

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

LEVEL 6 UNIT 5 – EQUITY & TRUSTS LAW

JUNE 2023

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2023 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report**, which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

Better performing candidates demonstrated good knowledge and understanding of the relevant law and used references to both statute and case law appropriately to underpin their analysis/explanation. Candidates who did less well: (a) did not display sufficient legal knowledge on which to base any sort of reasoned argument or (in terms of the Section B questions) to provide any sort of reasoned advice/application, and (b) cited little or no relevant statute or case law.

Weaker candidates tended simply to recite everything that they were able to recall about a particular topic (whether or not it was germane to the question posed). However, learning/recall must be accompanied by reasoned discussion and/or application if higher grades are to be achieved. This is particularly pertinent in relation to the Section A questions, where candidates are expected to be able (as the case may be) to analyse, evaluate or discuss both sides of a particular proposition.

In relation to the Section B questions, a failing which is common to a large number of candidates is a reluctance to commit to a conclusion and/or offer a pragmatic explanation or advice – the phrase “it all depends on what the court decides” (or its equivalent) is an all-too-common feature of many scripts. A discernible feature of this session’s cohort was a seeming failure to identify all the elements within a scenario which called for discussion. As ever, the question on trusts of the family home was by far the most popular question, but habitual shortcomings were also apparent, namely:

(a) not articulating the separate rules for ECICTs and ICICTs correctly, and (b) not treating quantification as being distinct from qualification.

As stated above, candidates are expected to cite statutory provisions and/or case law in relation to legal principles which they refer to. They are also expected to be accurate in their citation. No credit is given for statements such as 'In a decided case...', or 'In the case about...' or 'In [] v [] ...' or 'The Trustee Act 2000 deals with this...'.

Several candidates gave quite short answers, particularly in relation to the Section A questions. Although volume certainly does not go hand in hand with quality, it is somewhat optimistic to hope that a 300-400 word answer will garner a significant proportion of the marks which are available in relation to a 25-mark question.

Excessive or unnecessary recitation of the facts of particular cases receives no credit.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

8 of the 19 candidates answered this question, which is a slightly surprising number given that the subject matter is generally popular with candidates as a 'self-contained' area of the course.

Question 2

This question was identified likely being the most challenging Section A question. It is a discrete topic within the unit specification which many candidates choose not to revise. The performance of the candidates who attempted the question suggested that they had only a limited recall of the relevant issues.

Question 3

This question considered different equitable remedies. Parts (a) and (b) were generally handled satisfactorily, although a common characteristic across both parts was a lack of detail re some of the finer intricacies (especially in relation to the safeguards for a defendant). Part (c) was generally not answered well – many of the candidates did not seem to know either the relevant legal test or the authority which is the source of it.

Question 4

All the candidates attempted this question, which is a perennially popular topic whether it appears in Section A or Section B. As noted in previous CE reports, common 'weaknesses' in scripts were: (a) not distinguishing clearly between the separate rules for ECICTs and ICICTs, and (b) not treating quantification as being distinct from qualification.



Section B

Question 1

This question concerned formalities and constitution. A common failing was failing to articulate the legal tests comprehensively and/or failing to apply the law to the facts.

Question 2

This question concerned tracing and the liability of strangers in relation to trust assets. This topic is generally popular with candidates, but they habitually struggle to apply the law to the facts with any conviction/accuracy. Few candidates answered this question, all of whom appeared to handle part (a) quite well. Part (b) appeared to be the differentiator: the candidates who performed less well struggled with the 'liability of strangers' element (which perhaps is indicative of poor revision/recall).

Question 3

This question combined fiduciary duties with the power of advancement. Tracing (which was the subject of part (a)) is invariably popular with candidates and they tend to perform well in relation to it. Results in relation to part (b) were patchier, with several candidates not really grasping the nature of a power nor the rules relating to the manner of its exercise.

