# LEVEL 6 - UNIT 5 – EQUITY AND TRUSTS

# CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

# JANUARY 2020

**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 January 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 showed similar characteristics in that they used case law appropriately to underpin their analysis and had good knowledge and understanding of the law. In terms of the Section A questions they were able to mount a cogent argument, and in terms of the Section B questions they were able to apply their legal knowledge so as to put forward accurate advice. Candidates who did less well did not have a sufficient legal foundation on which to base any sort of reasoned argument or advice. Citation of relevant statute or case law was scant. In some cases, answers were very discursive and generalised.

Candidates generally preferred to answer, and were better at answering, Section B questions rather than Section A questions. Candidates also preferred questions that were split into parts.

Most of the better performing candidates were able to answer four questions to a reasonably comparable standard. A small number of candidates, however, only offered three such answers, and then 'threw in' a fourth answer which was significantly worse than the others – in some instances this meant that

the candidate did not achieve enough total marks for a pass. Given that those poorer answers did not appear to bear any of the hallmarks of time pressure, it would seem that those candidates had not revised a sufficient number of topics to cover the elements of the unit specification which appeared in the question paper.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### SECTION A

**Question 1**

This question required candidates to discuss the various bases on which the courts have legitimised the existence of non-charitable purpose trusts. Seven of the 29 candidates answered it and five secured 13+ marks. The majority of candidates discussed the Endacott and Re Denley exceptions in reasonable detail. The discussion (if any) of Re Lipinski was generally weaker. The two weaker scripts demonstrated no real understanding of the topic.

**Question 2**

This question required candidates to discuss formalities and constitution, with specific reference to the 'every effort' test and unconscionability. This was a popular question – over two thirds of the candidates answered it, but only just over half of those secured 13+ marks. Weaker answers were characterised by vague and discursive explanations of what 'every effort' requires and/or how unconscionability justifies the perfection of an imperfect gift. The discussion of both Pennington and Choithram was generally poor. The discussion of proprietary estoppel was patchy.

**Question 3**

This question required candidates to discuss search orders and freezing orders. Nine candidates answered this question but only two achieved 13+ marks. Of the remainder, six achieved less than 10 marks. Very few candidates were able to articulate the threshold tests correctly, and a number seemed confused as to the purpose of each order.

**Question 4**

This question required candidates to discuss the circumstances in which beneficiaries and the courts may vary a trust. This was the least popular question on the paper. Answers were very poor, and no answer demonstrated any real understanding of the topic.

### SECTION B

**Question 1**

This question required candidates to discuss and apply the law relating to implied trusts of the home to a given set of facts. This was a very popular question and over two-thirds of the candidates secured 13+ marks, which indicates that on the whole the question was answered well. Better candidates articulated the different requirements in relation to implied and express

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 Victoria qualified for a share in the property and did not embark on a reasoned discussion in relation to the quantification of any possible share.

**Question 2**

This question required candidates to discuss: (a) powers of appointment, (b) the use of a cy-près scheme to save a legacy to a charity which no longer existed, and (c) half secret trusts. Again, this was a very popular question, with just over a third achieving 13+ marks. Virtually all the candidates mistakenly identified the legacy in (a) as a discretionary trust rather than a power of appointment. Some candidates answered this part on the basis that there was a charitable purpose under Charities Act 2011, ss 2 and 3(1). Although not intended as an approach when the question was set, it was agreed on standardisation that this was a legitimate approach and credit was given accordingly. Answers to parts (b) and (c) varied widely in quality/accuracy. As to the latter, most candidates identified that the legacy gave rise to a half secret trust (although fewer were able accurately to articulate the requirements for such a trust to be valid), and a significant number did not discuss Re Gardner at all.

**Question 3**

This question required candidates to discuss various aspects of the Trustee Act 2000. Nearly two-thirds of the candidates achieved 13+ marks. Most candidates discussed the relevant provisions of TA 2000, ss 1-5 and Nisha's passivity in reasonable detail. The discussion in relation to Quentin as agent was somewhat patchier. In relation to Xander, a significant number of candidates discussed this as if there had been a request for an advancement of capital under Trustee Act 1925, s 32 (notwithstanding that the question clearly stated that the request had been for trust income) – on standardisation it was agreed that such a discussion was not relevant and would not be credited.

**Question 4**

This question required candidates to discuss breach of fiduciary duty, tracing and 'liability of strangers' (i.e. recipient and accessory liability). Seven candidates answered this question, but only one achieved 13+ marks. In general, the discussion of both recipient and accessory liability was weak: candidates did not articulate the relevant principles or identify relevant case law with any accuracy. Discussion of the principles of equitable tracing was also poor.

