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 2013 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 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.

SECTION A

Question 1

This essay will consider whether the statement in the question is an accurate reflection on the law regarding the three certainties. It will consider the well-established rules concerning the three certainties in relation to private express trusts, and move to consider the requirements for other forms of trust, including charitable, resulting and constructive trusts.

For an express private trust to be created there must be certainty of intention, certainty of subject matter and certainty of object, (Knight v Knight 1840). These requirements help to ensure that an individual is not made trustee if a gift was intended. These rules exist since a trust creates legal obligations enforceable by the courts, although a court will not uphold a trust if the obligations under the trust are unclear. In order to fully discuss the question posed it is necessary to discuss each certainty in turn.

Certainty of Intention

From cases such as Lambe v Evans (1870), Comiskey v Bowring-Hanbury (1905), Paul v Constance (1977) it is clear that an outright gift is presumed unless a trust was clearly intended. In Re Hamilton (1895) Lindley LJ, said that the courts must look at all the words used by the testator or settlor to see if, on their true construction in the context of the particular transfer, a trust was intended. This means that cases have to be looked at on a case by case basis as in one case particular words will not create a trust even though in previous cases similar words would have created one, thus making it clear there are no definitive rules for determining whether words or dispositions have created a gift or a trust.

The test for certainty of intention is subjective; it asks what the actual intentions of the persons were, looking at the words as a whole, rather than concentrating...
on particular words. Nevertheless, certainty of intention must be established for a trust to be created. If a trust cannot be established where the gift is in a will the donee will take beneficially as no trust was intended.

Certainty of Subject Matter

Any property can form the subject matter of a trust; where there is uncertainty of subject matter the decision concerning certainty of intention can be affected. Lack of certainty of subject matter will occur if the property which is supposed to be managed or administered by the trustees on behalf of the beneficiaries cannot be determined, as in Re London Wine Co. (1975). Furthermore, where the purported trustees are granted no discretionary powers, the subject matter of the trust must be granted in specific shares, or this will prevent a trust being created as the beneficial entitlement of the beneficiaries could be unclear (Boyce v Boyce (1849); Palmer v Simmonds (1854)).

Certainty of Object

Certainty of Object must be present for the creation of a trust, however the degree of certainty needed for certainty of object varies depending on the type of trust. Without certainty of object, the trustee would not know who the beneficiaries were and could not therefore distribute the trust property. In Morice v Bishop of Durham (1805) the importance of the administration of the trust was highlighted with the court stating “there can be no trust over the exercise of which this court will not assume control; for an uncontrollable power of disposition would be ownership, and not trust.”

Unlike certainty of intention or subject matter, certainty of object varies with the type of potential provision being considered. The two key areas for consideration are: (i) the Fixed Trust; and (ii) the Discretionary Trust.

i) The Fixed Trust

In a fixed trust, the trust instrument sets out the shares of each beneficiary in the trust property, so that each beneficiary’s interest is fixed. In order for a trustee to distribute the trust they must be able, under IRC Broadway Cottages Trust (1955), to draw up a comprehensive list of everyone beneficially entitled.

ii) The discretionary trust

Is a trust where the settlor has designated a class of people from which beneficiaries may be chosen, but the actual selection is made by the trustees. This type of trust can be either exhaustive, in so far that all the income must be distributed, or non-exhaustive, where the trustees have the discretion whether to pay a part or indeed any of the income. McPhail v Doulton (1971) overruled Broadway Cottages with the test for certainty of object for discretionary trusts determined as “can it be said with certainty that any given individual is or is not a member of the class?” This is known as the ‘given postulant’ or ‘individual ascertainability’ test.

Conceptual and evidential uncertainty as discussed in Re Baden’s Deed Trusts (NO 2) also add support in understanding the certainty of object debate. This concept states that if a person cannot be proved to be in a class he is held not to be in that class; it does not matter whether others can or cannot be proved to fall within the class If a class of beneficiaries is conceptually uncertain when the McPhail test is applied the trust fails. If, however, there is only evidential
uncertainty then difficulty in finding evidence to establish who is a member of the class is not an objection.

Despite everything that has been stated above in relation to private express trusts the accuracy of the statement above is, of course, questionable when you think about other forms of trust such as charitable and resulting and constructive trusts. Charitable, resulting and constructive trusts are the exceptions to the rule that the three certainties must be present for a valid trust to be created.

In relation to charitable trusts, for example, the requirement that the objects of the trust be certain is relaxed. Charitable trusts may be established for any purpose that is charitable and do not have to specify the objects. There is even a reserved power for the court to distribute the trust property along charitable purposes if the settlor’s intention cannot be fulfilled. This is known as the cy-pres doctrine. Cypres states that where a settlor’s intended gift to charity fails for lack of certainty, or because the charity subject to the gift no longer exists, the settlor’s gift may still be distributed to charitable purposes analogous to those he/she envisaged. The court derives this power from the fact that charitable trusts are legally enforceable by the Attorney-General.

