LEVEL 6 - UNIT 5 – EQUITY & TRUSTS
SUGGESTED ANSWERS – JUNE 2010

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 2010 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 the guidelines for establishing the liability of a defendant accused of dishonest assistance in a breach of trust or knowing receipt of trust property. It will argue that the guidelines for liability are clearer for assistance than they are for receipt.

Actions against third parties (or “strangers to a trust”) are popular where the trustees are insolvent. Beneficiaries of a trust may also choose to pursue a third party if the third party is in possession of trust property or the proceeds of trust property and the value of that trust property or its proceeds has increased.

Although a stranger is said to be liable as a constructive trustee, it is not necessary in cases of dishonest assistance to show that the stranger received trust property. The stranger is required to account for the trust money but it is a personal rather than a proprietary claim and the trust will not rank above other creditors.

The two main situations in which third parties are liable following a breach of trust are “dishonest assistance” and “knowing receipt”. Liability for dishonest assistance requires evidence of a trust, a dishonest and fraudulent design on the part of the trustee of that trust, assistance by the stranger in that design and dishonesty on the part of the stranger: Royal Brunei Airlines v Tan (1995). Liability for knowing receipt requires proof that the defendant had knowledge of the breach of trust and received trust property with that knowledge. The knowledge must exist at the time of receipt: Re Montagu’s Settlement Trusts (1987).

With liability for knowing receipt, the difficulty has been defining “knowledge”. Five categories of knowledge were listed in Baden Delvaux and Lecuit v Societe Generale (1983). These are:
1. actual knowledge,
2. wilfully shutting one’s eyes to the obvious,
3. wilfully and recklessly failing to make such enquiries as an honest and reasonable person would make,
4. knowledge of circumstances which would indicate the facts to an honest and reasonable person, and
5. knowledge of circumstances which would have put an honest and reasonable person on enquiry.

There is no doubt that category 1 is sufficient, and no doubt that category 5 is not. However, the categories in between are more doubtful, as actual knowledge shades gradually into constructive knowledge.

Applying the categories rigidly is difficult because the boundaries between them are not clear or precise (Polly Peck International plc v Nadir (No 2)(1992)). It is also very difficult to discover whether someone’s failure to make enquiries was wilful or merely stupid. Although many cases talk about the Baden Delvaux categories, there has never been a definitive statement about where the line will be drawn.

Many cases place more emphasis on whether there is any fault. Failing to make enquiries or notice relevant circumstances may indicate fault, but it will not always do. Re Montagu’s Settlement Trusts (1987) held that the recipient’s conscience must be affected and therefore constructive knowledge would not be enough, there must be some “want of probity”. A similar approach is found in BCCI (Overseas) Ltd v Akindele (2000) where Nourse LJ said, the question was whether the third party had enough knowledge that it would be unconscionable for them to retain the property received. Again, in Agip (Africa) Ltd v Jackson (1989) Millet J said that what mattered was the line between honesty and dishonesty, rather than between precise degrees of knowledge or constructive knowledge. This has not received general acceptance so far. Knowledge is needed for there to be dishonesty or unconscionability, but not all who have knowledge will be dishonest or will have behaved unconscionably.

The conflict in the cases therefore seems to be about whether knowledge is the essential requirement or whether knowledge is just a key to whether there is dishonesty or unconscionability. As a result, it is not easy to predict when there will be liability. Although complete certainty is not possible, and equity is not given to rigid rules, this level of uncertainty is undesirable.

Turning to dishonest assistance, before Royal Brunei Airlines v Tan, the knowledge test was also applied to this head of liability and its replacement with a dishonesty test was intended to resolve the difficulties with the Baden categories. However, just as the meaning of knowledge has caused problems, there have been disagreements about what “dishonesty” requires, and its relationship with knowledge. Resolution of the issues in this area has been difficult partly because the leading cases were decided by the Privy Council, so that they are not binding on English courts.

Dishonesty was described in Royal Brunei Airlines in terms of commercially unacceptable conduct, and it is clear that this requires knowledge of the facts giving rise to the trust or the trust itself (Brinks Ltd v Abu-Saleh (No 2)(1995)). What is unclear is whether knowledge of unacceptability is needed. In Twinsectra v Yardley (2002) the House of Lords appeared to say that the defendant must have realised that their behaviour was dishonest by the ordinary standards of reasonable and honest people but later cases have backtracked on this. The Privy Council in Barlow Clowes International Ltd v Eurotrust International Ltd (2006)
rejected this interpretation of Twinsectra, and said that it had not introduced a requirement of conscious wrongdoing. This re-reading of Twinsectra was approved in Abou-Rahmah v Abacha (2007).

