CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2021

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 January 2021 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 immediately 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 of the issues raised by the question and/or application of the law to those facts. Candidates are expected to cite case law and to be precise when doing so. More so than in previous sessions, many candidates appeared to treat citation of authority as being optional/unnecessary. Equally, no credit is given for statements such as 'In a decided case…', or 'In the case about…' or 'In [blank] v [blank]….'. At the other end of the spectrum, candidates are not expected or required to recite the facts of particular cases. More often than not, those facts are irrelevant (unless they are strikingly similar to the facts presented in the question), and setting them out only absorbs time and effort which could be more gainfully employed elsewhere.

CANDIDATE PERFORMANCE FOR EACH QUESTION

SECTION A

Question 1

This question required candidates to discuss the concept of 'dishonesty' in relation to accessory liability. Although the quotation in the question was taken from the speech of Lord Hoffman in Twinsectra Limited v Yardley and Others (2002), better candidates discussed dishonesty in the context of both knowing receipt and dishonest assistance.

This was not a popular question. The range of marks achieved varied considerably. A hallmark of all the scripts was weakness in relation to a critical evaluation of Lord Hoffman's statement and a failure to discuss the principles which emerge from the relevant cases in sufficient detail.

Question 2

This question required candidates to discuss the various bases on which the courts have sought to justify the validity of a gift to an unincorporated association, and to identify the problems associated with each identified justification.

Relatively few candidates attempted this question. Most of those who did were unable to identify all the various alternatives. Almost all those who attempted this question struggled to articulate succinctly the rationale behind Re Denley and/or Re Lipinski.

Question 3

This question required candidates to discuss the law relating to constructive trusts of the home (with an acknowledgement to the law relating to resulting trusts).

As ever, this was a very 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.

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). Many candidates appeared to think that Stack v Dowden has established definitive principles in relation to both elements.

A surprising number of candidates confused express trusts with express common intention constructive trusts, which inevitably resulted in some rather wayward discussion.

Question 4

This question required candidates to discuss fiduciary duties and the appropriate remedy for breach of fiduciary duty in the specific context of a bribe/secret commission.

In the main, this question was answered poorly. As regards part (a), candidates discussed only trustees, rather than fiduciaries generally. This inevitably resulted in a rather 'narrow' discussion. As regards part (b), a number of candidates who answered part (a) simply did not attempt to answer part (b) at all.

SECTION B

Question 1

This question required candidates to discuss equitable remedies: specific performance and interim mandatory injunctions in part (a) and interim 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 context of part (a), hardly any candidates referred to the possibility of seeking an interim mandatory injunction. In relation to part (b), a significant proportion of the candidates chose to focus on search orders and/or freezing orders (with examples of the 'usual' confusion as to the actual purpose of a freezing order).

Question 2

This question required candidates to discuss secret trusts. Due to the number of issues involved, this was a challenging question.

With some exceptions, candidates discussed the requirements for the creation of a valid secret trust reasonably well. A surprising number mis-identified which of the dispositions resulted in a fully secret trust and which resulted in a half-secret trust.

Application of the law to the facts was generally good, but barely any of the candidates considered whether LPA 1925, s 53(1)(b) applied to the trust relating to the house. Some, but not all, considered WA 1837, s 15 in relation to Erin.

The quality of the discussion regarding whether Helga was entitled to retain the entirety of the bequest varied considerably, but most candidates at least identified the issues involved and attempted to embark on a reasoned discussion,

Question 3

This question required candidates to discuss formalities and constitution in relation to dispositions of particular assets.

Part (a) involved a transfer on trust of land. A surprising feature of the answers on this part was that candidates chose to focus on either the transfer, or the trust, but did not discuss both.

Part (b) involved dispositions of an equitable interest. The discussion of LPA 1925, s 53(1)(c) was extremely poor.

Part (c) involved a *donatio mortis causa*. Virtually every candidate identified this and engaged in a reasonable discussion.

Question 4

This question required candidates to discuss breach of fiduciary duty and tracing. Again, the number of dispositions involved, and the issues raised by them, meant that this was a challenging question.

This was a relatively popular question. Discussion of the principles of equitable tracing was poor in the weaker scripts. Even in the better scripts, very few candidates went through the mathematical calculations raised by the facts and engaged in only generalised discussion.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 5 – EQUITY & TRUSTS

SECTION A

Question 1

The facts of <u>Twinsectra v Yardley and others</u> (2002) were that the defendant (Y) obtained a loan from Twinsectra (T). The loan monies were paid to Y's solicitor (S), who gave an undertaking to T that they would be used solely for acquiring property and would be retained by S until they were used for that purpose. In breach of that undertaking, S paid the monies to another solicitor acting for Y (L). S accepted Y's confirmation that the monies would be used for acquiring property). L knew the terms of the undertaking given by S, but nevertheless paid the monies out to Y on Y's instructions, without ensuring that they were used to acquire property. In so doing, L deliberately 'shut his eyes' to any issues arising out of S's undertaking (which he did not regard as being of his concern). The monies were misapplied by Y and lost to T.