Furthermore, whilst the thrust of the statement may be valid in relation to private express trusts, equity may impose other forms of trusts, such as resulting or constructive trusts, without the need for strict satisfaction of the rules regarding three certainties. Both resulting and constructive trusts may not comply with the rules regarding the three certainties and often arise in relation to disputes concerning the family home.

There are two forms of resulting trust which shall be discussed briefly: (i) a presumed resulting trust which arises whenever purchase money for property is provided by more than one person but without any certainty or specificity of beneficial interest; and (ii) an automatic resulting trust which occurs whenever legal title to property is incompletely transferred by a donor. In the former case, equity will impose a trust upon the property subject to the beneficial interest in proportion to the original contributions of the parties to the purchase price of the property concerned, as in Bull v Bull (1955). In the latter case, equity will impose a resulting trust automatically whenever a private express trust fails for lack of certainty of objects. In this case, the trust property will be held on resulting trust for the settlor.

Finally, constructive trusts do not operate according to the rules of certainty required by private express trusts. Constructive trusts arise in many situations and are usually used as equitable remedies to prevent injustice or unconscionability. The power of the court to use constructive trusts is very wide. It is also clear that the traditional requirements of certainty of intention, subject matter and object are relaxed. For example, a constructive trust may be used to give effect to a claim in proprietary estoppel, where no beneficial interest in the particular property had been specified (Jennings v Rice 2002).

From this discussion it is clear that for a private express trust to be valid, the three certainties must be complied with. However, for many other forms of trust, the requirements are relaxed. The various types of trust each have different requirements and are used in different ways by the courts – there are many situations in which courts will refuse to require compliance with the three certainties in order to give effect to justice.
Question 2

Re Baden (No. 1) and McPhail v Doulton are the same case, heard in the House of Lords in 1971. The judges in this case were asked to decide what the 'class test' entailed in order to decide whether a person could satisfy the certainty of objects test in a discretionary trust. Once they decided what the 'class test' was the case was returned to the court of first instance to decide the outcome. Re Baden (No. 2) (on appeal from the original Re Baden) was the appeal following the court of first instance’s decision heard in the Court of Appeal in 1973.

In McPhail v Doulton, the trust instrument said:

‘...the trustees shall apply the net income of the fund in making at their absolute discretion grants to or for the benefit of any of the officers and employees or ex-officers and ex-employees of the company, or to any relatives or dependants of any such persons in such amounts at such times and on such conditions (if any) as they think fit.’

Prior to this decision, this trust would have failed for uncertainty of objects because a complete list of all 'relatives and dependants' could not be drawn up. However, the House of Lords reformulated the test and decided that the following should apply: “Can it be said with certainty that any given individual is, or is not, a member of the class?” now known as the ‘class test’. Lord Wilberforce in McPhail v Doulton clearly stated that it must be said with certainty that anyone is within/without the class for the test to be satisfied – the 'any given postulant test'.

Conceptual Uncertainty and Evidential Uncertainty

The test for certainty of objects is concerned with conceptual certainty ‘is it certain that this class of persons can exist as a class?’ and, in the context of Re Baden (No 2), were the terms 'relatives and dependants' certain enough to form a class? With regard to relatives for example, does this mean derived from a common ancestor? Blood relatives? Relatives through marriage?

Eventually, it was decided that in this case ‘relatives and dependants’ were conceptually certain enough to satisfy the class test; the court stated that trustees should be trusted to exercise their discretion and act sensibly and not to select remote and distant relatives.

Once it is decided that a class of objects is conceptually certain, it should be possible to show whether any person is, or is not, a member of the class, which is a question of evidence. Courts are never defeated by evidential uncertainty, it can always be proven whether a person is/or is not a member of a class.

Re Baden (No.2):

The test is satisfied if it can be said with certainty that a substantial number of people can say whether or not they fall within the class of beneficiaries. This would be so even where there are some people about whom it cannot be said with certainty that they do fall within the class. i.e. the potential beneficiary must be able to show that he is within the class - if they cannot show that they are in the class, they are not in it.

Stamp LJ, however, applied the strict test from McPhail. The test could only be satisfied if it could be said of every potential claimant whether or not they belonged to the class i.e. every potential beneficiary must be given a positive or
negative answer. Stamp LJ held that the discretionary trust was valid, he reached this conclusion by taking a narrow view of relatives, he viewed them as being statutory next of kin.

Sachs and Megaw LJ took a much broader approach to the term “relative”, defining it as anyone sharing an ancestor. This definition is problematic as it is very difficult for the court to test the claim. Sachs and Megaw LJJ attempted to address this issue by placing the onus on the person claiming to be an ancestor to prove it. This approach appears to make the “any given person” test redundant. Some commentators have argued that another interpretation of Sachs and Megaw LJ could be made. This approach would argue that a discretionary trust is valid but if an individual cannot prove he is a “good person” it will be assumed he is not. Sachs and Megaw LJ appear to have wanted to ensure the law was not left too broad in this area which meant that each judge added certainty requirements. Sachs LJ stated that the class of those to whom A can distribute the benefit of A’s right must be “conceptually certain”: that is, it must be possible to come up with a definition of the class. Practical and evidential problems as to whether an individual is or is not within that definition can be dealt with by applying the simple rule that they are out of the class until they prove otherwise.

