CHIEF EXAMINER REPORT

JANUARY 2024

LEVEL 6 UNIT 5 - EQUITY & TRUSTS

The purpose of the suggested points for responses is to provide candidates and Training Providers with guidance as to the key points candidates should have included in their answers to the January 2024 examinations.

The suggested points for responses sets out points that a good (merit/distinction) candidate would have made.

Candidates will have received credit, where applicable, for other points not addressed in the suggested points for responses or alternative valid responses.

Chief Examiner Overview
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. More limited responses tended simply to recite what they were able to recall about a particular topic (whether or not it was relevant to the question posed). 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. In relation to the Section B questions, a reluctance to commit to a conclusion and/or offer a pragmatic explanation or advice can be witnessed in more limited responses.

Candidate Performance and Suggested Points for Responses

It is noted that the low numbers of candidates taking the Level 6 exams limits the scope for constructive feedback to be given and for firm conclusions to be reached. Therefore, feedback on candidate performance is limited.

Section A

Question 1	25 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	
• Introduction re debate as to the relationship of law to equity since the Judicature Acts which fused the administration of law and equity and whether it remains appropriate to discuss equity and the common law as distinct systems. • Discussion of the historical origins, distinct functions and advantages/disadvantages of each system (with reference to, eg, Earl of Oxford's case (1615)). • Discussion of development of equity as a flexible tool to ensure justice is achieved (with examples of how equity has developed (eg constructive trusts (of various kinds), Quistclose trusts, equitable remedies, etc) – all with reference to appropriate case law (eg A-G v Blake (2000), Hussey v Palmer (1972). • Discussion of equitable maxims, their role and relevance, with reference to, eg, Patel v Mirza (2016). • The purpose of the Judicature Acts 1873 and 1875 and their effect in relation to court administration. • Supreme Court (Senior Courts) Act 1981.	

Question 2	25 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	
• Introductory discussion of three scenarios in which a strange may assume liability to a beneficiary (i) trustee de son tort, (ii) knowing receipt, (iii) dishonest assistance. • Discussion of the relevant principles and case law relating to trustee de son tort, including reference to Mara v Browne (1895), and noting that liability for 'intermeddling' does not turn on dishonesty. • Discussion of the relevant principles and case law relating to recipient liability, including discussion of the merit or otherwise of the test of'unconscionability' expressed by Nourse LJ in BCCI v Akindele (2001). Better candidates will identify and discuss (at some point in their answer) the distinction between this test for knowing receipt and the test of dishonesty which applies to dishonest assistance. • Discussion of the relevant principles and case law relating to dishonest assistance, with reference to Royal Brunei Airlines v Tan (1995), Twinsectra v Yardley (2002), Barlow Clowes International Ltd (In Liquidation) v Eurotrust International Ltd (2006), Abou-Rahmah v Abacha (2006) and Starglade Properties Ltd v Nash (2010).	

Question 3	25 marks
A common characteristic amongst in response to both parts of the question was a lack of detail regarding some of the finer intricacies (especially in relation to the safeguards for a defendant).	
Suggested Points for Response:	

(a) (12 marks)

- Introductory discussion of nature of a freezing order (formerly known as a 'Mareva injunction') – ie an interim (or interlocutory) injunction which prevents a defendant (or third party holding the defendant's assets) from dissipating those assets or removing them from the jurisdiction: the objective being to protect the interests of the claimant by ensuring that, should the claimant be successful at trial, there will be property of the defendant available to satisfy any judgment obtained by the claimant.
- Discussion of potential serious harm to a defendant, eg financially and/or reputationally, hence the existence of stringent requirements which must be satisfied before a freezing order will be granted.
- Discussion of three-part test to be satisfied (Third Chandris Shipping v Unimarine (1979)), ie:
    - good arguable case (cf less stringent test for other injunctions of 'a serious question to be tried' (American Cyanamid Co v Ethicon Ltd (1975));
    - existence of assets against which an order can be made, wherever they are located (Groupo Torras SQA v Sheik Fahad Mohammed Al –Sabah (1996))
    - strong evidence that there is a real risk of dissipation of assets so as to render any judgment the claimant may obtain nugatory.
- If granted, the order will usually:
    - identify specific assets
    - allow the defendant to use money for normal expenses including reasonable legal costs of defending the action.
- Freezing orders are often made without notice to prevent dissipation/removal before the order can be made, in which case potential prejudice to the defendant is counterbalanced by:
    - applicant's obligation to make full disclosure of all material matters, identify full particulars of proposed claim and raise points which defendant might argue
    - sanction of injunction being discharged if it is subsequently discovered that full disclosure has not been made
- applicant must give an undertaking to pay damages in case the action is not successful (HM Revenue & Customs v Egleton (2006)) in an amount sufficient to compensate the defendant for any loss of business profits or other losses incurred due to the freezing order.