The current position therefore seems to be that knowledge of the facts giving rise to the trust is a prerequisite of a finding of dishonesty, but that a person can be dishonest without realising their own dishonesty. Although it is not clear whether this is the correct interpretation of Twinsectra or a convenient re-reading of it, the Court of Appeal in Abacha was confident that this is how the House of Lords would now state the test. This is certainty of a kind, and probably sufficient for liability to be predicted with reasonable accuracy.

To conclude, there is continuing uncertainty about the boundaries of liability for knowing receipt. There has been a lot of uncertainty about dishonest assistance, but at present, the courts are in agreement about the test to be applied.

**Question 2(a)**

Doubt about whether a settlor or testator intended to create a trust arises in a number of different situations. When courts consider this issue they look for evidence that the settlor or testator intended to create an enforceable obligation as opposed to a mere moral obligation. No particular form of words is needed, and the evidence of intent to create a trust can come from conduct, provided the subject matter of the trust is not land, where there is a requirement that it is evidenced in writing.

The approach can be illustrated through a selection of cases.

A common problem is when a testator uses precatory words (words expressing hope) in a will, and it is unclear whether the gift is on trust or whether the testator has put the recipient under a moral obligation to use it in a particular way. At one time, words like this were always interpreted as creating a trust but this was rejected in Lambe v Eames (1871). The modern approach is to look at the overall intention. “In full confidence” did not create a trust in Re Adams and the Kensington Vestry (1884), but used in a different context, it did in Comiskey v Bowring-Hanbury (1905). “It is my wish” combined with the later use of the word “trust” was sufficient in Re Harding (Deceased) (2007). As a trust is an onerous obligation, the court does not find one lightly. Someone who has attempted to make a gift but failed, will not be treated as having declared themselves trustee (Richards v Delbridge (1874), Jones v Lock (1865)). Where the court is relying on informal words or even conduct, the level of education of those involved is important. It is the effect of the obligation created, not the words used that matters: for instance, “as much yours as mine” in Paul v Constance (1977), and a reference to “our” security in Rowe v Prance (1999). Creating a new bank account for customer deposits was sufficient in Re Kayford (1975). However, the overall arrangements are important. Thus there was no trust in Azam v Iqbal (2007) because there was clearly no obligation to keep the funds separate from other customer funds.

**Question 2(b)**

For a trust to be administered properly, the trustees need to be able to identify the beneficiaries of the trust. Where this can be done, the trust is said to have “certainty of objects”.

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In a fixed trust, the trustees need to be able to list all the beneficiaries in order to carry out the trust (*IRC v Broadway Cottages Trust* (1954)). This is called list certainty. The trust will fail if the trustees cannot make a list. When looking at whether a list is possible, trustees should check whether they are really dealing with a class of beneficiaries rather than a series of gifts to individuals. If each gift is independent of the others, no list would be needed, as in *Re Barlow’s Will Trusts* (1978).

In a discretionary trust, the class of beneficiaries may be very wide, and it can be difficult to list them all. Membership of the class may even change from day to day. At one time, the list certainty test was applied to discretionary trusts (*IRC v Broadway Cottages Trust* (1954)). It also applied to powers of appointment. This was because without a list, the trustees could not consider all possible applicants. Also, if the trustees failed to carry out the trust and the court intervened, it would need a list in order to divide the trust property equally.

In *Re Gestetner’s Settlement* (1953) the court decided that list certainty was unnecessary for a power because the person who holds it is not under any obligation to exercise it. All that was needed was that the donee of the power was able to ascertain whether any given claimant was a member of the class of objects of the power. In *McPhail v Doulton* (1971), the House of Lords decided that it was unnecessary to have list certainty for discretionary trusts either. The trustees did not have to consider every possible claimant and the court would not ever have to divide the fund equally. The test set out was whether it could be said with certainty that any given individual is or is not a member of the class (the “is or is not” test).

The problem with the “is or is not” test is that it is not entirely clear what it means. If the words used do not have a clear meaning, it is not possible to say whether someone is or is not a member of the class. An example of a class that was not conceptually certain was given in *Re Lloyd’s Trust Instrument* (1970) – “someone under a moral obligation”. The trust will not fail for uncertain objects just because there might be evidential difficulty – the onus falls on the claimant. It will also not fail because of unascertainability.

However, there is some dispute about how much conceptual certainty is needed to satisfy the test. The problem was with the “or is not” part of the test. Did this mean that there had to be absolute certainty about every possible applicant? The judges in *Re Baden’s Deed Trusts (No 2)* (1973) agreed the trust was certain, but they all gave different reasons.