**LEVEL 6 - UNIT 5 – EQUITY AND TRUSTS**

**SUGGESTED ANSWERS**

**SECTION A**

**Question 1**

*Critically analyse, with reference to case law, how the courts have dealt with trusts for non-charitable purposes.*

- Beneficiary principle - trusts are valid only if they have beneficiaries who can, if necessary, go to court to enforce them (**Morice v Bishop of Durham (1804); Re Astor's Settlement Trusts (1952**)).
- Beneficiaries are essential to ensure trust is carried out.
- The beneficiary principle means that noncharitable purpose trusts are generally void.
- **Re Denley's Trust Deed (1969),** a purpose trust can be valid if there are ascertainable beneficiaries who can enforce them. 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.
- Examples of invalid purpose trusts - **Re Astor's ST** - trust for the maintenance …of good understanding between nations' and the 'preservation of the independence and integrity of newspapers'. Held to be too abstract or indirect to give them locus standi to enforce the trust.
- Prior to **Re Denley**, it was thought that beneficiaries had to have a proprietary equitable interest in the trust property in order to enforce the trust.
- As a result of **Re Denley**, it is possible that a factual benefit from a trust is enough to allow beneficiaries to enforce it and thereby satisfy the beneficiary principle. (The alternative explanation of Denley is that it was a more conventional discretionary trust (**Re Grant's WT (1980)).**
- For the trust to be valid the beneficiaries must be 'ascertained or ascertainable'.
- It is unclear which certainty of objects test appertains to Denley trusts but if they are discretionary trusts, the given postulant test applies (**McPhail v Doulton (1971))**
- Objects must be conceptually certain (**Re Baden's Deed Trusts (No 2) (1973)).** Denley trusts will fail if the class of objects 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.
- In some cases, the purpose has been deemed to express the motive for the gift and the beneficiary is entitled to the property absolutely - **Re Andrews Trust (1905)**, **Re Osoba (1979).**

- The reasoning in Re Denley was applied in **Re Lipinski's Will Trusts (1976)** to a gift to a non-charitable unincorporated association on trust to construct new buildings for the association and to make improvements to the said buildings. The judge 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.
- There are some anomalous cases where trusts for non-charitable purposes with no ascertainable beneficiary have been upheld.
- In **Re Hooper (1932),** it was held that a trust for the upkeep of various family graves was valid despite the absence of a beneficiary to enforce the trust. 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.
- Trusts for the saying of private masses are also valid (**Re Khoo Cheng Teow (1932)**).
- These exceptions to the beneficiary principle have been described as "concessions to human weakness" (**Re Endacott (1960)).** The courts have refused to extend them to similar situations.
- While these anomalous trusts are valid, they are unenforceable. There is no beneficiary who can compel the trustees to carry out the trust.
- The trustees must have the power to spend the trust capital within the perpetuity period of 21 years. However, the courts have allowed some trusts which do not appear to comply with the rule e.g**. Re Dean** where a trust for the maintenance of the testator's horses and hounds for 50 years was held to be valid.

**Question 2**

*It is an established equitable maxim that 'equity will not assist a volunteer'; however, there are exceptions to this. Using critical evaluation, explain the following as exceptions to the maxim:*

*a) The 'every effort' test;*

- Every effort test - in order to make a perfect gift, the donor must transfer the property in the correct manner to the donee.
- Settlor must convey the property to the trustees using the appropriate formalities; otherwise the trust is void and the maxim that equity will not assist a volunteer applies.
- The 'every effort test' is an exception to this maxim.
- The exception has been applied where the donor has done everything necessary to transfer the property but there is an outstanding step to be taken by a third party (**Milroy v Lord (1862); Re Rose (1952)).**
- In **Re Rose** it was held that this stage is reached for gifts of shares when the transferor has parted with the stock transfer form and share certificate beyond recall and it lies in the transferee's power to be registered as the new shareholder. Once that point is reached, it is too late for the donor to withdraw.
- In **Mascall v Mascall (1985)** a father had executed a transfer deed of land in favour of his son. The father handed the deed to his son but then changed his mind. It was held that it was too late for the father to change his mind because he had done everything that he had to do to transfer title and the only remaining step was for the son to get himself registered.

- The requirement for formalities provides time for donors to change their minds. They are not bound until they have parted with the relevant documents.
- However, the 'every effort' test ensures that a donor's intention to make a gift is not defeated by, for example, the donor's death before registration or the company's refusal to register the donee. The 'every effort test' does not create uncertainty because there is a clearly defined point at which the transfer is complete in equity.

