CILEx CHARTERED INSTITUTE OF LEGAL EXECUTIVES

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 2020

LEVEL 6 - UNIT 5 – EQUITY & TRUSTS

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the September 2020 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 candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and learning centre tutors should review the suggested answers 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

The better performing candidates exhibited similar characteristics, in that they possessed both good knowledge and understanding of case law and statute, which they were then able to deploy in providing relevant legal analysis, argument or advice. Weaker candidates were found wanting in one or more of these respects.

A number of weaker candidates tended simply to recite everything that they were able to recall about a particular topic (whether or not it was relevant to the question posed). In many (but, unfortunately, not all) cases, they would then conclude with a single sentence along the lines of 'this shows/proves/demonstrates that….', or 'I therefore agree/disagree with the statement in the question', or 'It follows that X has a claim for/should (not) do …'. In relation to most questions, this was not sufficient to achieve a pass mark – mere learning/recall must be accompanied by reasoned discussion and/or application.

Weaker scripts tended to exhibit significant amounts of repetition – either by way of two juxtaposed sentences which were but different ways of making the same point, or by way of separated sentences/paragraphs (in which the latter simply went over the ground previously covered in the former, occasionally at

some length). Not only does this gain no credit, but it must inevitably reduce the time available to the candidate to answer other questions.

Candidates are expected to be precise in their citation of case law. No credit is given for statements such as 'In a decided case…', or 'In the case about…' or 'In [blank] v [blank]….'. Equally, excessive or unnecessary recitation of the facts of particular cases also receives no credit.

CANDIDATE PERFORMANCE FOR EACH QUESTION

SECTION A

Question 1

This question required candidates to discuss three equitable remedies: specific performance in part (a) and interim mandatory and prohibitory injunctions in part (b). Only a few of the candidates who answered this question were able to articulate the relevant threshold tests fully and correctly.

In the main, the discussion of injunctions was better than the discussion of specific performance.

Question 2

This question required candidates to discuss whether either the 'fraud theory' or the 'dehors the will theory' adequately justifies the enforcement of secret trusts. This was a reasonably popular question.

With one or two exceptions, candidates discussed the requirements for the creation of a valid secret trust reasonably well. However, most were on less solid ground when discussing the theories which justify the existence of secret trusts in apparent contradiction of Wills Act 1837, s 9. The content of the answers at this point tended to become generalised and discursive – this was more prevalent in relation to the 'dehors' theory than the 'fraud' theory.

Question 3

This question required candidates to discuss the circumstances in which gifts to charities, or gifts for charitable purposes, may be saved if implementation is impossible. This was one of the less popular questions on the question paper.

In the main, this question was answered poorly. Several candidates opted to write about charity/charitable purposes generally. Others wrote in only the most generalised terms, with little, if any, reference to statute and/or case law on the specifics regarding initial and supervening impossibility.

Question 4

This question required candidates to discuss the various bases on which the courts have legitimised the existence of non-charitable purpose trusts. This was a relatively popular question.

A large majority of the candidates who answered this question discussed the Re Endacott exceptions to a greater or lesser extent. Somewhat surprisingly,

far fewer discussed Re Denley (whether at all, or with any real evidence of conviction/comprehension). Re Lipinski was barely mentioned; this was also true of the 'motive' cases.

SECTION B

Question 1

This question required candidates to discuss various aspects of the Trustee Act 2000. This was a relatively popular question.

Most candidates discussed the relevant provisions of TA 2000, ss 1-5 in reasonable detail. The discussion of Gina's motives in relation to the sale and re-investment of the existing shareholding was also generally sound, as was the discussion of Harry's passivity in relation to it. Only a handful of the candidates who answered this question paid any real attention to Harry's conduct in relation to the company.

Question 2

This question required candidates to discuss the three certainties in relation to various testamentary dispositions. Generally, candidates handled this question well. However, part (c) of the question proved by some margin to be the most troublesome for candidates, with some rather wayward statements in places regarding certainty of objects and/or administrative unworkability.

Question 3

This question required candidates to discuss and apply the law relating to implied trusts of the home to a given set of facts. As ever, this was a popular question.

Better candidates correctly articulated the different requirements in relation to express and implied common intention constructive trusts and cited relevant case law to support their discussion of the relevant principles. Weaker answers were much more discursive as to whether Anya qualified for a share in the property and tended to put all the circumstances into a single 'melting pot'. A number of those candidates who articulated the principles with a reasonable degree of accuracy nevertheless did not then go on to engage in a reasoned application of those principles to the given facts.

It was a common feature of all but the best answers that the discussion about 'quantification' was noticeably weaker than the discussion about 'qualification' (and in a number of instances it was absent altogether). Candidates should be encouraged (i) to provide some sort of assessment as to the size of the non-owning beneficiary's share, and (ii) to justify that assessment. Credit is available for any reasonably plausible discussion.

Question 4

This question required candidates to discuss breach of fiduciary duty, tracing and 'liability of strangers' (ie recipient and accessory liability).

In general, the discussion of both recipient and accessory liability was weak: a significant number of candidates simply failed to spot the issue at all or misidentified it as a breach of statutory/common law duty, and most others

did not articulate the relevant principles or identify relevant case law with any real accuracy. This is perhaps surprising given that these topics are relatively self-contained from a revision perspective. Discussion of the principles of equitable tracing was also poor in the weaker scripts.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 5 - EQUITY & TRUSTS

SECTION A

Question 1(a)

A decree of specific performance is a court order which requires a contracting party to perform their obligations under the relevant contract. An order for specific performance may be made in relation to an actual or an anticipated breach. Failure to comply with a decree of specific performance may constitute a contempt of court.