Question 4

This question combined the topics of: (i) certainties; (ii) a gift to a defunct charity, and (iii) half secret trusts. This question was identified as likely being the most challenging Section B question, but notwithstanding that assessment it still comes as a surprise that so many candidates did not achieve a pass mark. The identified challenge arose out of the combination of three distinct topics in a single question. However, the factual scenario for each was straightforward. Candidates seemed to find parts (a) and (b) to be the most difficult: in relation to part (a) this appeared to be because they did not correctly identify the nature of the discretionary trust or the problems which were presented in administering it, and in relation to part (b) there appeared to be a simple lack of revision/recall. Part (c) was generally handled well (candidates like the topic of secret trusts).

SUGGESTED POINTS FOR RESPONSE

LEVEL 6 UNIT 5 – EQUITY & TRUSTS LAW

Question Number	Suggested Points for Responses	Marks (Max)
1	<p>Responses should include:</p> <ul style="list-style-type: none"> • Brief discussion of the beneficiary principle and its rationale • Discussion of the nature of a purpose trust and how its legitimacy appears to contradict the beneficiary principle • Identification of the three types of purpose trust: <ul style="list-style-type: none"> ▪ charitable trusts ▪ private purpose trusts ▪ <i>Re Denley</i> trusts • Discussion of each category, and how their existence in law is justified/rationalised notwithstanding the beneficiary principle, with identification of relevant case law to illustrate the discussion <p>Reasoned conclusion re the proposition set out in the question</p>	25
Question 1 Total:25 marks		
Question Number	Suggested Points for Responses	Marks (Max)
2	<p>Responses should include:</p> <ul style="list-style-type: none"> • Terms of trust instrument – the trust instrument may expressly empower the trustees to effect a variation without needing consent from the beneficiaries and/or court approval: the power must be exercised for the purpose for which it was granted and not beyond the reasonable contemplation of the parties: see eg <u>Society of Lloyd’s v Robinson</u> (1999) • Consent of beneficiaries – if all beneficiaries are sui juris and absolutely entitled, they can end the trust and either: (i) take their entitlement absolutely, or (ii) resetttle the trust property on new terms, invoking the rule in <u>Saunders v Vautier</u> (1841) (see also, eg, <u>Stephenson (Inspector of Taxes) v Barclays Bank Trust Co</u> (1975)) • Court’s inherent jurisdiction – court has “inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts” (<u>Schmidt v Rosewood Trust Ltd</u> (2003)), but the jurisdiction should be exercised with great caution (<u>Re New</u> (1901)) and may well be limited to four circumstances: (i) conversion, (ii) emergency, (iii) maintenance (the only head under which the court will re-organise the beneficial interests), and (iv) compromise (<u>Chapman v Chapman</u> (1954)) • Trustee Act 1925, s 53 – the court may vary the terms of a trust ‘for the maintenance, education, or benefit of’ a child (which expands the scope of the inherent jurisdiction) • Trustee Act 1925, s 57 – the court may approve changes to the administration and management of trusts if it is ‘expedient’ to do 	25



so (either generally (Alexander v Alexander (2011)) or for a specific purpose): this power is not dependent on the existence of an 'emergency' and so largely renders the court's inherent emergency jurisdiction redundant, but the court cannot vary the beneficial interests under a trust (Re Downshire Settled Estates (1953))

- **Variation of Trusts Act 1958**

- the court may approve a variation of trust on behalf of beneficiaries who cannot consent for themselves, ie (i) children, (ii) future/contingent beneficiaries, (iii) unborn beneficiaries, (iv) a beneficiary under a protective trust
- in relation to all bar (iv), variation must "benefit" the beneficiaries, which will often be a financial benefit (eg Ridgwell v Ridgwell (2007), but may also be a moral and social benefit (eg Re Weston (1967) and Re CL (1969)), and must be "fair and proper" (Wright v Gater (2011) (including, in the case of an irresponsible beneficiary, postponing the vesting age where the beneficiary is shown to be (Re T's Settlement Trusts (1964)))
- variation may relate to: (i) administrative and managerial aspects of the trust, and (ii) all other terms, including those relating to the beneficial interests under the trust – gives the court a very wide discretion