*b) unconscionability*

- Proprietary estoppel may prevent a defendant from denying a promised gift.
- An estoppel arises where the defendant makes an assurance that the claimant will be given property and, in reliance on the assurance, the claimant acts to his or her detriment.
- In **Gillett v Holt (2000),** - three elements are intertwined, and the courts favour a broader approach where they consider whether it would be unconscionable to deny the claimant that which was promised or understood.
- The issue of unconscionability also arose in **T Choithram v Pagarani**. Mr Pagarani orally declared that he was giving company shares to 'the Foundation'. The Foundation was a charitable trust; the trustees were Mr Pagarani and a number of other individuals. Mr Pagarani died before formally transferring the shares to the trustees. This appeared to be an incompletely constituted trust and the maxim 'equity will not assist a volunteer' came into play.
- However, Lord Browne Wilkinson said that equity will not strive officiously to defeat a gift and the Privy Council held that the trust was valid in equity. Mr Pagarani had done enough to declare himself a trustee (trusts over personality can be declared orally) and it would have been unconscionable for him to have retracted. This was a sensible decision because, to have decided otherwise, would have defeated the settlor's intention.
- **Pennington v Waine (2002**) concerned an attempted gift of shares. The donor (Ada) wanted to give her nephew (Harold) shares in a company so that he would qualify to become a director. Ada handed the stock transfer form to her agent, but she died before Harold was registered at the company. Ada and her agent had told Harold about the gift and the agent had also told him there was nothing which he needed to do. Believing that he had been given the shares, Harold became a director of the company. It was held that the gift was complete in equity because it would have been unconscionable for the donor to have changed her mind.
- Arden LJ did not define unconscionability in this context but said it was significant that the donee had been told about the gift and had become a director. Arden LJ suggested that the courts should not be too eager to declare attempted gifts to be void on a technicality because this runs counter to the donor's intention. She relied on Choithram and said that equity should not strive officiously to defeat Ada's intended gift.

Criticisms:

- Critics argue that Choithram should not have been used as a precedent because it was an entirely different case relating to a declaration of trust and not an attempted gift as was the case in Pennington.

- In Pennington, giving effect to the gift carried out the donor's intention because she died without changing her mind. She thought that her agent was dealing with the registration of the donee. However, the point at which it becomes unconscionable for a donor to change his or her mind is unclear due to the inherent in the term 'unconscionability'.
- If it would be unconscionable for the donor to recant once he has told the donee about the gift, then donors do not have any cooling-off period in which they can change their minds.
- In **Curtis v Pulbrook (2011)** the judge suggested that Pennington was a case of proprietary estoppel, which is a recognised exception to the rule that equity will not perfect an imperfect gift. If this is the case, the donor can change his or her mind unless the donee has acted to his or her detriment in reliance on the gift being made.
- Pennington has been heavily criticised because donors may no longer be protected against being immediately bound by impulsive gifts and it may lead to uncertainty.

**Question 3**
*With reference to case law, critically analyse:*

*(a) the freezing order. Within your answer, provide detail of the tests the court will apply in its application;*

- A freezing order (formerly known as a Mareva injunction) is an 'interim' (or 'interlocutory') injunction - prevents a defendant (or third party holding the defendant's assets) from dissipating or removing assets from the jurisdiction.
- It protects the interests of the claimant by ensuring that, should the claimant be successful, there will be property of the defendant available to satisfy the judgment.
- However, it can result in extensive harm to a defendant, including loss or disruption of his business and loss of reputation - so there are stringent requirements which must be satisfied before a freezing order will be granted.
- There is a three-part test to be satisfied (Third **Chandris Shipping v Unimarine (1979**)).
- First, the claimant must establish that he has a good arguable case. This is a more stringent requirement than that set out in **American Cyanamid Co v Ethicon Ltd (1975)** where the test for other interim injunctions was said to be 'a serious question to be tried'.
- Secondly, the applicant must satisfy the court that there are assets against which an order can be made. Initially, a freezing order could be obtained only against assets in the jurisdiction but there is now the possibility of obtaining a worldwide order **Groupo Torras SQA v Sheik Fahad Mohammed Al –Sabah [1996]**
- The third condition is that the claimant must produce strong evidence that there is a real risk of dissipation of assets so as to render any judgment the claimant may obtain nugatory.
- The subject-matter is normally an identified sum of money or specific assets. The defendant will be permitted to use money for normal expenses including reasonable legal costs of defending the action.
- If defendants were given notice of the application for a freezing injunction, they could dissipate or remove the assets thereby thwarting the application and the applicant's chances of enforcing judgment in the case.