Megaw LJ added a different requirement, stating that a discretionary trust can only be valid if there are a “substantial number” of people who are clearly within the class to whom A can distribute the benefit of A’s right.

The extra requirements imposed by Sachs and Megaw LJJ do not assist in fulfilling the purpose of the “any given person” test: making sure the court can tell if A distributes the benefit of the right to a person outside the permitted class. Therefore, Re Baden (No.2) is not really an application of the McPhail test; the McPhail test was stricter and more narrow. The minority judgment of Stamp is in line with that of those in McPhail but he was outnumbered in his thinking.

**Question 3**

Before the 2006 Act there was no statutory definition of charity. The case law which developed in relation to charitable trusts was based upon the 1601 Preamble and Lord McNaughten’s 4 heads of Charity namely:

- (1) relief of poverty;
- (2) advancement of education;
- (3) advancement of religion; and
- (4) other charitable purposes.

The public benefit test is a key area of analysis for this question. The public benefit test means that an organisation seeking charitable status must serve either the community as a whole or a sufficient section of the community. The general principles are that the number of those eligible to benefit must not be negligible, they must constitute a group or class which can be considered to be a public class and any defining connecting link must not be a personal relationship such as family or employer/ee, known as the ‘personal nexus’ test.

The first three heads of charity, namely the relief of poverty, the advancement of education and the advancement of religion, used to enjoy a presumption of public benefit. This meant that public benefit was recognised as established and need not have been positively demonstrated. For charities with purposes in the fourth head, it had to be positively shown.
Relief of Poverty:

In the case of charities for the relief of poverty, beneficiaries may be derived from a much narrower pool than those for other charitable purposes. Indeed, the ‘personal nexus test’ which rules that intended beneficiaries cannot be linked by a personal quality such as working for the same employer does not apply to poverty trusts (Dingle v Turner (1972)). Moreover, under Re Scarisbrick (1951), the intended beneficiaries of a poverty trust may be linked personally to the settlor of the trust (such as being relatives), a restriction which would normally mean that charitable trust from other categories would fail. These ‘poor relations’ and ‘poor employees’ exceptions are well established and continue to operate following the 2006 Act.

Advancement of Education and Religion

Unlike under poverty trusts, the beneficiaries of educational or religious trusts cannot be linked by a personal nexus or familial connection. In relation to educational charities, trusts for the education of members of a particular family or defined by some relationship to the settlor cannot be charitable. This was established in Re Compton (1945), which concerned a purported charitable trust for the education of three named relatives of the settlor, and confirmed in the landmark decision in Oppenheim v Tobacco Securities Trust Co Ltd (1951), where a trust for the educational advancement of a group of employees of a tobacco firm was held not to be charitable. This was because although the potential number of beneficiaries was not negligible, they were linked by a personal nexus (their employment by the firm in question) and therefore, the trust failed as a charity because it did not benefit an appreciably wide section of the public. Trusts for the education of particular family members or employees of a company do not form a sufficient section of the public and cannot be regarded as charitable as the benefits they bestow are private, not public. Although educational trusts for family members cannot be charitable, trusts which give preference to, but do not limit that education to, settlor’s relatives may be charitable, as in Re Spencer’s case (1928) and Re Koettgen’s Will Trusts (1954).

As with educational trusts, religious trusts will generally fail to establish that they are charitable unless they benefit a sufficiently wide section of the public. For example, under Gilmour v Coats (1949), a trust for the recital of prayers in a cloistered community, was denied charitable status because the benefits it purported to confer could not be enjoyed by the public. These restrictions apply in contemporary times. So, for example, the Mormon Church in the UK has been denied charitable status because its places of worship are not open to the public. In some circumstances, the court was prepared to recognise a public benefit in the case of minority sects, with the caveat that the views of the sects were not ‘morally subversive’ (Re Thompson (1973); Thornton v Howe (1862)). However, Charity Commission guidance published since the 2006 Act suggests that this approach will no longer be followed, in line with a more strict interpretation of the public benefit test. Moreover, other

How does the 2006 Act Change this Position?

The Act introduced a new statutory definition of charity under section 1. It also provides a new statutory definition of charitable purposes under s.2(2), of which there are 13 heads. However, the main reform that has been made to the law on charitable trusts is the removal of the presumption of public benefit for charities in the educational and religious categories. Section 4 removes the presumption that charitable trusts for educational or religious purposes are automatically charitable. If organisations purporting to be charitable cannot demonstrate
positively that they benefit a sufficiently wide section of the public, they may lose their privileges as charities. The Charity Commission also has a new objective to “promote understanding and awareness of the public benefit requirement”.

