

## CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

### LEVEL 6 - UNIT 5 - EQUITY AND TRUSTS

JUNE 2022

#### 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 2022 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 statutory provisions 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.

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

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### Section A

#### Question 1

All candidates seemed to struggle with this question, with many doing little more than recite what they had learned about equitable tracing in particular. The discussion was generally superficial and unconvincing – only 2 of the candidates made any real attempt to discuss the proposition in the question.

#### Question 2

Just under a third of the candidates attempted this question, which was a little surprising given the subject matter (which is generally popular with students). The question offered relatively greater scope for simple exposition of the law than some others, which may well account for the overall success rate, but the level of the discussion in relation to the proposition in the question was disappointing.

#### Question 3

This topic is always popular with candidates. However, overall performance was disappointing, and the range of marks awarded ranging was broad (ranging from 20 to 5).

#### Question 4(a)

Only four candidates did not attempt this question – this has proven to be one of the most consistently popular topics for candidates over the years. In this session the topic was framed as a Section A question rather than a Section B question. Without the possibility of earning marks for application, candidates were reliant on providing a clear exposition of the law, which has always been something of a weak point for many.

**4(b)** See previous comment.

## Section B

### Question 1(a)

Some candidates appeared to misunderstand what area of law was involved, treating it as a 'powers of investment' question rather than a 'breach of fiduciary duty' question. It is not clear why they thought that this was the case.

(b) See previous comment.

### Question 2

All candidates achieved 10+ marks, with weaker candidates displaying poor application of the law (which is relatively straightforward) to the facts: this was the epitome of a 'what would you actually advise' question.

### Question 3

Many candidates appeared to adopt a sort of 'tunnel vision' in relation to the question by only discussing the charity issues raised by it: they appear to have identified the possible charity 'angle' re the first gift (where charity was perhaps most relevant as a topic for discussion) and then to have assumed that charity was also relevant (and indeed the predominant issue) in relation to the other elements of the question. In fact, the principal topic across the question as a whole was the validity of gifts to private purpose trusts/ unincorporated associations.

### Question 4

Unusually for this topic, several candidates struggled to articulate the relevant legal principles arising out of the relatively small number of 'headline' cases which are set out in the Unit Specification.

**SUGGESTED POINTS FOR RESPONSE****LEVEL 6 - UNIT 5 - EQUITY AND TRUSTS**

<b>Question Number</b>	<b>Suggested Points for Responses</b>	<b>Marks (Max)</b>
<b>1</b>	<b>Responses should include:</b> <ul style="list-style-type: none"><li>• Discussion of tracing as a remedy (ie its purpose)</li><li>• Discussion of common law rules</li><li>• Discussion of equitable rules</li><li>• Discussion of advantages/disadvantages of each</li><li>• Discussion of the complications which arise from two sets of rules</li></ul> Reasoned conclusion re the proposition set out in the question	<b>25</b>
<b>Question 1 Total:25 marks</b>		
<b>2</b>	<b>Responses should include:</b> <ul style="list-style-type: none"><li>• Discussion of relevant equitable maxims (eg 'equity will not assist a volunteer', 'equity will not perfect and imperfect gift')</li><li>• Discussion of mechanisms by which equity intervenes to perfect imperfect gifts</li><li>• Analysis of the juridical basis for each</li><li>• Discussion of the extent to which that basis withstands critical scrutiny and/or is consistent with the maxims previously discussed</li></ul>	<b>25</b>
<b>Question 2 Total: 25 marks</b>		
<b>3</b>	<b>Responses should include:</b> <ul style="list-style-type: none"><li>• Discussion of the formalities re Wills</li><li>• Discussion of the rules relating to fully secret trusts</li><li>• Discussion of the rules relating to half secret trusts</li><li>• Analysis of the juridical basis for each set of rules</li><li>• Discussion of the extent to which that basis withstands critical scrutiny</li></ul>	<b>25</b>
<b>Question 3 Total:25 marks</b>		