- Freezing orders are often made ex parte without granting the defendant a hearing.
- This imbalance is redressed by requiring the applicant to make full disclosure of all matters which it is material for the judge to know, give particulars of his claim and the points made against it by the defendant (**Third Chandris Shipping Corpn v Unimarine SA (1979)).**
- The injunction will be discharged if it is subsequently discovered that full disclosure has not been made.
- The court may grant an ancillary disclosure order against the defendant but will protect the defendant by requiring an undertaking from the applicant that he will not use the information revealed by the disclosure order to start civil or criminal proceedings in other jurisdictions.
- In **Den Norske Bank v Antonatos (1998)** it was held that a defendant can refuse to provide information which would infringe his privilege against self-incrimination.
- The applicant must give an undertaking to pay damages in case the action is not successful (**HM Revenue & Customs v Egleton (2006**)).
- If appropriate, the undertaking should be supported by a bond or security. The damages should compensate the defendant for any loss of business profits or other losses incurred due to the freezing order.

*(b) the search order. Within your answer, provide details of how the court balances the interests of the parties.*

- Explaining that a search order (previously 'Anton Piller order') is an interim mandatory injunction.
- A search order - 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 articles specified in the order.
- The courts have to balance potential injustice to the applicant if vital evidence is destroyed and the violation of the defendant's privacy and disruption to business or family.
- In **Anton Piller KG v Manufacturing Processes Ltd (1976**) it was said there are three pre-conditions.
  1. First, there must be an extremely strong prima facie case (a higher standard than for other interim injunctions).
  2. Secondly, the damage, potential or actual, for the applicant must be very serious.
  3. Thirdly, there must be clear evidence that the defendants have incriminating documents or articles and there is a real possibility they will destroy them before the trial. Lord Denning added a fourth requirement in Anton Piller, that the order would do no real harm to the defendant or his case.
- 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 a list must be made of any items to be removed and the defendant given the opportunity to check it.
- Aggravated damages may be awarded for seizing items which are not covered by the order (**Columbia Pictures Inc v Robinson (1986**)).
- Search orders are granted ex parte because the element of surprise is essential to prevent the defendant destroying or hiding the evidence.
- The defendant can apply to the court at short notice for variation or discharge of the order provided the claimant and his solicitor and the

supervising solicitor have been allowed to enter the premises although not commenced the search.

- In order to safeguard the defendant's rights, the applicant must give an undertaking to pay damages in case the action is not successful.
- A search order should not generally require a defendant to disclose information which would incriminate him (**Rank Film Distributors Ltd v Video Information Centre (1982**)).
- In **Chappell v United Kingdom (1990**) the European Court of Human Rights held that a search order did not infringe a defendant's right under Article 8 of the European Convention of Human Rights (right to respect for private and family life) since the aim of protecting the rights of others was legitimate and the safeguards were sufficient to ensure that action was only taken where it was necessary.

**Question 4**

*Discuss, with reference to statute and case law, the circumstances in which beneficiaries and the courts may vary a trust.*

- Equity regards the beneficiaries as the true owners of the trust property - in some circumstances, the beneficiaries are able to end or vary the trust.
- Where a settlor created a trust to protect the property from vulnerable, extravagant or irresponsible beneficiaries, a variation or termination of such a trust is likely to conflict with the settlor's intentions.
- However, a change in the beneficiaries' circumstances or new tax laws can justify a variation even if it appears to disregard the settlor's intentions.
- If all the beneficiaries are sui juris and between them absolutely entitled to the trust property, they can end the trust and divide the trust property between themselves or insist that it is transferred to new trustees to hold on different terms (**Saunders v Vautier (1841)).**
- The settlor may have created a trust to protect the trust capital against a beneficiary e.g. by giving the beneficiary a life interest or by imposing a high contingency age. Provided all the beneficiaries are sui juris and in agreement, they can end the trust and divide the trust capital between themselves. The settlor's intentions can be entirely disregarded. If there are beneficiaries who are unable to consent, an application can be made to the court under the **Variation of Trusts Act 1958** to sanction the variation.
- The court is able to consent on behalf of certain classes of beneficiary namely: persons who are incapable of consenting (e.g. infants), a person who may become entitled to an interest as being at some future date (or the happening of some future event) as a person answering a specified description, persons unborn and individuals who have future discretionary interests under a protective trust where the principal beneficiary's interest has not yet determined (**s1(1)).** The court cannot consent for beneficiaries who are ascertained and capable of consenting for themselves.
- The court will grant the application if it is satisfied that the proposed variation is for the benefit of the person for whom it is asked to consent. The term 'benefit' is not defined by the Act.
- Case law confirms that the requirement is satisfied by financial advantages (including tax savings as in **Ridgwell v Ridgwell (2007))** and also moral and social benefit as in **Re Weston (1967)** and **Re CL (1969).** The postponement of the vesting age where the beneficiary is

shown to be irresponsible has been held to be for that beneficiary's benefit (**Re T's Settlement Trusts (1964)).** However, in **Wright v Gater (2011**) the judge decided that delaying a beneficiary's entitlement was not for his benefit.