T sued L for having dishonestly assisted in a breach of trust (there was an issue as to whether the monies were in fact held on trust, but this was resolved in favour of T). Dishonest assistance (formerly referred to in older cases as 'knowing assistance') is an example of accessory liability: a person who assists in the misapplication of trust money is liable to the victim of that misapplication if that person has acted with the requisite degree of 'fault'.

The issue as to the requisite degree of fault which is required was considered by the Privy Council in Royal Brunei Airlines Sdn Bhd v Tan (1995). Lord Nicholls stated that in the context of accessory liability that the touchstone for liability was dishonesty and that 'acting dishonestly … means simply not acting as an honest person would in the circumstances. This is an objective standard …'. In the course of his speech, he expressly rejected both knowledge and unconscionability as alternative tests for liability. In rejecting the former, he stated that 'knowledge' invited tortuous convolutions about the "sort" of knowledge that was required (in the course of which he referred to, and recommended abandonment of, the five degrees of knowledge articulated in Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France (1983). In rejecting the latter, he noted that: (a) if it meant the same as dishonesty, then dishonesty was just as good a word to use (and was certainly one which was more familiar to non-lawyers), and (b) if it didn't mean the same as dishonesty, it was unclear what it did mean.

The majority in Twinsectra (Lord Millett dissenting) held that a defendant would be dishonest if their conduct would be regarded as such by the standards of ordinary people, and if the defendant realised this: per Lord Hoffman '… the principles laid down by the Privy Council in [Tan] … require more than knowledge of the facts which make the conduct wrongful. They require a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behaviour'.

Although purporting to apply the principles established in Tan, this formulation appears to equate the relevant test for 'dishonesty' with the criminal test set out R v Ghosh (1982), by introducing both objective and subjective elements (this was a yardstick which had been rejected by Lord Nicholls in Tan). In his dissenting speech, Lord Millett considered that the the test should be objective only, with the standard of behaviour being that expected (objectively) of a person in the position of the defendant.

The decision in Twinsectra was subsequently subjected to considerable criticism and subsequent analysis. Later cases, such as Barlow-Clowes v Vaughan (2006) in the Privy Council and Abou-Rahmah v Abacha (2007) in the Court of Appeal, saw a 're-interpretation' or 'clarification' of the decision in Twinsectra to minimise any apparent divergence from Tan. In Abou-Rahmah and Starglade Properties Ltd v Nash (2010) it was accepted that it is unnecessary to show that the defendant realised that their conduct would be considered dishonest or indeed gave any thought at all to that question. This process of re-appraisal has since been endorsed by the Supreme Court in Ivey v Genting Casinos (UK) Ltd (t/a Crockfords) (2017).

Although Lord Nicholls rejected unconscionability as the touchstone for liability in relation to cases of assistance, it should perhaps be noted that unconscionability has emerged as the touchstone for liability in relation to the other limb of accessory liability, namely knowing receipt (see BCCI (Overseas) Ltd v Akindele (2000), where the test was suggested to be whether the defendant had 'such knowledge as to make it unconscionable to retain the property received').

In terms of the actual decision in Twinsectra, many might feel that L was fortunate to avoid liability. The majority in the House of Lords seem to have been much influenced by the trial judge's finding that L had not been 'dishonest'. However, the trial judge also found that L had deliberately shut his eyes to problems which would be caused by paying away the monies. In

Tan, Lord Nicholls said that an honest person does not deliberately close their eyes and ears, or deliberately not ask questions, for fear of learning something they would rather not know, and then proceed regardless. Lord Hoffman in Twinsectra agreed with that assessment, but nevertheless chose to characterise L's actions as 'taking a blinkered approach' or 'burying his head in the sand' (both of which justified the conclusion that L was not dishonest) rather than 'deliberately shutting his eyes' (which would presumably have led to the conclusion that L was dishonest, and which both Lords Hutton and Hoffman dismissed as essentially an unfortunate choice of words by the trial judge). To many, the variations in meaning between the three phrases are subtle at best, and might even be said to constitute a distinction without a difference.