(b) 13 marks

- Introductory discussion of nature of a search order (formerly known as an 'Anton Piller order') – ie an interim mandatory injunction which prevents a defendant from destroying vital evidence before the trial by allowing the applicant to enter the defendant's premises and search for, examine, remove or copy the evidence specified in the order.
- Discussion of potential serious harm to a defendant, eg violation of the defendant's privacy, disruption to business or family, reputational harm.
- Discussion of three pre-conditions which the applicant must satisfy before a search order will be granted (Anton Piller KG v Manufacturing Processes Ltd (1976)):
    - an extremely strong prima facie case (again noting that this is a higher standard than for other interim injunctions)

- the damage, potential or actual, for the applicant must be very serious
- clear evidence that the defendant has incriminating documents or articles and there is a real possibility that the defendant will destroy them before the trial. Lord Denning added a fourth

- The following safeguards exist for the benefit of the defendant:
  - the order must be served during office hours so that the defendant can obtain legal advice
  - the search must take place in the presence of the defendant and an independent solicitor
  - a list must be made of any items to be removed and the defendant must be given the opportunity to check it
  - the order must identify what is to be seized, and aggravated damages may be awarded for seizing items which are not covered by the order (Columbia Pictures Inc v Robinson (1986))
- Search orders are often made without notice to prevent destruction before the order can be made, in which case potential prejudice to the defendant is counterbalanced by:
  - applicant's obligation to make full disclosure (as above)
  - sanction of injunction being discharged if that obligation is breach (as above)
  - applicant must give an undertaking to pay damages in case the action is not successful (as above)
  - defendant cannot generally be required to disclose information which would incriminate him (Rank Film Distributors Ltd v Video Information Centre (1982)).
  - If the applicant complies with all the conditions/safeguards, the grant of a search order does not infringe a defendant's right to respect for private and family life, because the aim of protecting the rights of others is legitimate and the grant is a proportionate measure in the pursuit of that aim (Chappell v United Kingdom (1990))

Question 4	25 marks
Candidates were generally good at setting out the relevant rules, but they struggled to advance credible arguments for or against the proposition in the question.	
Suggested Points for Response:	
• Discussion of the formalities re Wills. • Discussion of the rules relating to fully secret trusts (relatively brief – the emphasis being on analysis by reference to the question, rather than a mere 'knowledge dump'). • Discussion of the rules relating to half secret trusts (relatively brief – the emphasis being on analysis by reference to the question, rather than a mere 'knowledge dump'). • Analysis of the juridical basis for each set of rules. • Discussion of the extent to which that basis withstands critical scrutiny. • References to relevant case law and statute throughout (eg Rouchefoucauld v Boustead (1897), Blackwell v Blackwell (1929), Re Snowden (1979), Re Young (1951), Re Gardner No.2 (1932), Ottaway v Norman (1971), Re Baillie (1886), Wills Act 1837, s 9, Law of Property Act 1925, s 53(1)(b). • Reasoned conclusion re the proposition set out in the question	

Section B

Question 1	25 marks
This question concerned, in the main, formalities and constitution, with a further element relating to Quistclose trusts. The former is generally popular with candidates and was handled reasonably well on this occasion. The discussion in relation to Quistclose trusts was generally less convincing. Some of the arguments advanced for saving the gift of the house were perhaps overly optimistic.	
Suggested Points for Response:	