- The intention of the settlor may be one factor to be taken into account. The settlor (if alive) should be made a party to the application. In **Re Ball's Settlement (1968)** it was said that the courts can approve variations but not resettlements which destroy the whole intention of the settlor. The judge maintained that the substratum of the trust must remain.
- The approach of the courts to the settlor's intention has been somewhat inconsistent. In **Re Steed's Will Trusts (1960**) the court refused to consent to a variation which removed a protective trust. The evidence showed that the testator had deliberately created a protective trust to prevent any benefit passing to a brother whom she regarded as a parasite.
- In **Re Remnant's Settlement Trusts (1970)** the court consented to the deletion of a trust provision which would have forfeited the interests of beneficiaries who were practising Roman Catholics. The court held that this variation was for the beneficiaries' benefit because it would prevent family dissension. However, the alteration to the terms of the trust clearly conflicted with the intention of the testator.
- In **Goulding v James (1997)** the will of the testatrix created a trust for her daughter for life with remainder to her grandson, if he attained the age of 40. The testatrix postponed the son's entitlement because he had not 'settled down'. If the grandson failed to reach 40, his children were to take the estate. The grandson and daughter applied to the court to end the trust. They proposed that they should each receive 40% of the trust capital (contrary to the wishes of the testatrix) with the remaining 10% being held on trust for the grandson's children.
- The Court of Appeal approved the scheme on behalf of the grandson's children because it was for their benefit. Their lordships said that the court's only concern was whether the arrangement was for the benefit of those for whom it was asked to consent; the intention of the testatrix was of little if any relevance. Re Steed's WT was distinguished.
- The purpose of the **Variation of Trusts Act 1958** was to put trusts with infant and unascertained beneficiaries on a par with trusts where all the beneficiaries were adult and could end the trust under **Saunders v Vautier**. It was desirable to give beneficiaries this flexibility to avoid the adverse consequences of changes in the tax laws.
- In some cases, under the Act the courts have deferred to the settlor's intention although this has not been universal. If the courts refuse to depart from the settlor's intention, trusts which have to rely on the Act are not placed on an equal footing with those where **Saunders v Vautier** applies.

Credit was given to students who discussed the common law power to vary:

- Court has inherent power to vary a trust
- Generally, restricted to emergency cases and salvage operations
- **Chapman v Chapman [1954] HL** held Courts can use their inherent jurisdiction to sanction a compromise but there must be a real dispute between the parties that requires a compromise: the power does not extend to cases where the motive is merely tax savings

## SECTION B

**Question 1**

*Explain to David on what grounds Victoria could claim a 'half-share' in the house and whether she is likely to be successful.*

- Victoria will have to establish that David held the legal title to the house on trust for her. The presumption is that a sole owner of the legal estate is also the sole equitable owner. The burden will be on Victoria to prove that she has an equitable interest.
- Unlike express trusts, resulting and constructive trusts can be created without writing (**s53(2) Law of Property Act 1925**).
- No resulting trust because she made no direct contribution to the purchase price at the time of purchase (**Curley v Parkes (2004), (Lloyds Bank v Rosset 1990).**
- The payment for furniture and redecoration was not a contribution to the purchase price. In any event, constructive trusts are more appropriate for determining the interests of cohabitees **(Stack v Dowden (2007)).**
- To establish a constructive trust, Victoria will have to show there was a common intention that she should have an interest in the house and she acted to her detriment in reliance on that common intention (**Lloyds Bank v Rosset (1990**)). Express or implied.
- An express common intention – 'agreement, arrangement or understanding' that the house should be shared beneficially.
- David's statement that he would treat it as Victoria's home may have been intended to be a statement that she could live there, but not an agreement that she should have a beneficial interest.
- Victoria could argue that there was a common intention that the house would have been in joint names but for the mortgagee's stance - **Grant v Edwards (1986)** and **Eves v Eves (1975).**
- If the court decides there is insufficient evidence of an express common intention, Victoria will have to persuade the court to infer a common intention which may prove difficult.
- In **Lloyds Bank v Rosset**, Lord Bridge said that a common intention could be inferred only from direct contributions to the price such as paying the deposit or some of the mortgage instalments.
- Victoria's payments for the furniture, redecoration and household expenses were not direct contributions. Victoria might argue that her substantial contributions to household expenses were indirect contributions to the purchase price because they freed up David's resources to pay the mortgage.
- Indirect contributions were not sufficient for the court to infer a common intention in **Gissing v Gissing (1971)** nor **Tackaberry v Hollis (2007).**
- However, in **Le Foe v Le Foe**, the High Court judge felt able to infer a common intention from the wife's substantial contribution to household expenses pursuant to an agreement that the parties would share the

mortgage and expenses equally with one paying the mortgage and the other paying the general household expenses.