It is a precondition of the court granting a decree of specific performance that the remedy at law is inadequate. The usual remedy (at law) for a breach of contract is an award of damages.

Whether damages are an adequate remedy will depend on the subject matter of the contract (whether it be for the supply of property (including both land and goods) or the supply of services); the question (in broad terms) is whether the subject matter of the promised supply is unique or irreplaceable, such that no amount of damages will be able to make up for the fact that the buyer will no longer receive what they contracted for.

As a matter of law, interests in land (be they freehold or leasehold) always satisfy this requirement. So too will goods which are of "unusual beauty, rarity, and distinction" (see Falcke v Gray (1859)) as opposed to "ordinary items of commerce" (see Cohen v Roche (1927) although that case might be decided differently today). Goods may also satisfy this requirement if: (i) they are in short supply, even if only temporarily (see Phillips v Lamdin (1949) and Sky Petroleum Ltd v VIP Petroleum Ltd (1974)), or (ii) are of particular value/significance to the buyer over and above their intrinsic worth (see Behnke v Bede (1927)). Other assets (eg shares in a private company) will satisfy this requirement if they cannot be purchased on the open market (see Duncroft v Albreht (1841)).

The same fundamentals apply in relation to contracts for the supply of services. However, where the contract is for the supply of personal services, a decree of specific performance will be harder to obtain, because the court will consider whether ordering performance of the contract would be 'akin to slavery', or would require constant supervision, or would be too difficult to enforce in terms of identifying what is required and judging whether or not it has been delivered: see, for example, De Francesco v Barnum (1890), Co-operative Stores v Argyll (1997), Posner v Scott-Lewis (1987), Ryan v Mutual Tontine (1893) and Giles v Morris (1972).

1(b)

An injunction is an order of the court requiring a party to do something (a mandatory injunction) or to stop doing something (a prohibitory injunction). Failure to comply with an injunction may constitute a contempt of court.

An injunction may be granted as a final remedy after a trial, but where the matter is urgent or if the interests of justice otherwise require it is possible to obtain an interim injunction. The court may order that the interim injunction should run until a fixed date, or until the trial, or until further order.

An interim mandatory injunction (IMI) has similar effect to a decree of specific performance: however, a decree of specific performance is only available after a full trial (which may not occur for some time), so an IMI may be needed in order to prevent irreversible damage to a party. In order to be satisfied that an IMI is justified, the court must feel a high degree of assurance that, at trial, a decree of specific performance will be granted (see Shepherd Homes Limited v Sandham (1971), as subsequently approved by the Court of Appeal in Locabail International Finance Limited v Agroexport (1986)). This is a more stringent requirement than for the grant of an interim prohibitory injunction.

In deciding whether to grant an interim prohibitory injunction (IPI) the court must apply the guidelines identified in American Cyanamid v Ethicon (1975):

- Is there a serious question to be tried? This means that the claim must not be vexatious or frivolous, and is a low threshold for the claimant to meet.

- Would damages be an adequate remedy for the claimant if an injunction is not granted (having regard to the severity of the likely harm and the ability to quantify a sum which would provide compensation for it), and could the defendant afford to pay them? If the answer to this question is 'yes', then the court should not grant an IPI.

- If damages would not be an adequate remedy for the claimant, would damages be an adequate remedy for the defendant if the injunction is granted now but the court subsequently decides (in the light of all the evidence) that it should not have been, and could the claimant afford to pay them pursuant to a cross-undertaking for damages? If the answer to this question is 'yes', then the court will usually grant an IPI.

- If neither of the previous exercises provides an answer, the court should then ask where does the balance of convenience lie? This may involve consideration of a range of factors regarding the impact of granting or refusing an IPI (eg effect on market, business, profit, business reputation, employees, contractual obligations, etc), all of which allow the court to assess the risk of doing an injustice to one party or the other (see NWL Limited v Woods (1979)).

- If those factors are evenly balanced, the court will usually preserve the 'status quo ante', ie the position immediately before the conduct complained of (see Garden Cottage Foods v Milk Marketing Board (1984)). This tends to favour the grant of an IPI.

Question 2

Fully secret trusts arise where a will contains an apparently absolute gift to a legatee but, outside the will, the testator has asked the legatee to hold the legacy on trust in accordance with the testator's separate instructions, and the legatee has agreed (either expressly or by acquiescence – see Moss v Cooper (1861)). Half secret trusts arise where a will contains a gift to a legatee but it is clear on the face of the will that the legatee is not to take the gift absolutely (although it is not necessary for the word 'trust' to be used); again, outside the will, the testator has asked the legatee to hold the legacy on trust in accordance with the testator's separate instructions, and the legatee has agreed (either expressly or by acquiescence). For a recent discussion of the relevant principles, see Rawstron v Freud [2014] EWHC 2577.

Secret trusts contravene section 9 of the Wills Act 1837 (WA 1837), which requires that every disposition which is intended to take effect on death must be contained in a written will which has been signed by the testator in the presence of two witnesses, each of whom then signs the will in the presence of one another and also the testator.

