent cases.

Candidates usually dealt reasonably well with resulting trusts although some failed to refer to any resulting trust cases and many did not consider whether Romeo might have been making a gift or a loan. Some candidates did not discuss the size of a share under a resulting trust or inaccurately stated that it would allow Romeo to claim back his contribution, rather than explaining that he would acquire a share in proportion to his contribution, which was 10%.

Many candidates failed to make any distinction between express and inferred common intention constructive trusts. A number suggested that constructive trusts, as well as resulting trusts, required an initial contribution and that later mortgage payments would not count, despite the fact that Lord Bridge in Rosset clearly stated that a common intention constructive trust could be inferred from direct contributions, whether initial or mortgage payments. A number of candidates failed to consider how the size of an interest under a constructive trust might be calculated.

Some weaknesses were generic and are discussed above in ‘Comment on Overall Performance’. For example, some candidates adopted a poor structure, setting out all the law in the abstract and failing to apply it to the different events in the question. Many answers failed to refer to sufficient relevant case law. Some candidates had obviously revised the topic in detail and learnt a lot of cases but did not understand how to use them to answer the question, as discussed in ‘Comment on Overall Performance’. Many of these merely recited the facts of the cases without any indication of the relevant legal principles or any real attempt to apply them to the facts of the question.

Question 4

Suggested Answer:

Candidates were asked to advise Ben, Josh and Evan in relation to money taken by Clive from a trust and estate for which he was trustee and executor respectively. This required a discussion of the rules on tracing and making proprietary claims.

Candidates should have begun by explaining that Clive was in breach but that personal claims against him were unlikely to be met in full as he is about to be declared bankrupt, so proprietary claims are preferable. As the beneficiaries do not have legal title, they would be unable to use the common law rules. To trace and claim in equity, candidates should have explained that a fiduciary relationship is needed - clearly present between a trustee or executor and the beneficiaries.

Candidates needed to consider the sale of the trust trophy to Rob. As he knew nothing of the breach and gave value, he was a bona fide purchaser for value without notice and no claim, either proprietary or personal, can be made against
him - Pilcher v Rawlins [1872]. Ben and Josh could trace into the proceeds of sale but these were given to YRC. As an innocent volunteer, YRC would be subject to a proprietary claim, as shown by Re Diplock [1948] and Foskett v McKeown [2000]. A proprietary claim would be possible in relation to the £500 in the new savings account, as well as any interest on the account. However, £7000 spent on a tour is dissipated and so no proprietary claim is possible for that. As an innocent volunteer, no personal claim lies against YRC by beneficiaries of a trust.

When Clive mixed trust money with his own in a bank account, Ben and Josh could claim a charge over the account to secure their claim - Re Hallett's Estate [1880]. The withdrawal would be treated as coming from Clive's money first under Re Hallett so that the shares were bought with his £2,000 and £2,000 of trust money and the increase could be claimed in proportion - Foskett v McKeown, confirming dicta in Re Tilley [1967]. Clive then dissipated the remaining money in the account, so candidates should have applied Re Oatway [1903] to the effect that Clive's money should be spent on the dissipation and trust money on the shares as far as possible. This would allow Ben and Josh to claim that their £3,000 was spent on the shares and they are entitled to three quarters of the increased value.

When money from Lucy's estate was mixed with trust money, the claimants would normally share in proportion but, as this is mixed in a current account, the rule in Clayton's Case [1816] may apply - Re Diplock. On this basis, the £2,000 from Lucy's estate would have been spent on the Stade shares which proved worthless and Ben and Josh's £2,000 would remain in the account. However, cases such as Barlow Clowes International Ltd (in Liquidation) v Vaughan [1992], Russell-Cooke Trust Company v Prentis [2003] declined to apply Clayton's Case as it did not achieve justice. If the court took the same view here, it might treat the payments as coming from Ben and Josh's trust and Lucy's estate pari passu so that each fund would lose £1,000 on the shares and have £1,000 left in the account.

In relation to the £1,000 paid in by Clive, candidates should have discussed James Roscoe v Winder [1915] as indicating that this is not treated as a repayment and beneficiaries' claims are limited to the lowest intermediate balance on the account.

**Key Issues to Consider**

Answers to this question were mixed - some candidates dealt quite well with the issues but others did not apply the rules appropriately to the facts, although the tracing issues raised were quite straightforward.

The most common weaknesses were generic and are discussed above in 'Comment on Overall Performance'. In particular, too many candidates described the tracing rules in the abstract and failed to apply them in any detail to the question. Many candidates failed to make sufficient reference to relevant cases.