- Obiter dicta suggesting the Lord Bridge's statement ruling out indirect contributions might be too narrow (House of Lords in **Stack v Dowden**). If Victoria is able to establish a common intention (whether expressly or by inference), her payment of the household expenses will also suffice for detrimental reliance (**Grant v Edwards**).
- Application of inferred CI:
- However, Victoria contributed with David to the mortgage payments, paid out of their joint bank account into which she has paid £1,000 per month and David paid £700.
- If a reasonable number of mortgage instalments have been made, then it is likely that the court will infer a common intention that she was to have a beneficial interest in the property.
- Quantifying her interest - **Stack v Dowden** - the court will look at the whole course of dealings between the parties to determine the extent of a claimant's beneficial interest under a constructive trust.
- The size of each party's share will be what was said or agreed when the property was acquired.
- If there is no evidence of any such agreement or discussion, the court will infer the parties' intentions having regard to the whole course of dealing between them in relation to the property; discussions at the time of purchase, the nature of the parties' relationship, how the parties' arranged their finances, and how the parties discharged outgoings on the property.
- **Jones v Kernott (2011)** - the Supreme Court adopted the same approach but it was held that if the court cannot ascertain the parties' intentions as regards their shares, the court will ascertain what would be fair having regard to the whole course of dealings.
- It is arguable that the parties intended to have equal shares at the beginning (because it would have been a joint purchase had it not been for Victoria's credit rating). The fact that they opened a joint account and Victoria's contributions to the joint account will be significant according to **Stack v Dowden**.
- Victoria could argue that she should have a remedy through proprietary estoppel. A claimant can use proprietary estoppel as a cause of action if the defendant made an assurance on which the claimant relied to her detriment.
- The three elements are intertwined and the courts are favouring a broader approach where they consider whether it would be unconscionable to deny the claimant what was promised or understood (**Gillett v Holt (2000)).**
- Victoria acted to her detriment by contributing substantial sums to the joint account. David may argue that she did not incur this detriment in reliance on the belief that she had a share of the house but rather she was just paying her way in which case there will be no estoppel.
- The remedy for proprietary estoppel is in the court's discretion. In **Jennings v Rice (2003)** it was said that the court had to ensure that justice was done between the parties and that the remedy was proportionate.

**Question 2**
*Advise Isobel whether the legacies in clauses (a), (b) and (c) of Ribeya's will are valid and, if not, what will happen to the assets referred to.*

Legacy (a)

- Power of appointment – explanation why it is not a Discretionary trust
- The issue is whether the objects are certain. The test for powers (and discretionary trusts) is the given postulant test: (**McPhail v Doulton (1971)).**
- Conceptual certainty - in **Re Baden's Deed Trust No 2 (1973)** - the settlor had to define the class of objects in clear language.
- Evidential uncertainty, which would arise if, for some reason, some people could not prove that they were within the class, would not cause the trust to fail.
- Burden was on the applicant to prove that he was within the class
- The given postulant test was satisfied if one could say that a substantial number of people were within the class even if, as regards a substantial number of others, it had to be said that they were outside or could not prove that they were within it.
- 'Promising athletes in the Southwest" is not conceptually certain.
- Very good candidates could query the need for certainty of objects for a power,
- £250,000 passes to James to the extent it is undistributed.

Legacy (b)

- Legacy to a charity which no longer exists.
- A gift to an unincorporated charity is construed as a trust for the purposes of the charity (**Re Vernon's Will Trusts (1971**).
- If the purpose is still capable of being pursued, the Charity Commission will draw up a scheme applying the money for that purpose.
- Save the Wildlife could be given the money if it intends to run a wild animal hospital. The Little Animal Shelter's assets were transferred to Save the Wildlife. The bodies have, therefore, amalgamated.
- Under **Re Faraker (1912)** the Charity Commission may sanction a scheme whereby the legacy would be given to Save the Wildlife provided it is satisfied that The Little Animal Shelter has not been destroyed by the amalgamation.
- If The Little Animal Shelter is not continuing in any form, the legacy has suffered initial failure.
- The legacy may be applied cy-près (for similar charitable purposes) if the testatrix had a general charitable intention - (**Re Harwood (1936)).** However, a gift to a named body which had existed was applied cy-près in **Re Finger's Will Trusts (1972)**
- If the gift cannot be saved under Vernon or Faraker, it will probably fail and pass as part of residue.