Sachs LJ said that once the class is conceptually certain, then it is a question of fact whether someone is a member of the class. If they cannot prove that they are in the class, they are not in it. It is not necessary to prove definitively that they are not in the class. “ Relatives” was certain because it clearly means descent from a common ancestor, and if someone could not prove they were a relative, then they were not. Megaw LJ said the test would be satisfied if a substantial number of people can, with certainty, be said to fall within the class. It did not matter that there were others who could not be proven to be in or out of the class. This is different from what Sachs LJ says because first, it requires a critical mass of successful applicants, and Sachs LJ does not. Also, it allows for more conceptual uncertainty. Even if relatives is defined more narrowly than descent from a common ancestor, so long as some people are definitely relatives, it does not matter that with others it isn’t at all clear. Stamp LJ did not think that the “or not” part of the test was meaningless, and therefore if relatives meant descendents from a common ancestor, it was not certain. It would not be
possible to say for certain that someone was not a relative. However, he interpreted relatives as meaning next of kin, and this was certain.

As a result, where a term has a clear central meaning, but there are some doubtful cases around the edges, it is not certain whether the "is or is not" test will be satisfied. In practice, this uncertainty does not appear to cause difficulties, as there are no significant cases on the issue after Baden.

A qualification to the certainty test for discretionary trusts is that if the class is too big, the trust will fail because of administrative unworkability (McPhail v Doulton (1971)). An example of a trust like this would be one for “all the residents of Greater London”. The principle has only rarely been applied in practice (R v District Auditor ex parte West Yorkshire MCC (1986)).

Question 3

According to Goff J in Re Denley’s Trust Deed (1969), the beneficiary principle is confined to abstract or impersonal purpose trusts. If there is a beneficiary, then the trust may be valid even though it is expressed in terms of a purpose. This essay looks at how the courts deal with non-charitable purpose trusts, and asks whether Goff J was correct in Denley.

The beneficiary principle is the rule that a non-charitable trust must have a definite object, that is, someone in whose favour the court can decree performance (Morice v Bishop of Durham (1804)). A trustee cannot be expected to be subject to an equitable obligation unless there is someone who can enforce the equitable right, and the nature and extent of the obligation can be worked out. In Re Astor’s Settlement Trusts (1952) the court said that this meant that a trust for purposes such as the preservation of the independence of newspapers and promoting good understanding between nations was invalid. Although cases such as Astor and Re Shaw (1957) treat this as a well-known and longstanding rule of equity, in reality earlier courts did not apply it strictly.

In Re Denley Goff J suggested a qualification to the principle stated in Astor and Shaw. The trust property was a sports field, and the trustees operated it for the benefit of the employees of a company. Goff J said that the beneficiary principle did not invalidate the trust. Although it was for a purpose, that purpose benefited individuals. These “factual” beneficiaries were, just like the beneficiaries of a person trust, able to ensure that the trust was carried out. This disposed of the mischief that had led to purpose trusts failing in other cases. The solution is not possible, though, where the purpose is abstract or impersonal, as there will not even be a factual beneficiary.

The purposes in Astor and Shaw were very abstract and did not benefit particular individuals. The outcome of these cases is therefore consistent with the comments made in Denley. But does Goff J’s qualification to the beneficiary principle apply more generally? To find out, we need to look at the circumstances when a non-charitable purpose trust will be allowed.

The first series of exceptions is the “anomalous” cases of trusts for the erection of a particular monument or maintenance of a particular grave and trusts for maintenance of particular animals. Re Dean (1889) and Pettingall v Pettingall (1842) are examples. These trusts are trusts of imperfect obligation, in that there is no-one to compel the trustee to carry out the trusts, but the courts will still permit them. This line of cases may be consistent with Goff J’s theory, as the purposes are neither abstract nor impersonal. However, this is not the reason given in the cases themselves, and in fact they were decided before the courts
started to apply the beneficiary principle strictly. Although they are sometimes criticised as “occasions when Homer has nodded” or concessions to human weakness (Re Endacott) it may be fairer to say that they are simply relics of an older approach to purpose trusts. Re Endacott is clear that they will not be extended, and if the rationale of Goff J is correct, there would be no reason why they should not be.

Another series of cases that might be seen as exceptions to the beneficiary principle are those where a trust, although expressed in terms of a purpose, is interpreted as being for a person. Examples include Re Osoba (1979) and Re Andrew’s Trust (1905). Again, these cases are consistent with the suggestion that the problem is with abstract and impersonal purposes. There were clear factual beneficiaries in Osoba and Andrew. However, these cases do not purport to be exceptions to the beneficiary principle. Rather, they are presented as a matter of interpretation, and the end result is that the purpose as such is not enforceable. These are not enforceable non-charitable trusts, they are purpose trusts re-cast as trusts for persons.

