The purpose of the report is to provide feedback to centres and students on the students’ performance in the examination with recommendations about how any issues identified may be addressed.

The target audience for this report are centre tutors and students. The report should be read in conjunction with the Suggested Answers for the examination.

STUDENT PERFORMANCE OVERALL

Equity and Trusts is a notoriously difficult subject, and the Level 6 syllabus covers a wide range of topics. The January 2011 examination covered a large part of that syllabus but as with the last offering of this examination, far too many students had not revised a sufficient number of topics to adapt to unexpected questions. They simply provided a general summary of the (mostly) relevant law and did not engage with either the question posed in an essay or the detailed facts of a problem, sometimes answering the question they expected rather than the one that had been asked. In general, answers to problem questions (part B) were better than answers to essays, and this is perhaps something that tutors need to give attention to.

Overall, the performance of this cohort of students was poor and a high percentage actually failed. Although there were some completely unpassable scripts, many students who failed had managed to write adequate answers to 2 or even 3 questions but had insufficient depth of knowledge to write passing answers to the rest of their questions. Although some answers to individual questions were of excellent quality, those students who did pass, most received a mark under 60.

STUDENT PERFORMANCE FOR EACH QUESTION:

SECTION A – ESSAY QUESTIONS

Question 1
This was a question about equitable remedies.

The first part of the question was about specific performance and the requirement that damages are not an adequate remedy. Students were reasonably familiar with basic principles relating to specific performance but there was very little discussion of why damages must be inadequate and of the various situations in which they would be. Far too many students wasted the opportunity to increase their mark through more analysis and instead simply wrote down everything they knew about specific performance without relating it to the question they had been asked.

The second part of the question was about search orders and freezing orders. Students who answered this question showed reasonable knowledge of what these orders involve, but few were able to relate them to the law on interim injunctions more generally. The question referred specifically to "the criteria for ordering them" but there was little discussion of this point.

Question 2
The answers to this question were a particular disappointing. Many candidates either did not read the question properly or did not understand it, and rather than looking at the distinctions between fixed trusts, discretionary trusts and powers they simply described the different tests for certainty of objects for the three types of obligation, including material on discretion clauses and administrative uncertainty. This really was not relevant. A significant
number also misunderstood the reference to powers and wrote about the powers of advancement and maintenance – it should have been clear from the question that the emphasis was meant to be on the duties of the trustees/donees and the interest of the beneficiaries/objects. Very few answers went beyond explanation and into analysis or considered what kind of interest a beneficiary might have in a discretionary trust.

Question 3
This was another question where very few candidates answered the question. The first part asked about changes to the definition of charitable purposes made by the Charities Act, and it required the focus to be on what has altered (or not). Quite a few answers focussed mostly on a descriptive account of the Pemsel categories, and said very little about the 2006 Act. None of the answers paid much attention to the "any other purpose" category under either Pemsel or the Act, and there was an unfortunate tendency to simply list the purposes in the new Act – something that obtains little credit when students have statutes with them. This approach also meant there was often overlap and repetition between the first and second parts of the question. The second part of question 3 was about how courts approach the question of whether a purpose is charitable, and asked for discussion specifically of public benefit. There was room for comparison of the old and new law in this question. Although a lot of students were familiar with the different treatment of public benefit for different heads of charity, the answers were mostly descriptive rather than analytical and there was no discussion of whether the assumption that trusts for relief of poverty would now fail if they were not for 'a section of the public' is actually correct. In general, because of students' preference for case-law rather than statute, the answers were very skewed towards the old law. Not many mentioned the Charity Commission's advice on public benefit.

Question 4
This was not a very popular question, although it produced some of the better essays – essays that sought to express a point of view rather than just summarising case-law. Most of the candidates who chose this question were familiar with the no profit and no conflict rules and with the purpose of the rules, and could produce examples of their operation. Fewer explained the distinction between "fair dealing" and "self-dealing" or related this to the strictness of the rules. Candidates were less confident with the exceptions, although most answers mentioned the allowance made for skill in Boardman v Phipps and provision for trustee remuneration. None of the analyses went so far as to consider the dissent in Boardman v Phipps.

SECTION B

Question 1
This was probably the most popular question on the paper and most candidates did a good job of spotting the issues that arose. There was good general knowledge of the three certainties and secret trusts.