It is a well-established principle of equity that statute should not be used as an instrument of fraud: Rouchefoucauld v Boustead (1898). The fraud theory holds that not to allow secret trusts to be effective would be to allow WA 1837, s 9 to be used as an instrument of fraud (see McCormick v Grogan (1869)) – which is perhaps somewhat ironic given that WA 1837, s 9 is itself an anti-fraud measure). The rationale behind the fraud theory is that failing to hold the legatee to the trust to which they have agreed would allow the legatee a benefit which the testator did not intend them to have and which they had agreed not to take.

However, at best this can only potentially justify the validation of fully secret trusts, because in the case of a half secret trust it is clear from the face of the will that the legatee is not intended to take the legacy absolutely: in the case of a half secret trust a refusal by the legatee to abide by their agreement would be satisfactorily resolved by declaring that the legacy results back to the testator's estate because the declared trust has failed.

Moreover, and in relation to both fully secret trusts and half secret trusts, the fraud theory does not explain why the secret beneficiary is allowed to benefit – the secret beneficiary did not know of the trust and cannot invoke any form of consideration or detrimental reliance which might entitle them to enforce the secret trust. Compared to a beneficiary under a will, who has a mere hope (at best) of receiving a benefit, the beneficiary under a secret trust appears to enjoy a preferential position.

The more modern explanation of secret trusts is the dehors the will theory (see Blackwell v Blackwell (1929) and Re Snowden (1979)). This theory holds that a secret trust is in fact a lifetime declaration of trust and so is not caught by WA 1837, s 9 (or indeed any part of WA 1837) at all - this explains the decision in Re Young (1951), which was concerned with WA 1837, s 15 (which makes void beneficial gifts to attesting witnesses of wills). More particularly, the theory provides that:

- at the moment the secret trust comes into existence (following communication and acceptance, as above), it is incompletely

constituted (because the settlor does not intend legal title to the trust property to pass to the secret trustee until they die)

- the secret trust is only completely constituted on the settlor's death, when the testamentary legacy takes effect.

However, there are a number of additional problems with this theory.

Firstly, if the trust includes land, the formalities imposed by Law of Property Act 1925 (LPA 1925), s 53(1)(b) dictate that, as a lifetime declaration of trust, the secret trust should be evidenced by signed writing: see Re Baillie (1886) in relation to a half-secret trust. And yet, in Ottaway v Norman (1972) a fully secret trust of land was upheld notwithstanding that the terms of the trust were only communicated orally. The suggestion might be that a secret trust is a species of constructive trust which (by virtue of LPA 1925, s 53(2) is exempt from the requirements of s 53(1)(b), but this is difficult to square with the fact that the trust must be communicated and agreed to overtly (even if its precise terms may not be known until after the testator's death): see Wallgrave v Tebbs (1855), Re Boyes (1884), Re Keen (1937) and Re Bateman (1970). Alternatively, it might be said that reliance on LPA 1925, s 53(1)(b) to defeat a secret trust of land is to allow that statutory provision itself to be used as an instrument of fraud.

Secondly, if the trust is only constituted on the death of the testator, why is it necessary in the case of a half secret trust that communication and acceptance of its terms must occur before the will is made, whereas the case of a fully secret trust communication and acceptance need only occur during the testator's lifetime (as to which contrast Re Keen and Re Bateman (half secret trusts) with Wallgrave v Tebbs and Re Boyes (fully secret trusts). There seems no logical reason for the distinction.

Thirdly, if the secret trust is to be effective, the testator's will must first operate in accordance with its terms so that the legacy vests in the secret trustee. Some of the fundamental principles in relation to wills (and legacies within them) are that:

- a legacy fails if the property to which it relates is disposed of by the testator in their lifetime

- a legacy fails if the intended legatee pre-deceases the testator

- a will may be varied or revoked by the testator during their lifetime

However, the decision in Re Gardner (No 2) (1923) challenges these principles. In this case the secret beneficiary died before the testator. However, it was held that the legacy should be paid to the deceased beneficiary's estate because she was a beneficiary under a trust which came into existence from the date of the testatrix's lifetime declaration. This would suggest that a testator cannot change the terms of the trust by revoking or changing their will because the trust has already been sufficiently constituted.

In conclusion, neither theory is free from difficulty. However, it seems likely that secret trusts will continue to be employed by testators, regardless of any rationalised basis for their existence and enforcement.

Question 3

If a non-charitable gift fails, the property which was the subject of the attempted gift reverts to the estate of the donor/testator by way of a resulting trust. The same is also potentially true of a charitable gift (ie a gift to a charity or for a charitable purpose), but in many instances the gift will be saved by the application of the cy-près doctrine. There are strong policy reasons for preserving the validity of charitable gifts.

A cy-près scheme allows a charitable gift which would otherwise fail to be applied for a similar charitable purpose or purposes. Such schemes are sanctioned by the court or by the Charity Commission (see Charities Act 2011 (CA 2011), s 67) so long as certain conditions are satisfied.

Failure of a charitable gift may be initial or supervening. An example of initial failure would be a gift by will to a named charity which no longer exists by the time of the testator's death.