Further, there are some problems with the idea of a factual beneficiary. If it is the essence of a trust that the trustee has more than a moral obligation, then it is possible that an alternative method of enforcement would suffice. This is the case with charitable trusts themselves, which are enforced by the Attorney-General. However, it is not clear who has the beneficial interest in cases with only factual beneficiaries. There is no way in which the employees in Denley could force the trustees to bring the trust to an end, and they do not have any beneficial interest in the property. If, then, this is a trust, it is a different kind of trust from the standard one.

To conclude, although Goff J’s qualification of the beneficiary principle seems to be consistent with the results of the cases in this area, it probably does not really explain them. The fact remains that a trust for a non-charitable purpose can be enforced only as a trust of imperfect obligation – that is, a trust that is not enforceable – or as a trust for persons.

Question 4(a)

A resulting trust is presumed where there has been a voluntary transfer of legal title or a contribution to the purchase price of property. For example, shares bought in another person’s name were held to be subject to a resulting trust in Re Vinogradoff (1935). The idea is that someone is presumed to have intended to retain their beneficial ownership of the property. This presumption can be rebutted if the evidence suggests that the property transferred was a gift or if the contribution to the purchase price of property was a gift (Fowkes v Pascoe (1875)).

In the past, the presumption against a gift did not apply in every situation. Where transfers were between close family members, a gift may be more likely than not. The presumption of advancement said that where a transfer was made from a husband to a wife or by a father to a child, then the courts will presume a gift. If a gift is denied, it will be up to the transferor to rebut the presumption (as in Sekhon v Alissa (1989)). There were some controversies around the scope of the presumption of advancement. In particular, it is unclear whether it applies where the “child” is an adult. The Canadian Supreme Court thought it did not in Pecore v Pecore (2007), but the Privy Council assumed that it did in Antoni v Antoni (2007). There was no express discussion of this point in the English case-law. However, the presumption was abolished by s199 of the Equality Act 2010 and therefore this is now a moot point.
The clean hands principle is relevant to presumed resulting trusts and (where the transfer occurred before s199 came into effect) the presumption of advancement because sometimes the purpose of transferring property into another person’s name, or contributing to their purchase, is something that is illegal. For instance, in *Tinker v Tinker* (1970), the family home was conveyed into the wife’s name so that if his business was in trouble, his creditors could not take the home. The effect of the clean hands rule is that someone cannot rely on evidence of their own illegal purpose as support for their claim to property. So, in *Tinker v Tinker* itself, when the couple separated, he was not able to claim the house was his. This was a transfer from husband to wife, the presumption of advancement applied, and he could not rebut it by saying he was actually trying to defraud his creditors.

There are two problems with the application of clean hands to resulting trusts.

The first is that the courts have not always been consistent about what amounts to dirty hands. Some cases distinguish between whether the illegal purpose was carried out (*Tribe v Tribe* (1995), *Painter v Hutchinson* (2007)) but in others, such as *Tinker v Tinker* it does not seem to make a difference. The other problem was that the results can be arbitrary depending on whether the initial presumption was one of trust rather than advancement.

The important case here is *Tinsley v Milligan* (1993). A contributed to the purchase of a house by B, but the house was in B’s name. This was because A wished to continue to receive social security benefits, and did not want the authorities to know of her assets. A was able to obtain an interest in the house using a presumed resulting trust. Although she did not have clean hands, she was not relying on her illegal purpose. Her interest came through a direct application of the presumption of a resulting trust. If, however, A had been B’s husband, and the presumption of advancement applied, A would have needed to rely on the illegal purpose. A would have lost the case because of the need to rely on an illegal purpose to explain the contribution was not a gift.

This creates uncertainty about beneficial interests, and that is not desirable.

**Question 4(b)**

The question here is about why courts nowadays prefer to use common intention constructive trusts to resolve disputes over the family home. There are two main options for resolving this kind of dispute: the resulting trust and the common intention constructive trust.

A resulting trust makes use of the presumption of a resulting trust and the presumption of advancement (although the presumption of advancement probably does not apply if the couple are not married). If A contributed 75% of the purchase price, but the house is in joint names at law, the presumption of a resulting trust means that A and B will hold the property on trust for themselves, in 75% and 25% shares. B would need to rebut the presumption in order to keep a half share.

The disadvantages of this approach are many. It does not take account of anything other than direct contributions to the purchase price. An argument that payment of the mortgage is a direct contribution to the purchase price was rejected in *Curley v Parkes* (2004). Certainly, in the not unusual situation where B has been at home with young children, a resulting trust will ignore their non-financial contributions to the relationship. Nor is there any careful adjustment of interests: the 75:25 split will stand, even if B has been paying all the bills for the
last three years. The focus on purchase price, and on contributions at the time of purchase only, means that resulting trusts are a very limited remedy.