- **House** – discussion of formalities re gift (transfer) of title to land: (i) by deed (LPA 1925, s 52), (ii) compliance with LP(MP)A 1989, s 1, (iii) registration under LRA 2002, s 4 or s 27.
- Recognition that gift fails at law and cannot be saved as a self-declaration of trust, nor will equity perfect a gift in favour of a volunteer like Clare (Milroy v Lord (1862)).
- Discussion re how the gift might be saved: (i) a gift is complete in equity as soon as the settlor has done everything in their power to complete the transfer (Mascall v Mascall (1985), Re Rose (1952)) – but Ben has not done this (and passage of time might indicate a change of mind), (ii) possible reliance on Pennington v Waine (2002) if Clare can establish that it would be unconscionable for the transfer not to be completed, (iii) proprietary estoppel with reference to, eg, Guest v Guest (2022), Yaxley v Gotts (2000), Thorner v Majors (2009), Grant v Edwards (1986).
- Application to the scenario with a reasoned conclusion as to validity.
- **Loan** – can Ben's estate achieve priority over the company's creditors re the £100,000. Discussion whether a Quistclose (resulting) trust might be imposed to protect the estate (Barclays Bank v Quistclose Investments (1970), Twinsectra v Yardley (2002)).
- Discussion of relevant considerations: (i) was the £100,000 held in a separate account or mixed with company's general funds (Re Farepak Food & Gifts Ltd (2006)), (ii) has the purpose actually failed, given that the money had already been paid to the suppliers of machinery (Re EVTR (1987))?
- Application to the scenario with a reasoned conclusion as to validity.
- **Car** – is this an effective lifetime gift of the car to Ellie during Ben's lifetime (DMC), as an exception to WA 1837 (Cain v Moon (1896)).
- Discussion of requirements: (i) gift intended to be conditional on death, (ii) gift made in contemplation of death, (iii) donor must part with dominion over the subject-matter of the gift.
- Application the above to the scenario with a reasoned conclusion, with particular reference to the evidence re (iii) – Ben does not give the keys to the car (Woodward v Woodward (1992)) but instead gives the key code to the garage. Is this analogous to handing over the keys to a locked box (Re Mustapha (1891) and Re Lillingston (1952))?

Question 2	25 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	

(a) 13 marks

- If the trust instrument is silent on investment, trustees may rely on general power of investment (TA 2000, s 3) to make any investment that they could make if they were absolutely entitled to the assets of the trust, subject to the 'Standard Investment Criteria' (SIC) in TA 2004, s 4.
- Discussion of the SIC: (i) suitability of the investment, (ii) need for diversification.
- Application to the scenario: (i) investment appears suitable, (ii) investment is only 10% of the fund.
- Trustees have a statutory duty of care, regardless of when the trust was created and applicable whether the investment powers arise under the trust instrument or TA 2000, s 3, to take reasonable care and skill, taking into account any special knowledge or experience, and, in the case of a professional trustee, the knowledge or experience expected of a person in that position (TA 2000, s 1).
- Application to the scenario: (i) trustees do not appear to have special knowledge or skill that might result in a higher standard of care, but (ii) might there be an issue re possible favouritism/bias/lack of objectivity?
- Before exercising any power of investment, trustees must obtain and consider advice (TA 2000, s 5). So if the trustees took advice and were not made aware of the investigation, the decision to invest, although unfortunate, may have been a reasonable one. Reliance on advice would also negative any suggestion of favouritism/bias/lack of objectivity.
- Irina's support for the investment would not assist the trustees, because she is only one of the two beneficiaries, and Jamal's consent was not sought or obtained.

(b) 5 marks

- Trustees must act in best financial interests of trust, and choose investments with maximum return (Harries v Church Commissioners of England (1992)). The investment decision should not be influenced by ethical considerations simply to indulge the preferences of the trustees.
- If a more financially beneficial investment is available, the trustees may only make this investment if the beneficiaries are all sui juris and all consent (Cowan v Scargill (1985)).

(c) 7 marks

- Trustees must not profit from their trust, so can only claim payment in specific circumstances.
- Here: (i) payment for services was not authorised by the Will, (ii) TA 2000 allows professionals acting as trustees to charge reasonable remuneration for services they provide to the trust if their business consists of or includes the administration of trust or aspects of that; (iii) validation could be obtained via a court order, (iv) beneficiaries' consent could be obtained.
- Trustees are entitled to payment of out-of-pocket expenses in administering the trust (TA 2000, s 31).

Question 3	25 marks

This question concerned the perennially popular topic of implied trusts of the home. The differentiator in this question was the possible resulting trust arising from the £150,000 investment in the business and limited responses did not identify or address this. Some of the answers: (i) tended to 'blend' together the rules relating to ECICTs and ICICTs, and (ii) struggled on the issue of quantification.