In relation to instances of initial failure, cy-près is only available where the donor or testator displayed a general charitable intent. A general charitable intent will be held to exist where the specified charity or purpose can properly be regarded as simply an example or suggestion on the part of the donor or testator as to how their more wide-ranging and paramount charitable intention might be put into effect. For example, in Biscoe v Jackson (1887) the testator's gift to establish a soup kitchen and cottage hospital suffered from initial failure because no suitable site could be found. The court held that the testator had demonstrated a general charitable intent to relieve poverty, for which purpose the gift could be applied cy-près. However, a gift which is accompanied by detailed instructions will tend to suggest that the testator or donor had a specific intention to benefit a particular body or project to the exclusion of all others: as a result, the court of the Charity Commission is less likely to find the presence of a general charitable intent (see, for example, Re Wilson (1913), Re Good's Will Trusts (1950) and Re Rymer (1984)).

Where the initial failure is a result of the non-existence of the specified charity, it is easier to find a general charitable intent where the named charity has never existed rather than were it has ceased to exist between the making of the testator's will and their death (Re Harwood (1936)). A parallel principle applies where a particular purpose has become impracticable or impossible of accomplishment before the gift took effect (Re Spence (1979)).

Re Harwood was followed in Re Satterthwaite's Will Trusts (1966), where a gift to a charity which had never existed was applied cy-près in circumstances where all the other gifts in the will were also to charities. It would seem that the fact that the testator's will comprises solely or substantially of gifts to or in favour of charity may be sufficient to demonstrate a general charitable intent which is capable of saving a failed gift in favour of a specific charity (Re Finger's Will Trusts (1972)).

Supervening impossibility arises where implementation of the gift is possible when it takes effect but subsequently becomes impossible due to intervening events (eg Re Wright (1954). In that situation, cy-près applies whether or not the testator or donor has a general charitable intention.

CA 2011 contains extended statutory powers for applying property cy-près. CA 2011, s 62 sets out a list of situations in which a charitable gift will be deemed to have failed, for example:

- where the original purpose has been achieved or cannot be carried out

- where there are surplus funds after the original purpose has been achieved

- where property which is the subject of the gift could be more effectively used if it were amalgamated with other property which has been given for a similar purpose

CA 2011, s 63 caters for the situation where property is given for a charitable cause by either unidentified donors (who cannot be identified after reasonable advertisements or enquiries) or donors who have disclaimed. If the charitable purpose is impossible, the property may be applied cy-près as though those donors had a general charitable intention and had relinquished any interest in the gift. This section provides a convenient solution for property which would otherwise have to be held on resulting trust for those donors. CA 2011, s 64 obviates the need for expensive advertisements and enquiries where donations were received through collection boxes, lotteries, entertainments and other fund-raising activities by deeming those donors to be unidentified.

Where the relevant gift is to an institution which ceases to exist before the gift takes effect, it is necessary to establish whether that institution is an incorporated body or an unincorporated association.

Where the gift is in favour of an incorporated body, the gift fails and passes on resulting trust to the estate of the testator or donor, unless the incorporated body has been taken over by another charity which carries on the same charitable purpose as the intended done, in which case the gift will be good in favour of the new charity (Re Vernon's Will Trusts (1971)).

Where the gift is in favour of an unincorporated association, it cannot be for the association itself because the association has no separate legal personality. Consequently, the gift must be construed as a trust for the charitable purpose pursued by the association. If the purpose is still capable of being pursued despite the dissolution of the association, then the gift will be applied cy-près under a scheme sanctioned by the Charity Commission. If the association has merged with another charity, the gift may be good in favour of the consolidated charity (Re Faraker (1912)).

Question 4

The general rule is that a non-charitable trust will only be valid if it has one or more beneficiaries who can, if necessary, go to court to enforce the terms of the trust against the trustee: see Morice v Bishop of Durham (1804) and Re Astor's Settlement Trusts (1952). This is known as 'the beneficiary principle'. A trust for a non-charitable purpose has no beneficiaries and so will ordinarily fail.

However, there are a number of scenarios where the rule has not been applied. It is submitted that these can be divided into three broad categories:

- apparent trusts which, on analysis, can be regarded as valid outright gifts to identified individual(s)

- apparent purpose trusts which, on analysis, can be regarded as valid trusts for individuals because they benefit persons who have sufficient standing to enforce them

- 'true' exceptions (ie cases which ought to have been decided differently)

These will be examined in turn.

Firstly, what appears as a trust for a purpose may in fact properly be characterised as simply an outright gift which is accompanied by a non-binding expression of the motive held by the testator or donor in making the gift (Re Andrews Trust (1905) and Re Osoba (1979)).

Secondly, in Re Denley's Trust Deed (1969), it was held that a trust which is expressed as being for a purpose is nonetheless valid if there are in fact ascertainable beneficiaries who can enforce it. In this case land was left on trust to provide a sports ground for employees of a specified company: the trust was held to be valid because the employees derived a sufficient benefit from the purpose for which the trust was established to be able to enforce the trust. Goff J distinguished purpose trusts where the benefit to individuals was sufficiently direct and tangible to give them locus standi to enforce the trust and those where the benefit was too abstract, indirect, or intangible. The latter are not valid because they offend the beneficiary principle. However, the trust must be limited to the applicable perpetuity period. It is also unclear how such a trust complies with the requirement for certainty of objects (given that the number and identity of the beneficiaries will change (eg in Re Denley itself employees would join and leave the company) over the lifetime of the trust. However, if a Re Denley trust is regarded as being a discretionary trust, the given postulant test applies (McPhail v Doulton (1971)): ie it must be possible to be able to say of any given postulant that they are or are not a member of the class of objects. The description of the objects also must be conceptually certain (Re Baden's Deed Trusts (No 2) (1973)).