Most answers began with an explanation of why proprietary claims would be preferable on the facts and the requirements for using the equitable rules. Some candidates failed to deal with the sale of the trophy or did not accurately identify the position in relation to claiming against Rob and YRC.
Of those candidates who actually applied the law, most recognised the relevance of *Re Hallett* to the payment from the mix of trustee and trust money but surprisingly few went on to consider *Re Oatway* in the light of the subsequent dissipation; the beneficiaries' right to claim their share of the increase in value on the shares was usually referred to but not all candidates referred to authority on this; some candidates wrongly applied the rule in *Clayton's Case* as between the trust and trustee; candidates generally recognised its relevance in relation to the mix of money from the trust and estate, although not all explained that it applied as this was a current account, and better answers went on to discuss whether the rule might be displaced.

A surprising number of candidates failed to appreciate that the beneficiaries would have no proprietary claim (and so no priority over other creditors in the bankruptcy) in respect of the payment in of £1,000 from the sale of Clive's drawings, as he showed no intention to repay.

**Question 5**

**Suggested Answer:**

Candidates were asked to discuss a quotation relating to the onerous nature of the office of trustee. This question required a discussion of various aspects of trustees' duties, such as fiduciary duties, standards of care and skill, and personal liability for failing to comply. All these aspects were mentioned in the quotation and should have been discussed, although there was some flexibility as to the particular issues and authority that could be referred to under each.

The quotation referred to acting exclusively in the interest of the trust and standing to gain nothing. This required a discussion of fiduciary duties - not to allow conflicts of interest and not to make unauthorised profits. There were a number of different cases that could have been referred to on this, examples being *Wright v Morgan* [1926], *Keech v Sandford* [1726], *Williams v Barton* [1927], *Re Macadam* [1945], *Boardman v Phipps* [1966]. Candidates could also have discussed the remuneration rules and the changes to these in Trustee Act 2000.

The quotation referred to acting exclusively in the interest of the trust and standing to gain nothing. This required a discussion of fiduciary duties - not to allow conflicts of interest and not to make unauthorised profits. There were a number of different cases that could have been referred to on this, examples being *Wright v Morgan* [1926], *Keech v Sandford* [1726], *Williams v Barton* [1927], *Re Macadam* [1945], *Boardman v Phipps* [1966]. Candidates could also have discussed the remuneration rules and the changes to these in Trustee Act 2000.

The quotation also referred to trustees needing to observe reasonable standards of care and skill, so candidates needed to discuss case law on duties of care and skill, such as *Learoyd v Whiteley* [1887] or *Speight v Gaunt* [1883] and the statutory duty of care in relation to the exercise or delegation of investment powers, as laid down in the Trustee Act 2000. Other duties from that Act that might have been mentioned were the need to review investments and the standard investment criteria in s4 and the duty to take advice under s5. Reference could also have been made to some of the following: *Nestlé v National Westminster Bank* [1988] on balancing the needs of life and remainder beneficiaries, *Cowan v Scargill* [1985] or *Harries v Church Commissioners* [1993] on basing investment decisions on financial criteria, rather than moral or ethical considerations, *Bartlett v Barclays Bank Trust Company Ltd* [1980] on the higher duties that apply where the trust owns a controlling shareholding.

The quotation also talked about onerous personal liability for failing to reach standards set. In addressing this, candidates could have talked about the basis and extent of liability, delegating investment duties to agents under s11 Trustee Act 2000 and the extent of liability for agents under s23. Other points that might
have been included were liability as between trustees and the circumstances where a trustee is not liable or may be relieved of liability.

**Key Issues to Consider:**

There were a number of weak answers to this question. The quotation should have prompted candidates to discuss each aspect but a number of answers dealt with only some of them. Many failed to discuss fiduciary duties at all or mentioned them only in passing and some ignored the issue of liability. Weaker answers tended to concentrate almost entirely on investment duties as laid down by Trustee Act 2000, with little more than a recital of the statutory provisions without comment or direct connection to the question. However, there were a number of pleasing answers which considered all the issues raised by the quotation, albeit the emphasis varied between answers, which is of course acceptable.

**Question 6**

**Suggested Answer:**

Candidates were asked to discuss, with illustrations from case law, the circumstances in which specific performance or a mandatory injunction (final or interim) would be an appropriate remedy to grant. This required a consideration of the types of situation where an order to do something might be available and suitable.

Candidates should have begun by pointing out that specific performance is only available to enforce positive obligations in a contract. As an equitable remedy, it is discretionary and will not be awarded where common law damages would be an adequate remedy. This should have led into a discussion of when damages are not adequate for breach of contract, for example, in relation to contracts for the sale or land or an interest in land, as land is regarded as unique eg Penn v Lord Baltimore [1750].

In the case of goods, damages are normally adequate - Cohen v Roche [1927] but specific performance is appropriate if the item is of unusual beauty, rarity or distinction eg Falcke v Gray [1859], Phillips v Lamdin [1949]. Specific performance is also appropriate where there is no alternative market eg Duncuft v Albrecht [1841], Sky Petroleum Ltd v VIP Petroleum Ltd [1974].