The first issue that arose was whether a trust of the bulk of some shares was valid. The marker was pleased that candidates generally moved straight to this point instead of wasting time considering certainty of intention and objects (although a few did try to find uncertain objects, possibly because they assumed there must be a question on this). There was a tendency to over-complicate this particular point, and to look at the cases on trusts ex bulk. This was not really necessary: the problem was one of conceptual uncertainty in the definition of the subject matter. Even had there been adequate certainty, the ex bulk issue would only arise if the shares were of different types. As candidates did not have the information to determine the answer on this point, all they could do was highlight a possible issue.

The same tendency to bring in all knowledge on a particular point rather than only the knowledge that is relevant arose in the second part of this question, which was concerned with precatory words. Again, the issue was quite simple, and it was not necessary to discuss caselaw on conduct as evidence of intention since the problem arose from a written document. Candidates who were more focussed on the central issues tended to have more time for analysis.
The secret trust part of the question was handled quite well, with all answers spotting the communication issue, although the case-law was not discussed critically – this was definitely a missed opportunity. Not many considered in any detail whether there was sufficient evidence of intent to create a trust.

**Question 2**

This question was not very popular, and students who answered it did not perform particularly well. It required good knowledge both of trustees’ duties and of equitable tracing, and the marker suspects that many students had revised one but not both of these, which would explain the unbalanced answers.

In discussing the trustees' duties, answers were often too general, spending more time on the general duties of trustees and much less on the application of law to the facts. Quite a few answers picked on balance between present income and capital growth but not so many identified the riskiness of the investment as an issue. This was surprising.

When it came to remedies, not all candidates spotted that tracing was an issue and a number spent most of their answer exploring whether Noah had resigned as a trustee or could be removed. This point was not worth that degree of attention. On the tracing point, the analysis needed to be really systematic and to pay attention to the dates of different transactions. Noah made his initial payment into an overdrawn account: not all candidates commented that from this point, only £15,000 of the trust monies could be traced. The fact that the car could only be traced if backwards tracing was used was not spotted; most answers assumed that this was traceable. A number of the better answers noted that Noah's intention with respect to the legacy was significant; it was not possible that he could have intended the legacy to replace the trust funds because he had forgotten about it and it was paid into his account by a third party.

**Question 3**

This was another popular question but unfortunately almost everyone who tackled it made the same error.

The issue in part (a) was whether there was written evidence of the declaration of trust; this was a simple point and few candidates missed it. One problem that arose in a number of answers was an unnecessary digression into the formalities for the transfer of land. In part (b), the issue was whether there was a completed gift of the rental properties. There was no declaration of trust here. Answers needed to explain the ‘everything necessary to be done’ test and apply it to the facts. On the whole this was done fairly well, but candidates were insufficiently critical of *Pennington v Waine* (especially in light of the veiled criticisms made in *Zeital v Kaye*). The alternative approach based on proprietary estoppel was more popular.

The part of this question that caused real difficulty was (c). The issue was whether Hassan holds the house on a resulting trust for Mohammed, and there was also the complication of a possibly illegal purpose. If the scenario arose before October 2010, there was a faint possibility that Mohammed was in loco parentis, and the presumption of advancement applied. If that was the case, Hassan would possibly get to keep the house unless it was argued that the illegal purpose was never carried out. More likely, this was a case of a presumed resulting trust and therefore Mohammed’s illegal purpose was irrelevant as he did not need to rely on it. There was scope in this part of the question to consider policy issues around illegal purposes. Sadly, most answers either focussed on Mohammed's wife's interest in the house, even though no facts had been given that would enable candidates to consider this properly. As a result, there were overall good marks for this question.

**Question 4**

This question was expected to be popular and it was, but it did not produce particularly good results. Far too many candidates had inadequate understanding of *Stack v Dowden* and the significance of whether the property was in sole or joint names. When considering (a), many answers looked at whether Bella could argue that she held a share of the house on a common intention constructive trust. This was the wrong way round. Bella had a half-share
because she was a joint answer, and the person who might try to argue for a constructive trust was Cameron. There was little reference to post *Stack v Dowden* case-law. The facts given needed to be considered from that angle. Turning to part (b) of the question, the fundamental difference was that this time Bella would need to rely on the constructive trust argument. Most candidates correctly noted the significance of the lies about why Bella was not on the title, and referred to relevant cases. However, those cases were not discussed in any critical fashion and there was not much relevance to policy issues or to the reform proposals made in recent years. Again, opportunities for the better students to show their knowledge were not taken.