Common law decisions still retain huge significance as the Charity Commission will consult case law when deciding upon whether to grant or maintain charitable status to certain trusts in the future, particularly with regard to changing economic and social circumstances. It is almost inevitable that the court’s notion of public benefit may vary over the course of time; for example see Lord Wright’s comments in National Anti Vivisection Society v IRC (1948). Further, the quantum of benefit may vary from charity to charity as noted by Lord Simonds in Gilmour v Coats (1949):

"It would not, therefore, be surprising to find that, while in every category of legal charity some element of public benefit must be present, the court had adopted the same measure in regard to different categories, but had accepted one standard in regard to those gifts which are alleged to be for the advancement of education and another for those alleged to be for the advancement of religion, and it may be yet another in regard to the relief of poverty."

The Charities Act 2006 has therefore altered the position significantly with respect to whether charities must positively demonstrate that they satisfy the public benefit test. This may have serious implications for fee-paying schools/educational/religious establishments – prior to the Act, a trust for education was automatically assumed to satisfy the public benefit test – following the abolition of this presumption, it may be difficult for some exclusive educational trusts to be shown as benefitting a sufficiently wide section of the community. Thus, for example, educational trusts such as private schools, must now positively show that they benefit a sufficiently broad section of the public, or risk losing their charitable status. Many of these trusts since 2006 have tried to satisfy this requirement by offering free use of their facilities to members of the public at weekends or on public holidays. Furthermore, as noted previously, the test for public benefit in relation to minority religious sects has also been tightened up.

It is clear therefore that the removal of the presumption under section 4 of the Act has affected the way in which charitable trusts may positively demonstrate their satisfaction of the test and will continue to affect certain charities in their day-to-day operations.

**Question 4(a)**

Resulting Trusts arise to give effect to the implied intention of the owner of the property that someone else should not enjoy the benefit of that property. Lord Browne-Wilkinson in Westdeutschte Landesbank Girozentrale v Islington London Borough Council (1996) explained that a resulting trust arose in two sets of circumstances:

"(i) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B; or

(ii) The money or property is held on trust for A (if he is the sole provider of the money) or in the case of joint purchaser by A and B in shares proportionate to their contributions.”
These are of course only presumptions which can be rebutted by the counter presumption of advancement or by direct evidence of an intention to make an outright transfer. Lord Browne Wilkinson in Westdeutsche also explained that resulting trusts fulfil the implied intentions of the parties:

“Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intentions.”

Earlier cases such as Re Sick and Funeral Society of St John’s Sunday School Golcar (1973) had provided a less confusing rationale for resulting trusts with Megarry VC stating that “A resulting trust is essentially a property concept: any property that a man does not effectually dispose of remains his own.” Lord Millet in Air Jamaica Ltd v Charlton (1999), further explained resulting trusts stating “Like a constructive trust, a resulting trust arises by operation of law, although unlike a constructive trust it gives effect to intention. But it arises whether or not the transferor intended to retain a beneficial interest- he almost always does not-since it responds to the absence of any intention on his part to pass a beneficial interest to the recipient.”

Megarry J in Re Vandervell’s Trusts (no2)(1974) classified resulting trusts into presumed resulting trusts and automatic resulting trusts, which may arise where the transferor of property did not intend to dispose of his entire ownership interest in the property transferred. English law has two basic presumptions about the intentions of property owners which are both rebuttable by evidence of contrary intention: 1) A presumption against gifts; 2) A presumption in favour of the provider of purchase money. If an owner voluntarily transfers property into the sole names of transferees or his name and transferees, without receiving consideration, there is a presumption that it is a resulting trust in his favour unless this is rebutted.

The operation of the presumed resulting trust in land can be found in S60(3) Law of Property Act 1925 : In a voluntary conveyance a resulting trust for the grantor shall not be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee.

The purchase money resulting trust occurs when there is a presumption of a resulting trust in favour of a contributor to the purchase price of property and it applies to both personal property and land.

Pettit v Pettit (1970) Lord Reid: “In the absence of evidence to the contrary effect, a contributor to the purchase price will acquire a beneficial interest in the property.” Evidence to rebut this presumption varies from case to case (Fowkes v Pascoe (1875)).

Automatic resulting trusts arise by operation of law and not on the basis of any presumed intention on the part of the original owner of the property. Where a trust fails, unless expressly or impliedly expressed, an automatic resulting trust determines how any remaining surplus is applied. The presumption of intention is more robust than in a conventional presumed resulting trust. They are implied in the following circumstances: failure to declare the beneficial interests arising behind an express trust; failure of an express trust; trust fund has not been exhausted; pension fund surplus; failure of a loan made for a specific purpose; and certain Quistclose trusts.
The future of the resulting trust has been repeatedly questioned in the last twenty years due to the emergence of the constructive trust.

**Question 4(b)**

A constructive trust arises through law whenever the circumstances are such that it would be unconscionable for the owner of the property (usually but not necessarily the legal estate) to assert a beneficial interest in the property and deny the beneficial interest of another. There has, however, been much debate amongst the judiciary as to when the term “constructive trust” should be used and to what it should apply.