A Re Denley trust will nevertheless fail if the class of objects (ie the ascertainable beneficiaries) is too wide to be administratively workable. In District Auditor, ex parte West Yorkshire Metropolitan County Council (1986) a purpose trust for 2.5 million inhabitants of West Yorkshire failed due to administrative unworkability. In Re Harding (Deceased) (2007), it was accepted that a trust for 'the Black community' of four named London boroughs would have been void for administrative unworkability had it been a non-charitable trust. The objection to these trusts may be that members of such a large class of objects would have little interest in enforcing the trust.

The reasoning in Re Denley was applied in Re Lipinski's Will Trusts (1976), which concerned a gift to a non-charitable unincorporated association on trust to construct new buildings for the association and to make improvements to those buildings. An unincorporated association, such as most clubs and societies, is not a legal person capable of having interests in property, and therefore there cannot be a trust for an unincorporated association as such. Oliver J nonetheless held that this non-charitable purpose trust was valid because the members of the association were ascertainable beneficiaries who would have a sufficiently direct benefit from the trust to be able to enforce it.

Lastly, there are some cases where trusts for non-charitable purposes with no ascertainable beneficiary have been upheld. Trusts for the upkeep of various family graves and monuments have been held to be valid, despite the absence of a beneficiary to enforce the trust, in Mussett v Bingle (1876) and Re Hooper (1932). In Re Dean (1889) and Pettingall v Pettingall (1842), trusts to maintain specific animals were held to be valid despite the conflict with the beneficiary principle. Pettingall was applied in Re Thompson (1934), where a legacy was to be used toward the promotion of fox hunting. Trusts for the saying of private masses are also valid (Re Khoo Cheng Teow (1932) notwithstanding the same objection). These exceptions to the beneficiary principle have been described as "concessions to human weakness" (Re Endacott (1960)). They are regarded as anomalous and the courts, whilst not being willing to class them as having been wrongly decided, have refused to extend them.

While these anomalous trusts are valid (and so contradict the statement in the question), they are nonetheless unenforceable. There is no beneficiary who can compel the trustees to carry out the trust. Consequently, the trustees need not perform the trust if they do not wish to do so. For this reason, these anomalous trusts are sometimes referred to as 'trusts of imperfect obligation'.

SECTION B

Question 1

Trustees owe a duty of care in exercising their investment powers (Trustee Act 2000 (TA 2000), s 1 and Sch 1). This duty imposes a basic standard which requires trustees to exercise such care and skill as is reasonable in the circumstances. However, an enhanced standard may be owed where:

- the trustee has, or holds themself out as having, any special knowledge or experience (in which case the standard expected of the trustee is judged by reference to what it would be reasonable to expect of a person having that special knowledge or experience): see TA 2000, s 1(1)(a), or,

- the trustee acts in the course of a business or profession (in which case the standard expected of the trustee is judged by reference to the special knowledge or experience that it would reasonable to expect of a person acting in the course of that kind of business or profession): see TA 2000, s 1(1)(b)

It is perhaps unclear whether Gina is acting as a professional trustee in terms of TA 2000, s 1(1)(b), but she certainly has skills and experience that will raise the standard of care under TA 2000, s 1(1)(a). Similarly, regardless of Harry's actual level of experience, he has held himself out as being a very experienced businessman and so will be held to that standard by TA 2000, s 1(1)(a).

Sale of KC Shares and purchase of SRL shares

The trust fund was holding what appeared to be a very profitable investment. Although the trustees are required by TA 2000, s 4(2) to review their investments periodically, they must do so with reference to the standard

investment criteria (as defined in TA 2000, s 4(3)) to decide whether they should be varied.

If the trustees decide to vary their investments, they must also consider the same criteria when considering how to reinvest the trust property. They must also ensure that any new investment is authorised. There is nothing to suggest that the investment in SRL is unauthorised. The trustees have a very wide power of investment under TA 2000, s 3 which does not appear to have been excluded. However, it is still necessary to question whether they complied with their obligations to consider the standard investment criteria when selling the KC shares and reinvesting in SRL. It seems that Gina's concerns (which Harry ultimately endorsed) were motivated solely by ethical concerns. However, it is clear from Cowan v Scargill (1985) that this is not a legitimate consideration when trustees are exercising their powers of investment.

In exercising their power of investment, the trustees must also take 'proper advice' (under TA 2000, s 5). There is no suggestion that either Gina or Harry has any relevant experience or expertise of their own in relation to investments (such as might negate the need for advice), so it is unlikely that the exception in TA 2000, s 5(3) will apply.

It therefore appears as if Gemma and Marco have breached a number of their obligations when deciding to reinvest in SRL. In order to work out the extent of their liability, it is necessary to consider the way in which the investment has been managed over the last two years.

Management of SRL

Having bought a majority shareholding in SRL, the trustees are obliged to monitor their investment appropriately. It is clear from Bartlett v Barclays Bank (1980) that they must ensure they receive an adequate flow of information about the company, which they could achieve in a number of ways, including taking up a directorship position with the company (Re Lucking (1968)). Harry did indeed become a director of SRL but left all the running of the company to Unai. He has therefore not properly complied with his obligations.

Gina seems to have been a passive trustee in this situation. Although she may argue that she relied upon Harry to keep her informed, she cannot completely absolve herself of liability in this way. She still needs to make an effort to liaise with her co-trustee and satisfy herself that the investment is being managed appropriately.