Answers could also consider situations in which specific performance would not be appropriate, for example: where constant supervision would be required-Ryan v Mutual Tontine Westminster Chambers Association [1893] contrast Posner v Scott-Lewis [1987], and note the views of HL in Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd.[1997]; contracts for personal services eg Lumley v Wagner [1852] Page One Records v Britton (T/A The Troggs) [1968] and where it is difficult to judge whether imperfections in performance are deliberate, as equity will not act in vain - Giles v Morris [1972]. Other examples could also have been given, such as contracts to build or repair, illegal contracts, lack of mutuality, etc.

In relation to mandatory injunctions, candidates should have explained that these can be to compel the performance of a positive act or restorative ie requiring the defendant to undo a wrongful act. Examples that might have been
referred to as illustrating appropriate situations for their grant include: Kelsen v Imperial Tobacco Company [1957] – to remove an advertising sign; Wrotham Park Estate v Parkside Homes Ltd [1974] - mandatory injunction sought to compel demolition of houses built in breach of covenant but refused on the facts; note also Mortimer v Bailey [2005] suggesting that a mandatory injunction to pull down buildings would be granted in appropriate cases if it was clear that the defendant acted deliberately in breach of covenant and gambled on damages being ordered.

Mandatory interim injunctions are granted less frequently than prohibitory ones but examples could have included eg Von Joel v Hornsey [1895], Ghani v Jones [1970], Hart v Emelkirk Ltd [1983] and search order cases. Other examples are Esso Petroleum Co Ltd v Kingswood Motors [1974] - mandatory interim injunction compelling the re-transfer of a garage transferred to effect the breach of an agreement and Sky Petroleum v V I P Petroleum Ltd [1974] – injunction where there was no alternative source of supply of petrol (although the injunction was prohibitory in form, its effect was to compel supply).

Candidates might also have referred to the test for mandatory interim injunctions laid down in Shepherd Homes v Sandham [1971] and examples could also have been given of situations where the courts would be unlikely to grant a mandatory injunction.

Key Issues to Consider:

The question was not generally well answered. Specific performance was generally better dealt with than injunctions. Many of the weaknesses were generic and are discussed above in ‘Comment on Overall Performance’. In particular, answers often failed to address the actual question. For example, some candidates discussed prohibitory rather than mandatory injunctions and, whilst it was legitimate to consider situations where the relevant remedies were likely to be refused, some answers concentrated on this to the virtual exclusion of the circumstances where they would be appropriate.

Question 7

Suggested Answer:

Candidates were asked to discuss the requirement for the three certainties of intention, subject-matter and objects to be present in order to create a private express trust. The question also called for some discussion of different considerations applying (for example, the differing effects of failure to comply could have been considered) and of the inter-relation between the certainties. As an example of the latter, reference could have been made to the case of Mussoorie Bank v Raynor [1882], where Sir Arthur Hobhouse indicated that any uncertainty in the subject-matter can have a reflex action back upon the previous words and case doubt on the intention to create a trust, particularly where mere expressions of hope or confidence are used.

In relation to certainty of words or intention, candidates should have explained that an intention to impose a legally binding obligation is needed. This generally requires imperative rather than precatory words eg Lambe v Eames, [1871], Re Adams and the Kensington Vestry [1884] or other relevant cases, contrast
Comiskey v Bowring-Hanbury [1905], where the whole context indicated an intention to impose a trust.

Candidates should also have considered intention where the trust arises from oral statements and/or conduct and illustrated this with cases such as Paul v Constance [1977], Rowe v Prance [1999] or, in the commercial sphere, Re Kayford [1975], Re Challenor Club Ltd [1997], or other relevant cases.

In relation to certainty of subject-matter, candidates should have referred to cases such as Re London Wine [1986], Re Goldcorp [1994] and contrasted Hunter v Moss [1994], Holland Newbury [1997] in relation to certainty as to property from a greater mass; cases such as Palmer v Simmonds [1854], Re Jones [1898] as to how much property is intended to be subject to a trust. This could be contrasted with Re Golay [1965] where a reasonable income was said to be determinable as an objective yardstick had been laid down. Candidates should also have considered the need for certainty as to the beneficial interests to be taken by the different beneficiaries as illustrated by Boyce v Boyce [1849].

Candidates also needed to discuss certainty of objects and to explain the different tests that apply to different types of provision. They should have referred to the list test for fixed trusts - IRC v Broadway Cottages Trust [1964] and discussed in some detail the 'any given individual' test, laid down in Re Gulbenkian [1970] for powers of appointment and adopted by McPhail v Doulton [1971] in relation to discretionary trusts. Candidates should then have gone on to discuss the application of this test in Re Baden's DT (No 2) [1973] and to explain that it requires conceptual but not evidential certainty.