Nowadays, the preferred remedy is a common intention constructive trust. This is imposed where there was a joint intention between A and B that they would share the beneficial ownership of the home, B acted to their detriment on reliance on that common intention, and A now denies B’s interest. This argument can be used in cases where the home is in joint names to establish non-equal shares or where it is in the sole name of one party, to establish the other has a beneficial interest.

The reason this is a better remedy is that it is much more flexible. Once the common intention and detriment have been established, a whole range of factors can be considered, not just arrangements at the time of purchase. In deciding whether there was a common intention factors such as the reasons for the way in which ownership was organised, whether there were children to be housed, how household expenses were handled and even characters and personalities (Stack v Dowden (2007)).

The common intention trust is not ideal. Although sometimes, the court finds intention on flimsy grounds (eg, Eves v Eves (1975)) the remedy relies on there having been intention in the first place. The court will not presume the couple intended what reasonable people would have intended. It is relatively easy to obtain an interest if the house is in joint names (Fowler v Barron (2008) demonstrates this) but whether the house is in joint names may be an accident of the history of the relationship or conveyancing. A partner who stays at home and looks after the children will still have difficulty establishing a substantial interest, if the house is not in joint names.

SECTION B

Question 1(a)

The first issue is whether Kiranjit can challenge the trustees’ use of their discretion, whether he can find out the exact terms of the trust and whether he can find out about any instructions given to the trustees by Faizaan.

This is a discretionary trust and therefore the trustees do not have to give reasons for their decisions or produce documents containing details of their reasons (Re Marquess of Londonderry’s Settlement (1964)). The only situation in which Kiranjit could challenge the discretion would be if the trustees had breached the terms of the trust. There is nothing in the facts of the scenario to indicate that they have.

Kiranjit is entitled to see trust documents, however, and this would include the document(s) setting out the terms of the trust (Re Rabaiotti 1989 Settlement (2001)).

It is possible that Faizaan had given instructions to the trustees about how to exercise their discretion, using what is known as a “letter of wishes”. The trustees are under no obligation to reveal this to Kiranjit, but they may do so, if they think that is in the interests of the trust: Breakspear v Ackland (2008).

Question 1(b)

The next issue is whether Kiranjit can challenge the investment decisions made by the trustees. The investment decisions concern the company’s majority
shareholding in a company selling window cleaning equipment, investments in shares in Kempston’s Bank plc and in Premium Bonds.

The basic principles governing trustee investments are as follows. Trustees are expected to use the care expected of an ordinary prudent man of business and use such skill and are as is reasonable in the circumstances (s1 Trustee Act 2000 and Learoyd v Whitely (1887)). The trustees in this scenario do not appear to have special knowledge or skill that might result in a higher standard of care. There are statutory powers of investment in the Trustee Act 2000. The trustees must have regard to standard investment criteria. This means that they must have regard to the suitability to the trust of making investments of this particular type and also consider the suitability of these particular investments of that type. They must also consider the need for diversification of investments.

Where a trust has a controlling interest in a company, the trustees need to get the fullest possible information about the business. The trustees were correct in having Huda appointed as a director of the window cleaning company. Not to do so would be a breach of trust (Bartlett v Barclays Bank Trust Co Ltd (No 1) (1980)). However, she took no part in decision making and the company is now virtually worthless after an unsuccessful attempt at expansion. If Huda had known, she could have intervened or possibly sold the trust's interest while the shares had some value. There appears, therefore, to have been a breach of the trustees’ duties relating to investment with respect to this particular investment, and the beneficiaries may be able to bring an action against the trustees.

Seventy five percent of the trust’s cash assets were invested in Kempston’s Bank. Prudent investment requires consideration of the need to diversify and this is a problem with this investment, since the trust fund is large enough to permit diversification. As a result of over-reliance on one type of investment, the trust has suffered very badly from problems in the financial services industry. The failure to spread funds around is itself likely to be a breach of trust (see s4(3) Trustee Act 2000). It is less clear whether the choice to invest in banking shares is a breach of trust, even though the industry is not doing well. This may depend on why and when the shares were purchased and on whether the shareholding was reviewed regularly. Trustees are required to obtain and consider proper advice (s5 Trustee Act 2000). If the trustees took advice and concluded that it was better to retain the shares or if they bought them cheap in the expectation that they would increase in value as the sector improved, the decision to invest in banking may have been a reasonable one.