Remedy for breach of trust

There has been a steady decline in the value of this investment (which really ought to have been picked up by the trustees, as part of their duty to review their investments). There therefore appears to be a clear link between the various breaches of trustee duties and the loss in value of the trust fund; however, issues of causation may be pleaded in their defence: see Target Holdings v Redfern (1996)).

The beneficiaries will therefore request that an account is taken and require the trustees to make up the shortfall (a reparation claim). It is likely that they will be seeking £500,000 (plus any capital growth expected if they had invested appropriately/not changed their investment) and the lost income

from the last two years. It may prove difficult to claim profits beyond a reasonable investment (such as fixed-rate government bonds), although the claimants are free to try (Nestle v National Westminster Bank (1988)).

Section 61 of the Trustee Act 1925 allows the court to excuse trustees wholly or partly if they have acted honestly and reasonably and ought fairly to be excused for any breach of trust. However, the courts are reluctant to excuse passive conduct by trustees.

Apportioning liability for breach of trust

Both trustees appear to have breached their duties. Gina appears to be more responsible for the initial breach (ie the decision to reinvest) while Harry seems to be more responsible for the failure to properly monitor the investments. In both instances, one trustee has been more passive than the other – and it is no excuse for either to say, in effect, that they left the other to get on with it. Although Harry may argue that Gina is entirely responsible for the initial breach, having 'overborne his will' (Re Partington (1887) and Head v Gould (1898)), it would be difficult to argue that she is entirely responsible for the loss to the trust fund given that it could have been prevented (at least in part) if Harry had properly monitored the company thereafter (particularly given his claimed business acumen).

The trustees will therefore be jointly and severally liable for the loss caused to the trust (Bahin v Hughes (1886)). However, they may separately seek to argue that the liability should be apportioned between them in accordance with the Civil Liability Contribution Act 1978. The court will order such amount as is just and equitable having regard to their respective responsibilities for the loss.

Question 2

Legacy (a)

This legacy is an attempt to create a trust of the Kempstons plc shares (in separate proportions) in favour of Naheed on the one hand and her children on the other. The trust in favour of Irfan's nieces and nephews appears to be a discretionary trust.

However, in order for any trust to be valid, there must be certainty of intention, certainty of subject matter and certainty of objects (Knight v Knight (1840)). In the present case, Irfan clearly intended to create a trust and the objects (ie the intended beneficiaries) are also certain. However, there is a problem with subject matter. For present purposes, even if we assume that the number of shares in Kempstons plc which were owned by Irfan at the date of his death is known or can be ascertained (about which there should really be little doubt), there is clear uncertainty as to the proportions into which those shares should be divided in order to reflect the separate interests of Naheed on the one hand and her children on the other. The word 'bulk' is too uncertain (Palmer v Simmonds (1854)) for the trustee to know into what proportions the shares must be divided.

This uncertainty means that the discretionary element of the trust in favour of the nephews and nieces becomes irrelevant, because it is not possible to know the size of the trust fund.

This legacy therefore fails for uncertainty.

Legacy (b)

The legacy in relation to the bronze sculpture also raises an issue in relation to uncertainty, this time in relation to the intention to create a trust. If this were a trust, then the required certainties as to subject matter and object are clearly satisfied, but it not clear whether this is actually a trust at all. The words "fully expecting that she will pass it on to my grand-daughter when the time comes" are words of expectation rather than instruction, ie they are 'precatory' rather than 'imperative'. At one time precatory words were treated benevolently by the courts as imposing a trust, but the modern approach is to consider the legacy as a whole in order to determine its true meaning and effect (Lamb v Eames (1871)). The question here is whether Salma is under a binding obligation to hold the sculpture for Umara, or whether it is an absolute gift to Salma with only (at most) a moral obligation to comply with Irfan's apparent wish that the sculpture should be given to Umara at some point.

Given that clear words of intention to create a trust were used in relation to legacy (a), it would be legitimate to conclude that the use of less imperative words in relation to legacy (b) was intended to impose a less stringent obligation on Salma.

Legacy (c)

Certainty of intention is not an issue in relation to this legacy.

As to certainty of subject matter, Irfan does not state the number of motorcycles in his collection, nor does he identify them by manufacturer or model, so it is not apparent from the face of the will which motorcycles are to be held on trust by Bagya. However, provided that it is possible to establish by extrinsic evidence what Irfan regarded as 'my collection', then any motorcycles which he regarded as being part of it will be the subject matter of the trust. This is enough to establish certainty of subject matter at the outset.

There is also sufficient certainty as regards which motorcycles (if any) will pass to "my said nephews and nieces". Subject to the discussion below in relation to how the trust is to be administered, the position is that a finite number of motorcycles will be in the collection, a finite number may be selected by individual club members, and so a finite number (unless all the motorcycles are selected) will pass to the nephews and nieces. It does not matter that at the moment it is not possible to say which, or how many, motorcycles will pass, because these are facts which can be established in the course of administering the trust.

As regards certainty of objects, it would appear that this is a fixed trust, because: those members of the club living at Irfan's death can be definitively ascertained at the moment at which the trust is constituted, as can his "nephews and nieces". More particularly, the gift over is in favour of "my said nephews and nieces", which would be a reference back to any nephews and nieces who had been previously mentioned in the will – and that would take us back to legacy (a). Even if this were a discretionary trust, the is/is not test propounded in McPhail v Doulton (1971) could readily be applied to any given postulant.