The family home has been one of the most significant areas of operation of the constructive trusts in recent years as demonstrated by *Gissing v Gissing* (1971): “A .. constructive Trust...is created by a transaction between the trustee and the (beneficiary) in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the (beneficiary) a beneficial interest in the land acquired.”

These views in *Gissing* varied from the views previously expressed in *Pettitt v Pettitt* 1970. Following the diverging views in these cases the courts had another opportunity to discuss the constructive trust in *Lloyds Bank plc v Rosset* 1991. In this case the wife sought to claim an interest in the matrimonial home which was in the husband’s sole name despite being having been purchased ten years after their marriage. In making this claim the wife relied on a common understanding/intention due to her efforts organising extensive renovation of the property and redecoration she had undertaken. The House of Lords rejected her claim because, as stated by Lord Bridge: "The judge's view that some of this work was work 'upon which she could not reasonably have been expected to embark unless she was to have an interest in the house' seems to me, with respect, quite untenable." It therefore appeared that a constructive trust might only arise in favour of a claimant who had made financial contributions to the purchase price, or mortgage payments, on a property, so-called “bricks and mortar” contributions.

In contrast, in *Stack v Dowden* 2007, Baroness Hale disagreed with some of the remarks made in *Rosset*, as she felt many factors other than purely financial contributions could be relevant when ascertaining the parties' true intentions. Baroness Hale listed these factors as: any discussions at the time of the transfer which provide evidence of the parties’ intentions; the reason(s) the homes was purchased in joint names; the nature of their relationship; did they have any children together who they had to provide a home for; how did the parties purchase the property both in relation to a deposit and then subsequent mortgage payments; did the parties have joint or separate finances; and how did they pay for the upkeep of the property and any expenses they had as a household? Baroness Hale felt these factors were important in deciding parties’ beneficial interests and whether these were different to their legal interests and whether a constructive trust existed in the circumstances. In *Stack* it was held that Ms Dowden held the property 65/35 with Baroness Hale stating: “There cannot be many unmarried couples who have lived together for as long as this, who have had four children together, and whose affairs have been kept as rigidly separate as this couple's affairs were kept. This is all strongly indicative that they did not intend their shares, even in the property which was put into both their names, to be equal.”
Gissing is, therefore, credited with the birth of the ‘common intention constructive trust’ which, it was argued in Stack, had entirely subsumed the resulting trust in this area. The common intention constructive trust has the advantage of greater flexibility and the ability to resolve issues about ownership at the time of acquisition of the family home and later. There are 3 key criteria in relation to a common intention constructive trust: has an interest been acquired or conferred; what is the extent of that interest; and has there been reliance on this interest? All of these criteria must be satisfied for the trust to be found.

As can be seen from the discussion of the above case law this is an area of fertile litigation as its applicability as a mechanism for allowing a cohabitant to gain an interest has attracted much criticism as well as division amongst the judiciary. It could be argued that the constructive trust is an attempt to achieve a balance between regulation through formality, certainty and justice.

SECTION B

Question 1

This question concerns purpose trusts. Purpose trusts for private purposes are not usually recognised. However, there are a couple of notable exceptions called trusts of imperfect obligation, though they must adhere to the perpetuity period.

(a) In Re Hooper (1932) a testator made a bequest declaring that the income was used to care for and maintain certain memorials in centuries and churchyards. It was held that the upkeep of memorials would be allowed as a trust of imperfect obligation but could only take effect for 21 years after the testator’s death. Applying this to the facts in question this bequest would appear to be a valid bequest (see Mussett v Bingle (1876); Re Endacott (1959)).

(b) The key case in relation to this bequest is the case of Pettingall v Pettingall (1842). In this case the upkeep of animals was recognised as an exception subject to the perpetuity period. This bequest would therefore be valid as the dogs will not outlive the perpetuity period (see Re Haines (1952); Re Dean (1889)).

(c) In Re Thompson (1934) the testator bequeathed a legacy to a friend to be used by him as he thought fit in his absolute discretion for the promotion and furtherance of fox hunting. This was held in Re Thompson to be a valid trust of imperfect obligation. Applying this to the facts in question this would appear a valid bequest as the bequest is to promote fox hunting, however fox hunting has since been made illegal so it is unlikely the court would uphold such a bequest despite the case law.

d) This bequest concerns a potential purpose trust with indirect human beneficiaries. These are trusts which might look like trusts for private purposes but have in fact been construed as dispositions which would favour individuals who would benefit from the purposes being carried out. The key case in relation to this case is Re Denley (1969).

In Re Denley, land was settled on trustees for use as a sports club, for the primary benefit of the employees of a company and secondly for the benefit of such other persons as the trustees may allow. The gift had to occur within 21 years of the death of certain named persons. It was held that because of the private nexus between the potential beneficiaries of the trust and a particular company, the trust was not charitable because it did not benefit the public sufficiently. However, the court was satisfied that in this case there were individuals who would bring the matter to court if the trustees failed to meet
their obligations despite the perceived practical difficulties which would arise if there was disagreement over the purposes of the sports club. Applying this case to the facts in front of us it would appear that Re Denley applies and this would be held to be an invalid bequest.