Legacy (c)

- Gifts of property which are to have effect on a person's death must be in a valid will executed in accordance with s9 of the Wills Act 1837.
- The gift to Una did not appear on the face of Ribeya's will and therefore, did not comply with s9.
- It would appear that Ribeya tried to create a half-secret trust.

- Half-secret trusts - to be valid, the testatrix must communicate the terms of the trust to the trustee before the will is made (**Blackwell v Blackwell (1855**)).
- Communication by a sealed envelope which is not to be opened until after the testatrix has died is acceptable (**Re Keen (1937)).**
- The communication must be as stated in the will.
- The secret trustee must agree. Silence would be regarded as acceptance (**Moss v Cooper (1861)).**
- It would appear that all the requirements for a half-secret trust have been satisfied.
- Una - predeceased the testatrix.
- Normally, if a beneficiary dies before the testator, the legacy lapses.
- Secret trusts are said to operate outside the will; they are declared in the testator's lifetime when the terms are communicated to the secret trustee. The trust is only constituted on the death of the testator - **Re Gardner (No. 2) (1923),**
- The decision has been criticised because the trust is not effective until it is constituted which does not occur until the testator's death and therefore the legacy on trust for the predeceased beneficiary should lapse.
- If **Re Gardner (No 2)** is followed, the residue will be paid to Una's estate. If the decision is not followed, the residue will pass on Ribeya's intestacy.

**Question 3**
*Your advice is asked on the following:*

*(a) Whether the beneficiaries could successfully sue the trustees due to the fall in the value of the trust fund and, if so, Nisha's liability in respect of:*

*(i) the trust investments;*
*(ii) the delegation to Quentin.*

- The beneficiaries may sue the trustees for compensation if they have breached a duty in relation to the investments which has caused loss to the trust fund. Trustees have a duty to invest the trust fund and may invest it as though they were beneficially entitled (**s.3 Trustee Act ('TA') 2000**).
- The company shares were an authorised investment.
- The trustees owed a duty to have regard to the standard investment criteria under **s.4 TA 2000**; they should have considered the suitability of the shares and the need for diversification.
- Did they examine the suitability of the shares for the size of the trust and the nature of the beneficial interests and whether they took account of the level of risk?
- Investing in one company's shares suggest that they did not consider the need for diversification.
- The trustees will be in breach of trust if they did not obtain advice from someone, they reasonably believed to be qualified to advise them under **s5 TA 2000**.
- Furthermore, they should have reviewed the investments **(s5).**
- They owed a duty to apply such standard of care as was reasonable in the circumstances having regard to the knowledge, skill and any professional expertise they had or professed to have **(s.1).**

- Harry - might be expected to exhibit a higher standard of care due to his employment in the City (depending on his role in the City – provided it is a relevant financial job).
- Their duty was to obtain the best financial return for the beneficiaries setting aside their moral, political and social views.
- A company's environmental record was not a relevant consideration (**Cowan v Scargill (1985)).**
- The trustees are expected to achieve the same level of growth as that which a prudent trustee observing all his duties would do (**Nestlé v National Westminster Bank plc (1988**)).

**Loss resulting from Quentin's disappearance**

- Trustees are not vicariously liable for the agent's defaults (**s.23 TA 2000**).
- They are liable only if they have breached a duty in relation to the appointment of Harold which has caused loss.
- They were permitted to delegate their 'delegable' functions under **s11 TA 2000**. As the delegation relates to asset management, the appointment of the accountant should have been evidenced in writing and the trustees should have given the agent a written policy statement giving guidance on how to exercise the function (**s.15 TA 2000**).
- Under **s22** they should have reviewed the agent's work and the policy statement from time to time and considered whether to take action. Even if the delegation itself complied with these requirements, it seems that the trustees may have failed to comply with statutory duty of care in s.1 when selecting Quentin (if they were aware of his problems with the SFO) and possibly reviewing his activities, so they will be liable for the loss (**s.23**).

**Nisha's liability**

- Nisha cannot be passive **(Bahin v Hughes (1886)).**
- Trustees are under a duty to watch over and correct each other's conduct.
- If a breach of trust and loss can be established, both trustees are jointly and severally liable.
- If Nisha is sued alone, she could claim a contribution from Harry under the **Civil Liability (Contribution) Act 1978** on the basis of what was just and equitable, measured according to Harry's level of culpability.
- Nisha might seek a defence under **s.61 TA 1925** on the ground that she acted honestly and reasonably and ought fairly to be excused, but the courts are reluctant to relieve passive trustees.