Responses could include:

Discussion of other statutory provisions (outside Unit Spec) which allow trusts to be varied, eg:

- **Mental Capacity Act 2005, s 47** – Court of Protection has same powers as High Court (including re variation of trusts)
- **Matrimonial Causes Act 1973, s 24 / Civil Partnership Act 2004, s 72** – court has power to vary beneficial interests under a trust if making financial provision following divorce or termination of a civil partnership
- **Settled Land Act 1925, s 64** – court may authorise any transaction affecting settled land where the transaction is not authorised by the Act or by the settlement if it is for the benefit of the settled land or those interested under the settlement
- **Trusts of Land and Appointment of Trustees Act 1996, ss 6, 7 or 14** – the court has power in specified circumstances to partition land, convey land to beneficiaries, make orders relating to the exercise of the trustees' functions, or declare the nature or extent of a person's interest in trust property.

Question 2 Total: 25 marks



Question Number	Suggested Points for Responses	Marks (Max)
3(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of nature of an interim prohibitory injunction (IPI) • Discussion of power to grant (Senior Courts Act 1981, s 37) <p>Detailed articulation of test for when an IPI will be granted (with reference to relevant case law, which must at a bare minimum should include <u>American Cyanamid v Ethicon</u> (1975)) and the criteria which the court will apply</p>	8
3(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of nature/purpose of an order for specific performance (SP) • Detailed articulation of test for when SP will be granted, with reference to relevant case law <p>Discussion of circumstances in which court will refuse to grant SP, with reference to relevant case law (including, eg, <u>Cohen v Roche</u> (1927), <u>Sky Petroleum v VIP Petroleum</u> (1974), <u>Co-operative Insurance v Argyll Stores</u> (1997) and <u>Giles v Morris</u> (1972))</p>	12
3(c)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of nature/purpose of an interim mandatory injunction (IMI) <p>Detailed articulation of test for when IMI will be granted, with reference to relevant case law (including <u>Shepherd Homes v Sandham</u> (1971))</p>	5
Question 3 Total:25 marks		
Question Number	Suggested Points for Responses	Marks (Max)
4	<p>Responses should include:</p> <ul style="list-style-type: none"> • Brief contextual discussion re express trusts, resulting trusts and common intention constructive trusts (express and implied) • Detailed discussion re use of express and implied common intention constructive trusts to resolve disputes, including: <ul style="list-style-type: none"> ▪ citation of relevant authority (eg <u>Stack v Dowden</u> (2007) and <u>Jones v Kernott</u> (2011)) ▪ identification of move away from strict approach in <u>Lloyds Bank v Rosset</u> (1990) (but perhaps already anticipated by prior cases such as <u>LeFoe v LeFoe</u> (2001)) ▪ identification of factors to be considered in relation to qualification ▪ separate discussion re quantification and relevant case law, including <u>Oxley v Hiscock</u> (2005) (noting that this ‘fairness’ approach to quantification pre-dates both <u>Stack v Dowden</u> (2007) and <u>Jones v Kernott</u> (2011)) 	25

	Responses could include: <ul style="list-style-type: none"> • Brief discussion of proprietary estoppel. 	
Question 4 Total: 25 marks		