Administration of the trust does, however, present a problem in relation to selection by the club members. The number of members is unlikely to be so large that the trust is administratively unworkable on that ground alone (cf R v District Auditor ex p West Yorks CC (1986)), but it is entirely possible that there are more club members than there are motorcycles. Irfan's will does not deal with this scenario, nor does it state how long the selection process must remain open. It is submitted that the appropriate way for Bagya to resolve this would be to apply to the court for directions as to the administration of this trust. Likely directions would deal with:

- publicising the legacy to club members (by notices and advertisements sent to the club and/or its officials or members (if known) and (if necessary) published in local newspapers)

- fixing a deadline for club members to submit a request to choose a motorcycle (after which the list of possible recipients will close)

- providing that those who satisfy the deadline will be dealt with on an appropriate basis if there are more applicants than motorcycles (perhaps by drawing lots, or on a 'first come, first served' basis).

Question 3

Anya would have to establish the existence of an implied trust in order to gain an equitable interest in the house.

Cedric has not expressly declared a trust for her (and in any event, an express trust would not be enforceable unless it was evidenced by signed writing – Law of Property Act 1925, s 53(1)(b)).

Anya did not make a direct contribution to the purchase of the property initially and therefore she cannot claim an equitable interest under a resulting trust (Curley v Parkes (2004)).

In any event, since Stack v Dowden (2007), the courts have used common intention constructive trusts as a more appropriate method of determining the interests of cohabitees in their home where only one of the cohabiting couple is the legal owner of the property.

Anya will need to argue that Cedric held the house on a constructive trust for himself and her. She will have to establish a common intention that she should have an equitable interest and that she acted to her detriment in reliance on that common intention.

The common intention can be express or inferred from conduct. A common intention might be expressed in discussions between the parties. In Lloyds Bank v Rosset (1990), Lord Bridge said that express discussions regarding the beneficial interest would usually take place before the purchase or exceptionally at a later date.

When Anya suggested that the house should be conveyed into their joint names, Cedric said it was a, "*waste of money when we know that the house belongs to us both*." Anya might argue that these words evinced a common intention because they showed that Cedric recognised that she had an interest in the property but that it was not recorded formally.

Also, there was both a discussion around the time of the purchase and then again later when Anya was contributing financially. Cedric might argue that his statement was intended to reassure Anya that he would not make her homeless and did not indicate a common intention that she should have a share in the house. If Cedric succeeds in this argument, Anya will have to persuade the court to infer a common intention. In Lloyds Bank v Rosset, Lord Bridge said that the court will infer a common intention only from direct contributions to the purchase price and mortgage; he doubted whether anything less would do. Lord Bridge's comment was obiter and may be at odds with the House of Lords' view expressed in Gissing v Gissing (1971). It is thought that if the claimant has made substantial contributions to outgoings, without which the legal owner could not have afforded the mortgage repayments, these 'indirect' contributions to the purchase might give rise to an inferred common intention (Le Foe v Le Foe (2001)). This view has received obiter support from the House of Lords in Stack v Dowden and the Privy Council in Abbott v Abbott (2007). Acts which form the basis for inferring a common intention will also suffice for detriment.

The judges in Grant v Edwards (1986) gave differing explanations of what was required for detriment. Nourse LJ said it had to be 'conduct on which the [claimant] could not reasonably have been expected to embark unless she was to have an interest in the house' whereas Browne-Wilkinson LJ said it was 'any act done by her to her detriment relating to the joint lives of the parties'. Financial contributions to the purchase or mortgage will suffice, as will substantial payments of housekeeping expenses so that the legal owner can devote their resources to paying the mortgage (Grant v Edwards). It is unclear whether non-financial detriment (eg giving up job to look after family) will suffice. Anya has acted to her detriment in reliance on the common intention by using the proceeds of her flat to furnish the house and by paying a substantial number of household bills.

If Anya establishes the existence of a constructive trust, the court will quantify her equitable interest according to what the parties agreed. If they did not discuss the question, according to the House of Lords in Stack v Dowden, the court should try to ascertain the parties' intentions from the whole course of dealings. Baroness Hale suggested that the court should take into account the purpose for which the house was acquired, the nature of the parties' relationship, whether they had children for whom they had responsibility to provide a home, how the purchase was financed initially and subsequently, how the parties arranged their finances, how they discharged outgoings and household expenses. In Jones v Kernott (2011), the Supreme Court accepted that the parties' intentions regarding the size of their respective shares could change over time. The majority held that if there was no express agreement as to the shares the court would infer the parties' intentions according to what would be fair having regard to the whole course of dealings.

Anya could seek a remedy through proprietary estoppel. She would have to show that it would be unconscionable for Cedric to deny an assurance which she had relied upon to her detriment (Gillett v Holt (2001)). Cedric's words might be an assurance that Anya would not be evicted from the house. Alternatively, a passive assurance (ie standing by while the claimant acts to their detriment in the belief that they have an interest) will suffice.

Anya acted to her detriment by using her wages to buy furniture and maintain the house and later paying household bills.

The court will award the "minimum equity to do justice between the parties" (Jennings v Rice (2002)) -_this means "a fair and proportionate remedy" (Jennings v Rice and Joyce v Epsom (2012). The court may fulfil the claimant's expectations and award an interest in the property under a constructive trust or a right to occupy for life in the form of a life interest. If the expectation bears no relation to the detriment, then the court may refuse to award an interest in the property but may consider a financial remedy (such as a sum to reimburse Anya for her expenditure). The court will take a number of factors into account including benefits the claimant has received (eg rent-free accommodation).