Question Number	Suggested Points for Responses	Marks (Max)
4(a)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Discussion of the diminished (and possibly now redundant) role of resulting trusts (RTs)</li> <li>• Discussion of the law relating to common intention constructive trusts (CICTs), including clearly identifying the differences between express and implied CICTs</li> <li>• Specific reference/application to sole name cases</li> </ul>	17
4(b)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Discussion of the quantification exercise which follows from a finding of an RT, ECICT or ICICT</li> <li>• Discussion of the ambulatory trust – when it may apply and the consequences that it may have as opposed to relying on an RT or ECICT</li> </ul>	8
<b>Question 4 Total:25 marks</b>		

## SECTION B

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Discussion (brief) of fiduciary duties in general terms (not make a profit, not have a conflict of interest, no self-dealing, etc)</li> <li>• Discussion of Elaine’s duty to disgorge profit based on constructive trust in favour of beneficiaries</li> <li>• Discussion of Elaine’s failure to monitor</li> <li>• Discussion of Duncan’s culpability by inaction</li> <li>• Discussion of whether Elaine could have made a difference as only one of five directors, but recognising that the trustees could and should have been reviewing where the company was going and, if needs be, realised their investment by selling up</li> <li>• Discussion of Duncan’s duty to disgorge his profit, but recognising that equity may grant him a generous allowance reflecting the roles he has played in relation to the development both as an investor (who would have anticipated a return) and also in relation to the amount of time/effort he has committed as a project manager (who would have had to be paid)</li> <li>• Discussion re the decision to sell the cottage and invest in the flat – notwithstanding the supposed miscommunication, was it ever appropriate for a 17-year old to be tasked with obtaining a survey (duty of ordinary prudence)</li> </ul>	18

Question Number	Suggested Points for Responses	Marks (Max)
<b>1(b)</b>	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Discussion of TA 1925, s 62</li> <li>• Discussion of Civil Liability (Contribution) Act 1978</li> </ul>	<b>7</b>
<b>Question 1 Total:25 marks</b>		
<b>2</b>	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Discussion of discretionary powers under TA 1925, s 31 – (i) discretionary power to use income for maintenance, education or benefit of minor beneficiary and duty to accumulate, (ii) entitlement to income once 18, (iii) intermediate income, (iv) rules as to use of and entitlement to accumulations</li> <li>• Discussion of TA 1925, s 32 power to advance capital for advancement or benefit and limits on power</li> <li>• Discussion of changes effected by Inheritance and Trustees' Powers Act 2014.</li> <li>• Application of the above to the three scenarios, with particular attention to 'unusual' elements (eg request for a donation to charity)</li> </ul>	
<b>Question 2 Total:25 marks</b>		
<b>3</b>	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Discussion of gifts to unincorporated associations and bases on which they can be validated (including discussion of Re Denley re the 'floating' membership of the Genesis Club)</li> <li>• Discussion of purposes trusts (Re Endacott and its exceptions)</li> <li>• Discussion of any possible charitable elements</li> <li>• Application of the above to the three gifts</li> </ul>	<b>25</b>
<b>Question 3 Total:25 marks</b>		
<b>4</b>	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Discussion of law relating to specific performance (SP)</li> <li>• Discussion of factors which may prevent grant of SP</li> <li>• Discussion of possible need for, and principles behind grant of, an interim mandatory injunction</li> <li>• Discussion of prohibitory injunction to prevent disclosure of confidential information (including whether the 'information' is sufficiently confidential to be deserving of protection)</li> <li>• Discussion of possible freezing order to preserve £10,000 already paid so as to meet damages/costs</li> </ul>	<b>25</b>

	<p><b>Responses could include:</b></p> <ul style="list-style-type: none"> <li>• Candidates might suggest applying for a search order to seize any material/photographs in Paulina’s possession: but there is no evidence that this is the case so this would be ‘flying a kite’ at this stage – credit to be given <u>if</u> candidates discuss the weakness of the factual basis for this remedy</li> </ul>	
	<b>Question 4 Total:25 marks</b>	