In terms of prudent investment, the purchase of premium bonds is risky because there is no guarantee that the trust will win anything in the prize draws. Fortunately, in this case, the amount received in prizes seems to have been greater than the amount that might have been paid in interest or dividends on another investment, because of low current interest rates. Although the investment was contrary to the duty of care, and should not be retained, the trustees will not be liable simply because of their choice to purchase the bonds. However, there is another problem. This investment favours income over protection of capital, the value of the investment does not increase, and actually decreases with inflation. This may be in breach of the duty to maintain equality between beneficiaries (for instance, Lloyds Bank v Duker (1987)). This aspect of the investment decision can therefore be challenged.

**Question 1(c)**

The final issue is whether it is possible to replace Mohsin, one of the trustees. He has been overseas for 20 months and indicates he does not know when he will...
return to the UK. There is no provision in the trust documents for the appointment of new trustees.

A new trustee can be appointed under s36(1) Trustee Act 1925. This applies because Mohsin has been out of the UK continuously for more than 12 months. If Faizaan did not nominate someone to appoint replacement trustees, the appointment could be made by the continuing trustees. If this is not practical or there is a good reason why they should not make the appointment, then the court has a power to appoint trustees under s41 Trustee Act 1925. This provision can be used to replace a trustee against their will and therefore might be more suitable in this situation, given that there are some questions about the conduct of the other trustees in making investments. The court is to take into account the clearly indicated wishes of the settlor, the interests of the beneficiaries and the promotion of efficient administration of the trust (Polly Peck International plc (in administration) v Henry (1999)).

**Question 2**

The issues in this question are whether Briony has any right to The Gables, whether Lucinda should receive the shares, whether Sam gave his interest under the trust of the paintings to Tomas, and whether Sam gave the autograph collection to Pavel.

With The Gables and the shares, the question is whether there is either a fully constituted trust or a complete gift.

As Sam said to Briony that he would look after The Gables for her until she was old enough to have it for herself, he may have been trying to declare himself trustee of The Gables in favour of Briony. There is room to question whether there really was an intent to create a trust but this does not matter because there is no writing. Under s53(1)(b) Law of Property Act 1925 a trust of land can be declared orally but it must be evidenced in writing. No exceptions to this apply as there is no evidence of fraud and nothing to suggest proprietary estoppel, so Briony has no interest in The Gables.

Sam appears to have intended to make an immediate gift to Lucinda of the shares in XXY Ltd. The shares, however, were never transferred. Equity will not assist a volunteer by enforcing a gift that is not complete but under the rule from Milroy v Lord it is sufficient that the settlor has done everything that is necessary to be done according to the nature of the property. No transfer documents were completed at all, and so equity will not complete this gift under the rule in Milroy v Lord. Although the court in Pennington v Waine (2002) did complete a gift in circumstances similar to those in Sam’s case, this decision is controversial and in this case Sam did not encourage Lucinda to spend the proceeds before she received them. Also, unlike the donor in Pennington v Waine, who had relied on a third party to complete the transfer, there were still steps Sam needed to take himself. This may be enough to distinguish Pennington v Waine, as unconscionable behaviour is probably the key to the outcome in that case.

However, there is another ground upon which Lucinda may be able to claim the shares for herself. She was appointed executor of Sam’s estate. This brings the rule in Strong v Bird (1874) into play. This allows a trust to be fully constituted provided (a) there was an intention to make an immediate inter vivos gift, (b) this continued up to the donor’s death and (c) the donee was appointed executor. Sam did intend Lucinda to have the shares immediately, rather than to have them in the future. However, continuing intention may be a problem, as he did nothing to chase Tim up about the paperwork, even though some time
elapsed. There is no real justification for the rule in *Strong v Bird* and therefore it is likely to be applied strictly.

The next problem is the trust of the paintings. As Sam was a beneficiary of this trust, he had an equitable interest in the paintings. A disposition of an equitable interest must be in writing by virtue of s53(1)(c) of the Law of Property Act 1925. Sam was seeking to pass his entire interest in the trust to Tomas. This would be a disposition of the equitable interest as Sam would retain no duties. The disposition was therefore ineffective.

The final issue is the ownership of an autograph collection. The relevant law here is that relating to *donatio mortis causa*. This is an exception to the formalities in the Wills Act 1837. The gift must be made in contemplation of death, it must be conditional upon death and the property must be delivered (*Cain v Moon* (1896)). If this was an inter vivos gift, it would fail because there was neither actual nor constructive delivery of the autographs to Pavel.