*(b) Whether Harry was entitled to refuse to pay for Xander's golf lessons*.

- Xander has a contingent interest in the trust - includes an interest in trust income.
- s.31 TA 1925 - trustees had power to apply the income for his maintenance, education or benefit - golf lessons would undoubtedly qualify given Xander's talent.
- The trustees could not pay the income direct to Xander – minor.
- They could have paid for the lessons direct or given the money to Xander's parents.

- Trustees' refusal to grant the request is not a breach of trust - s 31 gives the trustees a discretion to apply income for his maintenance, education or benefit.
- The court will not intervene if the trustees acted in good faith and properly considered whether to exercise the discretion.

*(c) Whether Harry can retire as a trustee and, if so, how. Nisha also asks you whether Harry would avoid liability for any breach of trust by retiring.*

- Harry cannot retire under s.39 TA 1925 because he will not leave two trustees in office.
- Trustees can retire under s.36 TA 1925 provided they are replaced.
- The continuing trustees make the new appointment.
- The continuing trustees are Nisha (and Harry, if he is willing to join in).
- Nisha could block the retirement by refusing to co-operate in the appointment of the new trustee.
- In any event, a trustee who retires does not cease to be liable for his breaches of trust committed while in office.

**Question 4**
Advise Larry what possible remedies he and Chloe may have against:

*(a) Amy*

- The beneficiaries will want to pursue a proprietary claim because it will have priority on Amy's bankruptcy whereas a personal remedy will rank alongside the claims of Amy's creditors.
- Bright Sparks plc share purchase- she used an opportunity belonging to the trust. She breached her fiduciary duty because she placed himself in a position of conflict of interest and made a personal profit.
- No defence to say that the trust could not have made the profit - **Keech v Sandford (1726)**, **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.
- Irrelevant that the trust has suffered no loss.
- The trustee will account for her profit.
- As noted above, a personal claim will be pointless due to Amy's bankruptcy. However, according to **FHR European Ventures LLP v Cedar Capital Partners LLC (2014)** Amy holds the profit on a constructive trust for the beneficiaries who will be able to pursue a proprietary claim.
- Amy has mixed £40,000 of trust money with her own funds. Beneficiaries of a trust are able to use equitable tracing which can identify trust money in a mixed fund.
- The £15,000 paid to creditors has been dissipated.
- The beneficiaries will seek to establish that the shares and the car belong to the trust - **Re Hallett (1880**)
- This would mean that the shares belonged in part to Amy and she dissipated the trust money on debts. It would be preferable to use **Re Oatway (1903)** where the court held that the beneficiaries' charge subsists on each and every part of the trust fund and any asset purchased with it.
- **Re Oatway** would allow the beneficiaries to claim a lien over the shares and the dress.

- It is not clear whether, applying **Re Oatway**, the beneficiaries could recover the increase in value of the shares.
- **Foskett v McKeown** suggests that they would be entitled to the profit but this case did not deal with withdrawals from, a mixed bank account.

*(b) Yousef*

- Yousef received trust property for his own benefit in breach of trust.
- A personal equitable action on the grounds recipient liability will succeed if Yousef had knowledge making it unconscionable for him to have dealt with the trust property (**BCCI v Akindele (2001)).**
- 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 Yousef had constructive knowledge that the money came from the trust because he deliberately did not draw obvious inferences from the facts. £60,000 is an extraordinarily large gift.
- If the beneficiaries establish recipient liability, Yousef will be personally liable to pay compensation of £60,000.

**Yousef - Equitable proprietary claim**

- If the extension has not enhanced the value of the house, 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 house, an equitable proprietary claim may lie. If Yousef 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 Yousef 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)).**

*(c) Solomon*

- A personal claim for constructive trusteeship may lie against Solomon on the ground of accessory liability.
- He assisted Amy to breach the trust and is liable if he was dishonest (**Royal Brunei Airlines v Tan (1995)).**
- Dishonesty means not acting as an honest person (possessing the same skill and knowledge of the facts as the defendant) would have acted - **Tan**.
- Subsequent case law suggests that a person can be dishonest even if they do not appreciate that this is the case (**Barlow Clowes v Eurotrust (2006); Abuo-Rahmah v Abacha (2007); Starglade Properties v Nash (2010)**).
- Solomon is probably liable for £60,000 because an honest stockbroker, knowing that he was acting for a trust, would have made more enquiries before paying the money to Yousef.