Suggested Points for Response:

- Brief contextual discussion re lack of recourse to statutory financial relief and no express trust in M's favour. Therefore M must prove she has a beneficial interest.
- Discussion of likely inapplicability of resulting trust (RT) to relationship of a cohabiting couple (but see below).
- Detailed discussion re use of express and implied common intention constructive trusts to resolve disputes, including Stack v Dowden (2007), Abbott v Abbott (2007), Jones v Kernott (2011), Lloyds Bank v Rosset (1990), eg Eves v Eves (1975), LeFoe v LeFoe (2001), Clough v Killey (1996), Hammond v Mitchell (1991), Thomas v Fuller-Brown (1988), James v Thomas (2007)
- Recognition that this is a 'sole name' case rather than a 'joint names' case, so statements in leading cases are strictly obiter.
- Application to scenario, with particular reference to: (i) absence of any initial financial contribution by M, (ii) separate accounts; (iii) no express discussion re ownership of/interest in the property prior to loan; (iv) contributions re furniture and decorations and provision of supervisory services, manual labour, and managing the hotel, (v) later direct financial assistance following conversation, (vi) nature of that conversation, viewed objectively.
- Candidates may discuss that the £150,000 loan has the potential characteristics of an 'investment', and so might appropriately be considered under RT Principles: see Laskar v Laskar (2008), as considered in Marr v Collie (2017).
- Discussion re quantification of M's share, citing relevant authority.

Question 4	25 marks
This question combined the topics of: (i) certainties; (ii) unincorporated associations, and (iii) purpose trusts. A common theme across all the answers was the ability to identify the problem, but far less confidence about suggesting a possible solution.	
Suggested Points for Response:	

- Legacy (a) is an attempted declaration of trust. To be valid, it must have the three certainties of intention, subject matter and objects (Knight v Knight (1840)).
- Use of the word 'trust' is not essential, but the testator's words must impose a binding obligation on the trustee to deal with the property in a particular way. Precatory words expressing a wish or a hope do not achieve this (Re Adams and the Kensington Vestry (1884), Lambe v Eames (1871)).
- The testator's intention must be ascertained from the whole Will (Comiskey v Bowring Hanbury (1905)).
- Application: (i) the word 'knowing' does not impose a binding obligation on Petra to pay Raine's rent and expenses, meaning that Petra could keep the entire amount for herself, so the Will should expressly impose a trust.
- Discussion re a trust being void if the trust property or the share of the beneficiary is uncertain, but it is acceptable to provide an objective formula for calculating the amount to be given to the beneficiary (Re Golay's Will Trusts (1965)). Although there may be an objective formula to determine the amount to be paid in respect of Raine, namely the usual sums spent by Oracene, a better solution would be to create a trust imposing an express obligation to pay the whole, or a specified proportion of the rent and outgoings from the trust funds.
- Legacy (b) is a gift on trust to an unincorporated association (UA). A UA has no legal personality and so cannot receive gifts. Discussion of ways of legitimising this gift, with reference to Re Lipinski (1976), Re Recher (1972), Re Grant (1980) and Re Denley (1969).
- Application: the members of the club are all ascertainable and there would be no problem with the rule against inalienability because the whole of the fund would be spent on the construction of the tennis courts.
- Legacy (c) is a discretionary trust. This issue here is re certainty of objects based on the given postulant test (McPhail v Doulton (1971). Evidential uncertainty occurs where a claimant cannot prove that they fall within the description but this does not lead to failure of the trust (Re Baden's Deed Trusts (No 2) (1972), with discussion of the differing judicial opinions in that case).
- Discussion of issues re administrative unworkability if the definition of the beneficiaries is "so hopelessly wide as not to form anything like a class" (per Lord Wilberforce in McPhail v Doulton), with reference also to R v District Auditor ex p West Yorkshire MCC (1986).
- Discussion re absence of any objective criteria to indicate who would be a 'worthy young female tennis player'. Also the number of young players may also lead to failure of the trust due to administrative unworkability.
- The uncertainty re 'worthy' (and also 'young') could be avoided by providing an objective test for identifying beneficiaries (any plausible suggestions should be credited)