(e) This bequest would appear to be invalid. In Mussett v Bingle (1876) a testator erected a monument to his wife’s first husband and left money to upkeep the monument. The erection of the monument was upheld but not the upkeep as this would breach the perpetuity period. Secondly, any trust can fail for capriciousness. A capricious trust is one characterised by whim or fancy of the settlor and these trusts fail because no trustee or court can reasonably be called upon to carry out the trust. This view is also supported by M’Caig v University of Glasgow (1907).

(f) The key case for this bequest and its validity is Re Lipinski (1976). In Re Lipinski, Mr Lipinski was active in the Hull Jewish community. He decided to leave “half of the residual part of his estate for the Hull Judeans Association in memory of his late wife. The money was to be used solely in the work of constructing new buildings for the association and/or improvements their buildings’. The other half was split with one quarter for the Hull Hebrew School, and the other quarter for the Hull Hebrew Board of Guardians. The next of kin challenged these provisions, questioning whether the gift to the association would be void. Oliver J held that the bequest was to the association absolutely, so in fact they did not need to use it for buildings, it would be their decision as to whether they honoured the request. Applying this rationale to the question it would appear that this bequest was for the Crazyman’s Cavern absolutely and the bequest would therefore be held as valid.

Question 2

In order to answer this question we need to establish the relevant parties and their role in the problem. Winifred is the settlor, Joyce and Mary are the beneficiaries and then we also have the potential children of Joyce and Mary who are as yet unborn. In order to answer this question we need to consider the law on variation of trusts.

Before we move on to the substantive issues, we should make it clear that the rule in Saunders v Vautier (1841) does not apply. This rule allows beneficiaries under a trust who are of full age, full capacity and absolutely beneficially entitled to the assets of the trust to either vary the trust or dissolve it and take the trust property absolutely. However, in this case because Mary has not reached the age of majority and because there is a postponement in vesting, the beneficiaries collectively cannot exercise this rule.

In order to decide whether a court has the power to make the desired variation two issues need consideration:

Firstly, Does the court have the power to vary a trust on behalf of Mary and the unborn children?

Firstly, it is clear that Joyce, as an adult beneficiary of full capacity must consent to any variation. The Court has power to vary the trust instrument under the Variation of Trusts Act 1958 (VTA) s.1(1)(c), which permits the court to consent to variation on behalf of the unborn and Mary (classed as an infant) to approve ‘any arrangement...varying or revoking any or all of the trusts.’ Courts may also vary trusts on behalf of infants for their maintenance or education under the Trustee Act 1925 s.53, although in this scenario, the court may feel that the VTA
1958 would be more appropriate as there are contingency interests for the unborn.

Secondly, is the settlor’s intention important?

Winifred’s initial intention appears that the trust would be UK based. The key cases on intention are: Re Steed’s WT (1960); Re Remnant’s ST (1970) and Goulding v James (1997). Following the dicta in these cases, it would appear that in some cases the intentions of the settlor in creating a trust or imposing restrictions on the vesting of the trust property must be considered by the court. In Re Steed for example, the court refused to vary the trust to remove a contingency preventing full vesting because the court concurred with the settlor’s belief that the beneficiary of the trust might be unduly influenced by a member of her family. The court may also not approve a variation if the effect would be to destroy the underlying purpose of the trust. This is known as the ‘substratum test’ and was formulated in Re Ball’s Settlement (1968).

However, where the purpose of the trust remains intact (as it does here) and in the absence of any contingency, courts will normally not consider that the settlor’s intention has great relevance, particularly if the proposed variation would be of financial benefit to the beneficiaries. Hence, the settlor’s intention in this case would almost certainly be ignored.

In discussing whether a court would consent to such a variation the issue of benefit needs to be discussed. In respect of financial benefit, there is no doubt that the court will grant approval on behalf of persons who would benefit financially from a proposed variation; in fact, almost every variation is sought for tax purposes (see Re Weston’s Settlement Trusts (1969)). However, there must be evidence that there is a financial advantage to all the persons required to be benefited – Re Clitheroe’s Settlement Trusts (1959). Under the facts of the case in question it possible, given the differing tax laws in the Bahamas, that all persons would benefit from the trust being moved from the UK to the Bahamas.

Secondly, we must consider non-financial benefits. The court must consider the general welfare of the person on whose behalf the approval is sought: this consideration and the financial benefit do not necessarily coincide. In Re Weston it was held that moving a trust and its beneficiaries to Jersey for tax purposes did not benefit the beneficiaries ‘socially or educationally’. Lord Denning argued:

"The court should not consider merely the financial benefit to the infants or unborn children, but also their educational and social benefit. There are many things more worthwhile in life than money...I do not believe it is for the benefit of children to be uprooted from England and transported to another country simply to avoid tax."