SECTION B

Question Number	Suggested Points for Responses	Marks (Max)
1	<p>Responses should include:</p> <ul style="list-style-type: none"> • Identification of attempted disposition of an equitable interest under a bare trust • Discussion of formalities/constitution re such a disposition, including: (i) LPA 1925, s 53(1)(c), (ii) apparent non-compliance, (iii) how the disposition might be ‘saved’ (with reference to relevant case law) • Application of the above to the scenario with a reasoned conclusion as to validity • Identification of attempted transfer of shares by way of gift • Discussion of formalities/constitution re such a transfer, including (i) Stock Transfer Act 1963, (ii) apparent non-compliance, (iii) how the disposition might be ‘saved’ (with particular reference to <u>Pennington v Waine</u> (2002)) • Application of the above to the scenario with a reasoned conclusion as to validity • Discussion of formalities/constitution re gift of a chattel, including (i) need for delivery, (ii) apparent non-compliance, (iii) how the disposition might be ‘saved’ (with particular reference to <u>Mascall v Mascall</u> (1985) and <u>Re Rose</u> (1952)) • Recognition that principle of ‘fortuitous vesting’ may save this gift in any event (with particular reference to <u>Strong v Bird</u> (1874) and <u>Re Stewart</u> (1908)) • Application of the above to the scenario with a reasoned conclusion as to validity • Discussion of formalities/constitution re transfer of land, including (i) Law of Property Act 1925, s 52 and completion by registration at HMLR under Land Registration Act 2002, s 27, (ii) apparent non-compliance, (iii) how the disposition might be ‘saved’ (with particular reference to <u>Mascall v Mascall</u> (1985) and <u>Re Rose</u> (1952)) • Application of the above to the scenario with a reasoned conclusion as to validity. 	25
Question 1 Total: 25 marks		



Question Number	Suggested Points for Responses	Marks (Max)
2(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • When equitable tracing is available in relation to breach of trust and/or fiduciary duty and its preferability over a common law claim where: (i) funds are mixed or used to purchase another asset, and/or (ii) there are competing claims in bankruptcy (<u>Agip (Africa) Ltd v Jackson (1991)</u>) – discussion should be brief and tied to the facts of the scenario • Discussion of withdrawal of £25K, including (i) <u>Re Hallett</u> charge over initial deposit in the Account, (ii) Isolde appearing to be an innocent volunteer, but noting possible personal claim against her under <u>Re Diplock, Ministry of Health v Simpson (1951)</u>, (iii) tracing claim re watch • Discussion of £20K and dissipation (<u>Re Diplock (1948)</u>) • Discussion of £4K deposit and impact on subsequent withdrawals (ie when is fiduciary’s money deemed to be used) • Appropriate discussion and application of <u>Re Hallett (1880)</u>, <u>Re Oatway (1903)</u>, <u>Re Tilley’s Will Trusts (1967)</u> and <u>Foskett v McKeown (2001)</u> • Discussion of tracing into mixed funds (<u>Clayton’s Case (1816)</u> and <u>Re Oatway (1903)</u> [NOTE TO MARKERS: Candidates may deal with this when answering part (b)] <p>Responses could include:</p> <ul style="list-style-type: none"> • Brief discussion of knowing receipt (but only if candidates dismiss it as a possible remedy) 	12
2(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of withdrawal of £100K and subsequent purchase of shares, including (i) <u>Re Hallett</u> charge over deposit in the Account, (ii) availability of tracing claim re remaining shares and proceeds <p>Discussion of dishonest assistance and/or knowing receipt re Laverne’s actions (including appropriate reference to and application of <u>Royal Brunei Airlines v Tan (1995)</u>, <u>Twinsectra v Yardley (2002)</u>, <u>Barlow Clowes v Eurotrust (2006)</u>, <u>Abou- Rahmah v Abacha (2007)</u>, <u>BCCI v Akindele (2000)</u> and <u>El Ajou v Dollar Land Holdings plc (1994)</u>)</p>	13
Question 2 Total: 25 marks		
Question Number	Suggested Points for Responses	Marks (Max)
3(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • General discussion of a trustee’s fiduciary duties • Discussion re investment powers/duties, including relevant provisions of Trustee Act 2000 • Identification of various breaches and application of the law to the scenario, including relevant case law, eg <u>Cowan v Scargill (1985)</u> and <u>Nestlé v National Westminster Bank plc (1988)</u> 	17