Other possible things that could be mentioned were: that some uncertainties might be resolved by a provision for someone to settle the matter, as in Re Tuck [1978]; that, even if certain, the class could still fail for administrative unworkability as discussed obiter in McPhail and applied in R v District Auditor ex p. West Yorkshire Metropolitan CC [1986]; that different tests apply to other types of provision, such as the Re Allen [1953] test, applied in Re Barlow's WT [1979] to gifts with a condition precedent.

**Key Issues to Consider**

This question was answered reasonably well by a good number of candidates but there were also some weak answers. Some weaknesses were generic and are discussed above in ‘Comment on Overall Performance’. For example, some answers were far too short, with too many candidates failing to deal with all three certainties in sufficient depth. Too few candidates actually tried to relate the discussion to the actual question by considering differences (such as in the effect of failure to comply) or the way in which certainties are inter-related. Better answers gave some thought to this and discussed all three certainties in reasonable depth with plenty of cases.

**Question 8**

**Suggested Answer:**

Candidates were asked to discuss the requirements for validity of fully and half secret trusts and critically consider the arguments put forward for enforcing them despite non-compliance with the Wills Act 1837.
This required an explanation of the fact that secret trusts are an exception to the general rule that testamentary gifts and trusts must comply with the formalities set out in s9 Wills Act. To avoid the usual formalities, they must comply with certain requirements and the courts have sought to justify ignoring s9 by the fraud and outside the will theories.

Candidates should have explained the requirements for validity of secret trusts and pointed out the differences between the rules applying to fully secret and half secret trusts. For a fully secret trust, communication to the secret trustee of the existence of the trust – Wallgrave v Tebbs [1855] – and terms - Re Boyes [1884] - must take place before death. The secret trustee must also accept either expressly or by silent acquiescence - Moss v Cooper [1861]. Re Keen [1937] held that the terms can be communicated by handing a sealed envelope to the secret trustee to be opened after the testator’s death.

For a half secret trust, the existence and terms must be communicated before or at the time of signing the will, as held in Re Keen and Re Bateman’s WT [1970]. Good answers would also consider the need for consistency between the communication and the way it is referred to in the will, as discussed in Re Keen.

Candidates might also perhaps have discussed the position where communication is made to only one of two or more trustees - Re Stead [1900].

Candidates then needed to consider the justifications for upholding secret trusts despite the fact that they do not comply with s9. The original justification was the prevention of fraud - McCormick v Grogan [1869] - a secret trustee should not be allowed to profit from his fraud by keeping the property for himself, as equity will not permit a statute to be used as a cloak for fraud – Rochefoucauld v Bousted [1897].

This is relevant to the enforcement of fully secret trusts but not half secret trusts, where there is no possibility of the secret trustee keeping the property. However, in the quotation in the question - from Blackwell v Blackwell [1929] (a case relating to a half secret trust) - Viscount Sumner states that equity fastens on the conscience of the secret trustee in order to give effect to the wishes of the testator, which seems to suggest a wider view of fraud ie failing to carry out the trusts after agreeing to do so. A similar suggestion was also made by Lord Buckmaster.

Viscount Sumner in Blackwell also put forward the more modern view that secret trusts arise outside the will and so s9 does not apply - the outside (dehors) the will theory would apply equally to fully and half secret trusts. Candidates could also have referred to Re Gardner (No. 2) [1923] and Re Young [1950] as applying this theory. The latter case held that s15 Wills Act was also inapplicable because the beneficiary did not take under the will but under the secret trust which arose outside the will. Re Snowdon [1979] also refers to operation outside the will. However, the will is still relevant as the means for constituting the secret trust - Re Maddock [1902] – a fact which seems to have been overlooked in Re Gardner (No. 2).

Candidates might also possibly have discussed whether s 53(1)(b) Law of Property Act 1925 applies to secret trusts of land. For example, if secret trusts are enforced to prevent fraud, this might suggest they are constructive and that
secret trusts of land would be exempt from the formality requirements of s 53(1)(b) LPA 1925 as a result of s 53(2).

**Key Issues to Consider**

This question was, in general, not particularly well answered, with many candidates failing to make any real effort to address the actual question, as discussed above in ‘Comment on Overall Performance’. There were some good answers which explained the requirements and discussed the two theories and whether they justified ignoring the statutory requirements of Wills Act.

However, many candidates merely recited the requirements for validity. Some also mentioned one or other of the theories but without connecting the discussion to the question in any way or relating the theories to the avoidance of the statutory formalities. The weakest answers did not even give a full and accurate explanation of the requirements for validity or failed to refer to relevant case law.

**EXAMINATION STATISTICS**

Candidates Sitting: 91  
Percentage Passing: 30%  
Distinctions Achieved: -