However, it is important to note that in other cases on this topic, the results have depended on the motives for trustees and beneficiaries in leaving the jurisdiction. In Re Seale’s Marriage Settlement (1961) for example, the court held in this case that because there was ample evidence that the family in question were intending to permanently emigrate to Canada, regardless of tax considerations, the facilitation of the administration of a trust would be of benefit to the infant. In Re Windeatt’s Will Trusts (1969) it was held that the export of a trust to Jersey and the appointment of Jersey based trustees was in the interests of the beneficiaries, as the family had lived there for 19 years.

Based on the case law, it appears that moving the trust to the Bahamas may not be of sufficient benefit to the beneficiaries, including the potential unborn
children. The issues raised in Re Weston would appear to be particularly applicable to the current scenario. Neither Joyce nor Mary wish to leave the UK; in fact both wish to remain and to go on to university in the UK. There appears little motive to remove them from the UK other than to save money on tax. The court must therefore consider the potential benefits to the beneficiaries by conducting a holistic assessment and ask, in particular, whether the saving of tax would be of sufficient benefit to justify allowing Winifred to uproot her children and permit them to emigrate to save money. The answer would have to be probably not and the court would not approve the variation.

**Question 3**

This question requires discussion of each of the four beneficiaries’ complaints.

(i) **The purchase of the freehold**

There appears to be nothing in the trust instrument to exclude the power to purchase land under s.8 Trustee Act 2000. Provided the freehold is value for money and £1 million is a fair market price, it appears that Mike and Aisha would have discharged their duty as trustees in respect of the dock purchase, in purchasing the land for the trust.

(ii) **Appointing themselves directors and charging fees**

Mike and Aisha are now earning money from appointing themselves as directors and charging for directors’ fees, this will constitute a breach of trust. The trustees, as fiduciaries, are under a duty to ensure their interests do not conflict with those of the trust – the so-called ‘no-conflict rule’:

A ‘Fiduciary Relationship’ was defined in *Reading v AG (1951)* thus:

"a fiduciary relationship exists (a) whenever the plaintiff entrusts to the defendant property…and relies on the defendant to deal with such property for the benefit of the plaintiff or purposes authorised by him, and not otherwise, and (b) whenever the plaintiff entrusts to the defendant a job to be performed…and relies on the defendant to procure for the plaintiff the best terms available."

In *Bray v Ford* (1896) Lord Herschell stated that:

"It is an inflexible rule of equity that a person in a fiduciary position...is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict"

Therefore, the rule is that a trustee may not profit from using any knowledge gained as a trustee of the trust or otherwise by abusing his position as a trustee. If he does so, the trustee is a constructive trustee of the profit that he has obtained.

Mike and Aisha may therefore be in breach of the no-conflict rule by virtue of the fiduciary duty not to make incidental profits from their position as trustees – *Boardman v Phipps* (1967).

The court may also hold Mike and Aisha accountable to the trust under the “collateral opportunity rule”. If a fiduciary makes a profit by virtue of an opportunity presented to him by virtue of his position as a fiduciary, he will be held to restitute this as the opportunity profit properly belongs to the principal.
Regal (Hastings) Ltd v Gulliver (1967); Industrial Development Consultants Ltd v Cooley (1972); Boardman v Phipps (1967).

If the court holds that a breach has occurred, there are three forms of remedy:

Equitable compensation: equitable damages to compensate the beneficiaries for any loss the trust fund has suffered as a result of the breach of fiduciary duties Swindle v Harrison (1997).

Restitution: where a fiduciary is in breach of fiduciary duty and receives an unauthorised profit he will be liable to make restitution to the trust fund as there is an equitable duty to account for any profit received.

Constructive trust: if the money or property that the fiduciary acquired through his breach of duty is still in existence, whether in the hands of the fiduciary himself or in the hands of third parties, there is scope for a proprietary remedy via a constructive trust.

If Mike and Aisha have committed a breach of fiduciary duty, they will hold their remuneration from the company, as constructive trustees for the beneficiaries (Re MacAdam (1946).

(iii) The operation of a competing business

Under the no-conflict rule, trustees are under a positive duty not to compete with the trust concerned. A trustee must therefore not be in competition with the trust e.g. In Re Thompson (1930) the executors of a will were directed to carry on the business of the testator who had been a yacht broker. One of the executors was intending to set up on his own account as a yacht broker in competition with the estate. The court held that he could not set up in a competing business given that he was a trustee of the estate.

Applying this principle, the £20,000 Mike and Aisha profited from by virtue of their competing yacht brokerage will almost certainly be held on constructive trust for the beneficiaries.

(iv) The sale of the painting

As trustees, Mike and Aisha are under a duty to administer the trust in accordance with its terms and the principles of equity with a view to protecting the interests of the beneficiaries in the trust property - equity's general duty of care.

Similarly, Mike and Aisha are under what may be called "the statutory duty of care", (see: the Trustee Act 2000 s.1 – a duty to exercise such care and skill as is reasonable in the circumstances) when commuting one form of investment of trust property into another. These duties might be loosely called - “a duty to act in the best interests of the trust”.