	<ul style="list-style-type: none"> • Discussion of Quentin’s passivity and its consequences, including reference to (i) <u>Bahin v Hughes</u> (1886), (ii) a possible claim for contribution by Quentin under the Civil Liability (Contribution) Act 1978, and (iii) whether Quentin can invoke a defence under Trustee Act 1925, s 61 on the ground that he acted honestly and reasonably and ought fairly to be excused. <p>Responses could include:</p> <p>Conclusion that P cannot avoid liability simply by retiring.</p>	
3(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of when the power to apply income arises under Trustee Act 1925, s 31, including relevant case law (eg <u>Re Lofthouse</u> (1885)) • Discussion of the nature of a power generally <p>Application of above, with reasoned discussion of (and conclusion re): (i) factors for and against exercise of power in favour of Oscar, and (ii) although the power is exercisable at the trustee’s “sole discretion”, the trustee must exercise that power reasonably and in good faith, so the court might well set aside a refusal which is ‘perverse’ and/or does not suggest a proper application of the trustee’s mind to the exercise of the discretion.</p>	8

Question 3 Total:25 marks

Question Number	Suggested Points for Responses	Marks (Max)
4	<p>Responses should include:</p> <ul style="list-style-type: none"> • Legacy (a) is a discretionary trust – candidates should conclude that it is not charitable because it is for the benefit of individual athletes rather than sport in general • The trust can be valid only if it has the three certainties (<u>Knight v Knight</u> (1840), but the issue here is whether the objects are certain (applying the postulant test from <u>McPhail v Doulton</u> (1971) and considering the need for both evidential and conceptual certainty as debated in <u>Re Baden’s Deed Trust No 2</u> (1973)) • Discussion of administrative unworkability if candidates consider that the definition of the objects is “so hopelessly wide as not to form anything like a class” (see <u>McPhail v Doulton</u> (1971) and <u>R v District Auditor ex p West Yorkshire MCC</u> (1986)) • Reasoned application of the above to the scenario, with conclusion that if the trust is void the £250K will pass as part of the residuary estate • Legacy (b) is given to a charity which no longer exists – the discussion should cover: (i) a gift to an unincorporated charity is construed as a trust for the purposes of the charity (<u>Re Vernon’s Will Trusts</u> (1971), so if the purpose is still capable of being pursued, the Charity Commission will draw up a scheme applying 	25



	<p>the money for that purpose (and so End Hunger Now could well be given the money if it intends to run a foodbank in Candleford (see, eg, <u>Re Faraker</u> (1912)) if the Commission is satisfied that Candleford Foodbank has not been destroyed by the amalgamation of the two charities)</p> <ul style="list-style-type: none"> • If Candleford Foodbank is not continuing in any form, the legacy has suffered initial failure and can only be applied cy-près if Sandrine can be shown to have had a general charitable intention (which will be difficult given that she has selected a particular body which has existed <u>Re Harwood</u> (1936), but see also <u>Re Finger's Will Trusts</u> (1972)) • Legacy (c) is an attempted half secret trust, so discussion of: (i) secret trusts do not need to comply with Wills Act 1837, s 9 despite being testamentary dispositions: see, eg, <u>McCormick v Grogan</u> (1869), (ii) criteria for a valid half secret trust in relation to certainties, communication, acceptance and reliance (see, eg, <u>Ottaway v Norman</u> (1972), <u>Kasperbauer v Griffith</u> (2000), <u>Wallgrave v Tebbs</u> (1855) and <u>Moss v Cooper</u> (1861)) <p>Application to facts of gift of residue to Valerie, with additional discussion re pre-decease of Una and the decision in <u>Re Gardner (No. 2)</u> (1923) which (if followed) would uphold the gift.</p>	
Question 4 Total: 25 marks		