Sam was contemplating his death when he spoke to Pavel, and it does not matter that he died of some other cause (*Wilkes v Allington* (1931)). It is not clear, however, whether this was a conditional gift. He said, “when” I am not gone, which is ambiguous and Sam may have been intending to leave Pavel the collection in his will. The *donatio mortis causa* argument may therefore fail at this point. If it does not, and this is interpreted as being a gift conditional on Sam’s death, the delivery requirement may also be a problem.

The case-law indicates that Sam must have delivered either the autographs themselves or the means of control, so that he can no longer get at them. Sam told Pavel where the autographs were and gave him the “spare” key to the safe. It does not matter that Pavel cannot get access to the autographs (he does not have a front door key) if Sam can no longer get access himself (*Re Lillingston* (1952)) but *Re Craven’s Estate* (1932) treated retention of another key by the donor as fatal. If Sam still has a key to the safe, Pavel’s case will only succeed if *Re Craven’s Estate* is distinguished or overruled. It is possible that this would happen as *Woodard v Woodard* (1992) said that what matters is the intention of the donor to hand over dominion and *Re Craven’s Estate* should not automatically be applied. If the key was the only key despite being described as “spare” this problem does not arise.

To conclude, there is no enforceable trust or gift of The Gables. There was no inter vivos gift of shares to Lucinda but as she was appointed Sam’s executor, she may take them under the rule in *Strong v Bird*. The lack of writing means that Sam’s disposition of his equitable interest in the paintings was ineffective. It is unclear whether there was a valid *donatio mortis causa* of the autographs: this depends on whether the gift was conditional on death and on whether the delivery of the spare key was sufficient.

**Question 3**

I have been asked to advise Debra whether the gifts in Sonia’s will are valid. Sonia’s will states that the gifts are charitable, and names three separate purposes. Purpose trusts are not normally valid unless the purpose is charitable (*Re Astor’s Settlement Trusts* (1952)). The first issue, therefore, is whether these gifts are for charitable purposes.

Charitable purposes are defined in the Charities Act 2006. There is a list of charitable purposes in s2 of the Act, although the older case-law is still important.
as it explains the meaning of terms such as “advancement of education”. In addition, the purposes must be exclusively charitable and the public benefit test must be satisfied.

The first gift is to provide scholarships for students wishing to study fashion design and to support a campaign for a legal ban on the use of very thin fashion models.

Provision of scholarships would come under s2(2)(b), advancement of education, even though this is not a traditional academic subject. Education is interpreted widely and not restricted to traditional classroom subjects: for example, publication of law reports was a charitable purpose in *Incorporated Society of Law Reporting & Attorney General* (1972). There is nothing in this particular purposes causes a problem with public benefit, as the class of potential beneficiaries is not limited and there is no reason to think that the general purpose is not beneficial.

However, the gift for scholarships is bracketed with a campaign to support a legal ban on the use of very thin models. This is a political purpose and as such, cannot be charitable: *McGovern v Attorney-General* (1982), *National Anti-Vivisection Society v IRC*. The reason for this is that judges are not qualified to indicate whether there would be public benefit in a change to the law. As this purpose is linked to the trust for scholarships, gift (a) in Sonia’s will is not exclusively charitable and will fail (*Morange v Bishop of Durham* (1804)). Although sometimes a trust will be charitable even though some expenditure is permitted for non-charitable purposes, this is only possible if the non-charitable purpose is incidental (*Re Coxen* (1948)). The purpose of changing the law clearly is not incidental here.

The second gift is to provide assistance for Sonia’s former colleagues who have been made redundant. Under s2(2)(a) Charities Act 2006, “relief of poverty” is charitable purpose. Indirect references to poverty were sufficient in cases such as *Re Young* (1950) (“decayed gentlefolk”) and *Spiller v Maude* (1881) (“aged and decayed actors”). The requirement that the former colleagues have not yet found new employment means that the trust is for the relief of poverty resulting from their unemployment. *Re Coulthurst* (1951) defines poverty in terms of going short, this does not require utter destitution. The reference is to redundancy rather than poverty but this should not matter. According to the Charities Commission, the fact that need is temporary rather than permanent, does not mean that relieving that need is relief of poverty.

However, this trust will also fail. The problem is that the public benefit test is not satisfied. The gift is to benefit a group defined by reference to their former employment and therefore it is not for a “section of the public”. *Oppenheim v Tobacco Securities Trust* (1951) stated that the nexus between current and/or former employees is a personal one, based on common employment, and the element of public benefit is not satisfied. Before the Charities Act 2006 came into force, there was an exception to this requirement for trusts for relief of poverty (*Dingle v Turner* (1972), *Re Segelman* (1995)). This was removed by the Act, which states that all charitable trusts must satisfy the public benefit test.