Mike and Aisha’s actions in:

(a) failing to put the trust property into auction; and

(b) offering the painting for sale to a ‘connected person’

may well have been in breach of these duties if loss has been caused by the fact that insufficient time or opportunity was given over to the matter of advertising
the availability of the painting for purchase at auction and this has resulted in a sale at substantial undervalue.

It may be the case that the beneficiaries can successfully challenge the sale. A court can, in its discretion, declare a sale of trust property by a trustee to a ‘connected person’ as void if the connected person is seen to be the trustee's *alter ego* – (i.e. his other self). A sale by a trustee to a connected person is not automatically voidable, but the circumstances of the sale will be closely examined. See *Tito v Waddell (No. 2)* (1977).

**Question 4**

This question concerns trustee duties and powers and whether there is personal liability for failure to comply. There are several key issues in this question in relation to one or all trustees, this answer will deal with each in turn.

For the purposes of this question it will be assumed that the trust property has been vested in Andrew and Dave as required by S40 Trustee Act 1925. Anne holds a life interest with Jonathon as remainderman. Where this situation exists there is a duty to act impartially between the life tenant and the remainderman. This involves the trustees finding an equitable balance to ensure a high income for Anne whilst preserving the capital for Jonathon (*Re Tempest 1866*).

**Issues:**

**Sale of Shares:** Andrew and Dave were entitled to sell the shares either through an express power which may have been given in the trust instrument s4(2) Trustee Act 2000 which allows for investments to be reviewed and varied or under Section 12(1)Trustee Act 1925 which gives a power of sale without being answerable for any loss.

The fact that Andrew and Dave gave a receipt for the sale money that they both signed is sufficient to discharge the purchaser of the shares from any liability S14 Trustee Act 1925.

**Dave’s Depression:** S36TA1925 allows Andrew to appoint a new trustee in writing if Dave is unfit to act and wishes to retire. To be a valid appointment of Carlo, Andrew must have appointed him by deed to perform the trust. Dave cannot escape liability for failing to be an active trustee (*Bahin v Hughes (1886)*), and may be held liable for any breaches by Andrew.

**Carlo’s appointment:** As a new trustee, Carlo should have done the following: acquainted himself with the terms of the trust; inspected the trust instrument and any other trust deeds; ensured that all the property subject to the trust was vested in joint names of himself and Andrew and that all title deeds were placed in their joint control and finally investigated any suspicious circumstances which indicate a prior breach of trust and taken action if any breach has taken place. Failure to do any of these renders Carlo liable to Jonathon and previously Anne.

**Statutory duty of care:** the duties of Andrew and Carlo are imperative that is there is no discretional element to the exercise of their duties. The standard required is that of S1 TA 2000 to act reasonably, having regard to special skills and knowledge.

**The Speculative investment:** as previously mentioned Carlo failed to enquire as to the history of the trust and appears to be unaware of the speculative
investment in the green energy company. This will not exonerate him from any blame as he failed to fulfil his duties as a new trustee.

Section 3 Trustee Act 2000 provides that a trustee may make any kind of investment that he could make if he were absolutely entitled to the assets of the trust. This is referred to as the general power of investment. Section 5 Trustee Act 2000 states that before exercising any power of investment, the trustees should have obtained and considered proper advice. Section 5(4) states that proper advice is “the advice of a person who is reasonably believed by the trustee to be qualified by his ability in and practical experience of financial and other matters relating to the proposed investment.” The explanatory notes of the Act state that it is best practice to obtain the advice in writing in order to demonstrate compliance with the statutory duty of care. Section 5(3) states that a trustee need not obtain advice where they reasonably conclude that it is inappropriate or unnecessary. An example of this might be where the trust fund is relatively small and the cost of advice would be disproportionate.

Section 4(1) Trustee Act 2000 states that trustees must have regard to the standard investment criteria when investing on behalf of the trust. The standard investment criteria are laid down in S4(3) and include assessment of the suitability of the investment and diversity of investment. The explanatory notes indicate that the standard investment criteria facilitates investment in accordance with the modern portfolio theory, which is investment that seeks to maximise return for a minimum amount of risk through diversification of investment.

Carlo, Dave and Andrew are clearly in breach of their duty of care in terms of their duty to invest as they have failed to seek advice, they have not adhered to modern portfolio theory and they have failed to act reasonably by investing all of the money in a highly speculative company.

The facts in this scenario are similar to Nestle v Natwest Bank (1993), where it was held that trustees were under a duty to act prudently and fairly as they were accountable to their beneficiaries. The court held that it was inexcusable that the bank took no steps to obtain advice as to the scope of its power and that the bank should have undertaken regular investment reviews. However, the claim failed as Nestle was unable to prove loss and causation.

Jonathon would therefore have to prove that the investment resulted in a loss and that the trustees’ failure to take advice and invest according to the statutory standard of care was the cause of loss.