Question 4

(a) Zac

Zac received trust property (£50,000) for his own benefit as a result of Victor's breach of trust. A personal equitable action on the grounds of knowing receipt/recipient liability should therefore be considered. The test for knowing receipt was established in El-Ajou v Dollar Land Holdings (1993): firstly, there must be assets gained through breach of trust or fiduciary duty (this is clearly satisfied here), secondly, the assets received by the defendant must be traceable back to the breach (again, this seems to be satisfied), and thirdly the defendant must possess knowledge of the breach of trust or fiduciary duty.

Originally, 'knowledge' was assessed with respect to the scale applied in Baden v Société Générale (1983), but in (BCCI v Akindele (2001) knowledge was simplified to a test of unconscionability. Unconscionability is wider than dishonesty (Akindele). This has led to speculation that it may include constructive knowledge. The beneficiaries may be able to show that Zac had constructive knowledge that the money came from the trust because he deliberately did not draw obvious inferences from the facts. £50,000 is a very substantial gift. If the beneficiaries establish recipient liability, Zac will be personally liable to pay compensation of £50,000.

If the work has not enhanced the value of the flat, the money has been dissipated and the beneficiaries will have to content themselves with a personal claim. On the other hand, if it has added to the value of the flat, an equitable proprietary claim may lie. If Zac is a guilty recipient, the beneficiaries may claim a lien or a proportionate share of the house (Foskett v McKeown (2001)). The lien may be enforced by a sale of the house. If Zac is innocent, the court may refuse a lien over the house because it would be inequitable to compel the innocent volunteer to sell (Re Diplock (1948)).

(b) Xavier

Xavier has facilitated the commission of a breach of trust by Victor. A personal claim for constructive trusteeship may lie against Xavier on the ground of accessory liability. He assisted Victor to breach the trust and is liable if he was dishonest (Royal Brunei Airlines v Tan (1995)). In Tan, Lord Nichols said that dishonesty meant not acting as an honest person (possessing the same skill and knowledge of the facts as the defendant) would have acted. Subsequent case law suggests that a person can be dishonest even if they do not appreciate that this is the case (see Barlow Clowes v Eurotrust (2006), Abou-Rahmah v Abacha (2006) and Starglade Properties v Nash (2010)). Xavier is probably liable for £50,000 because an honest stockbroker, knowing that he

was acting for a trust, would have made more enquiries before paying the money to Zac.

4(c) Victor

The beneficiaries will want to pursue a proprietary claim because it will have priority over Victor's creditors in his bankruptcy. When Victor purchased the shares in ABC plc, he used an opportunity belonging to the trust. He breached his fiduciary duty because he placed himself in a position of conflict of interest and made a personal profit. It is no defence for Victor to say that the trust could not have made the profit. In Keech v Sandford (1726) the trustee was liable even though he could not have gained the profit for the trust. In Boardman v Phipps (1967) the fiduciary was accountable even though the possibility of the trust acquiring the profit was remote and the trust had lost nothing. Also, it is irrelevant that the trust has suffered no loss. It would appear that Victor is accountable for his profit.

As noted above, a personal claim will be pointless due to Victor's bankruptcy. However, according to FHR European Ventures LLP v Cedar Capital Partners LLC (2014), Victor holds the profit on a constructive trust for the beneficiaries, thus enabling them to pursue a proprietary claim.

Victor has mixed £40,000 of trust money with his own funds. Beneficiaries of a trust are able to use equitable tracing which can identify trust money in a mixed fund or where it has been used with other money to buy an asset. This will also include money which has been transferred electronically through a banking system (cf Agip (Africa) Ltd v Jackson (1991)).

The £10,000 paid to creditors has been dissipated and so cannot be recovered. The beneficiaries will seek to establish that the shares and the car belong to the trust. In Re Hallett (1880) it was held that a trustee is deemed to spend their own money first before resorting to trust money which they have misappropriated. This does not produce the best outcome for the beneficiaries if the first withdrawal was used to buy a valuable asset and subsequent withdrawals have been dissipated and are not, therefore, traceable. On the facts, it would prima facie appear that Victor's money was spent on the shares and the trust money was dissipated on debts. In this circumstance, Re Oatway (1903) can be used to displace Re Hallett: Re Oatway holds that the trustee is deemed to have acted in the best interests of the trust, so that if it would be better to presume that the valuable asset was purchased with the trust fund, then the asset will be treated as a trust investment and the beneficiaries will have a lien over it. Re Oatway would, therefore, allow the beneficiaries to claim a lien over the shares and the car. There is some uncertainty whether the beneficiaries are entitled to any increase in value of the asset or whether they are restricted to the amount of trust money which they have lost. A strict reading of Re Hallett suggests that they simply have a lien for the amount of trust money lost. However, in Re Tilley's Will Trusts (1967) it was suggested, obiter, that the beneficiaries are entitled to a proportionate share of any increase in value. Foskett v McKeown also suggests that the beneficiaries would be entitled to the profit, but this case did not deal with withdrawals from a mixed bank account.

The trust cannot claim the £10,000 paid in later because the balance on the account was previously reduced to nothing and they cannot claim anything over the lowest intermediate balance (Roscoe v Winder (1915)) unless the

trustee has specifically earmarked the money to restore the trust fund (as to which there is no evidence that this was the case).