The third gift is to the English Wetlands Charitable Trust for the preservation of peat bogs in Bedfordshire. It is more than likely that this is a charitable purpose, since s2(2)(i) lists as a charitable purpose the advancement of environmental protection or improvement. There is no problem with public benefit. However, the purpose cannot be carried out because there are no longer any peat bogs in Bedfordshire. Does this mean that this gift, too, will fail?
Under the cy-près doctrine a charitable trust may be saved, even if the property cannot be applied for the purpose stated by the settlor/testator. Under s13 Charities Act 1993 funds can be applied cy-près if the original purposes cannot be carried out (impossibility). In cases of initial impossibility, there must be a general charitable intent for a cy-près scheme to be permitted. This is a case of initial impossibility because when Sonia died the bogs had already been destroyed. Given that it was one of several gifts to charitable purposes and Sonia’s will referred specifically to giving her property to charitable purposes, this is quite likely. However, it is possible that the only bogs she wanted to preserve were ones in Bedfordshire, in which case the gift cannot be saved. Provided there is general charitable intent, which depends on information not provided in the question, the Campaign for English Wetlands will be able to put forward a scheme to use the money for a purpose close to the original purpose.

In conclusion, the first two gifts will fail and the property will fall into residue. The third purpose cannot be carried out, but it is likely a cy-près scheme will be permitted. This is good news for Debra, as she is the residuary beneficiary and will therefore receive the benefit of the gifts.

**Question 4(a)**

The issue is whether Helen has an arguable case to obtain an injunction preventing the newspaper story being published.

An injunction is a court order ordering someone either to do something (a mandatory injunction) or to stop doing something (a prohibitory injunction). The injunction that Helen will need is a prohibitory injunction. As this is an urgent matter, she will want to obtain an interim injunction, possibly without notice. Interim means that the injunction protects the status quo until full argument on the dispute can be heard. Without notice means that the injunction is issued by a judge based only on Helen’s side of the story, rather than making her wait until her opponent can be brought before the judge. Helen’s immediate goal is to make sure the story does not appear.

For an injunction to be available, Helen must show that she has an interest that has been breached and that damages would not be an appropriate remedy. The passing of the diaries to the newspaper for publication is clearly a breach of confidence and therefore the first requirement is satisfied (*HRH Prince of Wales v Associated Newspapers Ltd* (2006) involves a similar fact situation). The problem with damages as a remedy is that once the information has been made public, it cannot be made private again. The effect on Helen’s reputation and career, and also the effect on Ben and their children, will be serious, and no amount of money can repair that damage (*Argyll v Argyll* (1967)). Equity will not deny a remedy simply because Helen and Ben have not behaved perfectly (*Argyll v Argyll*).

The remedy of an injunction is discretionary, so Helen cannot guarantee success. When deciding an application for an interim injunction the court is to have regard to the overriding objective to deal with the case justly (CPR r1.1). In doing so the court will take notice of the *American Cyanamid v Ethicon* (1975) guidelines. It is not necessary for Helen to establish a prima facie case but the court must be satisfied her case is not frivolous or vexatious. If this test is satisfied, then it is a matter of the balance of convenience. If the matters are evenly balanced, the status quo (that is, non-publication) will be favoured.

In this case, since the information the newspaper wishes to publish is not currently known to the public, the balance of convenience probably favours non-
publication. The newspaper, if it wins at the trial of the action, will still have its valuable story, but if the story is published and then Helen wins, the damage has already been done. However, courts do take freedom of speech and public interest into account, so if the newspaper has a reasonable defence of public interest, the injunction may be denied.

**Question 4(b)**

The next issue is whether Helen can obtain an order of specific performance against the production company that produces her television show. An order of specific performance is a court order requiring one party to a contract to perform their duty under the contract.

The terms of Helen’s contract are not stated, so it is not obvious whether suspension was actually a breach of contract, but if it was, she needs to show that damages would not be an adequate remedy (*Cohen v Roche* (1927), *Sky Petroleum v VIP Petroleum* (1974)). The show has been suspended because the producers have heard about the story. It is not stated whether Helen is being paid anyway, but that is not the only reason she wants the show to continue. She will need a new contract when this one finishes, and that means it is important for her to remain visible on television. For this reason, damages may not be adequate.

Unfortunately for Helen, the contract she wants to enforce is not a type that is specifically enforceable. If it is a contract of employment or service, s236 Trade Union and Labour Relations (Consolidation) Act 1992 applies, to forbid an order of specific performance. If it is a contract for service, the court is likely to refuse an order on the basis it involves personal services. The reason for this is that it is difficult to supervise and courts are reluctant to force people into personal relationships against their will (*Co-operative Insurance v Argyll Stores* (1997) and *Giles v Morris* (1972)).