Question 2

An unincorporated association lacks legal personality and so cannot own property, or be the beneficiary of a trust, in its own right. In addition, a trust for a non-charitable purpose is generally void, because it offends the beneficiary principle. This principle states that, for a trust to be valid, there must be ascertainable human beneficiaries, capable of enforcing it (Morice v Bishop of Durham (1805)). Such a trust may also fail for lack of certainty of objects, and/or for offending the rule against perpetuity.

However, various alternative constructions may allow a gift to a non-charitable unincorporated association to be saved: these are set out in Neville Estates v Madden (1962)).

Trust benefitting identifiable persons

Re Denley's Trust Deed (1969) is authority for the proposition that a trust which is expressed to be for a purpose can be valid if it primarily benefits identifiable persons. The gift in question concerned a gift of land to trustees who were to hold it on trust for use as a sports ground, primarily for the benefit of employees of a named company, and for anyone else whom the trustees permitted to use the ground. Goff J held that the employees were identifiable persons who, whilst not beneficiaries in the normal sense of owning beneficial (ie proprietary) interests, could nevertheless ensure that the trust was enforced.

Re Denley was not itself a case concerning a gift to an unincorporated association. However, in Re Lipinski (1976) Oliver J relied on Re Denley as one of the grounds for upholding a gift to an unincorporated association which was to be used for the purposes of constructing buildings for the association's use. Oliver J's alternative ground was that the gift could be treated as an accretion to the association's funds – this is discussed below.

Even if the Re Denley/Re Lipinski approach is applied, the trust will still fail unless its duration is limited to the perpetuity period at common law (generally 21 years). There is also uncertainty as to how the class of objects of such a trust is to be identified: it has been suggested that the test should be the same as for discretionary trusts (ie the 'is/is not' test identified in McPhail v Doulton (Re Baden's Deed Trusts (No 1) (1971)), but the application of that test is not without its difficulties (see Re Baden's Deed Trusts (No 2) (1973)).

It should also be noted that the members of the association cannot, in any case, be forced to fulfil the specified purposes (despite Goff J assuming in Re Denley that the purposes were bound to continue).

The Re Denley line of reasoning has been doubted in subsequent cases (see, for example, Re Grant's Will Trusts (1980) where Vinelott J characterised Re Denley as an example of an ordinary discretionary trust for the employees of the company). However, it continues to be invoked (see, for example, Grender v Dresden (2009) where a residents' association incorporated for the purpose of maintaining private roads on a housing estate was upheld as a valid Re Denley trust for a definable class of persons (the residents of the estate).

Trust for present and future members

Alternatively, the gift may be construed as a trust for present and future members (as joint tenants or tenants in common). Such a trust would not offend the beneficiary principle because, self-evidently, it would have human beneficiaries. However, such a construction is unlikely unless the intention to benefit present and future members is expressed. In addition, the trust must be restricted to present members and those joining within 125 years, to avoid infringement of the perpetuity rule against remoteness of vesting (see Perpetuities and Accumulations Act 2009, s 5).

Again, there can be no certainty that the gift will actually be used for the donor's intended purposes because there is nothing to prevent the beneficiaries for the time being from bringing the trust to an end and dividing the fund between themselves.

Absolute gift to association members subject to the association's rules

The gift may be construed as an absolute gift to present members as an accretion to the association's funds and subject to the contractual restrictions contained in the association's rules or constitution (meaning that no individual member can claim their distributive share immediately). This analysis was used in Re Recher's Will Trusts (1972). There is no perpetuity issue with this construction as the gift vests immediately.

This 'contractual' construction is, in the absence of words clearly demonstrating an intention to impose a trust, now the preferred approach (see comments in, for example, Artistic Upholstery v Art-Forma (1999) and Hanchett-Stamford v HM Attorney General (2008)). However, it cannot be invoked where the association:

- has ceased to exist
- lacks identifiable rules
- is subject to external control (see Re Grant's Will Trusts (1980), but a limited degree of external control will not necessarily be fatal (see Re Horley Town Football Club (2006))

As with the other constructions already discussed, this contractual approach does not guarantee that the settlor's intentions will be carried into effect. The members of the association for the time being may, in accordance with its rules, agree that the association should be wound up and its assets distributed.

Absolute gift to existing members beneficially

This is a permissible construction (see, for example, comments in Leahy v A-G for NSW (1959) and in Re Grant's Will Trusts (1979)) but the occasions on which it is appropriate are likely to be infrequent (because invariably it is quite evident (not least from the subject matter of the gift itself) that the donor had no intention that the then members should be entitled to an immediate distributive share of the gift, but was intending to further the future purposes of an association which they had supported during their lifetime). This construction is only really appropriate where the association's name is being used as a convenient label to describe the current members with no intention of benefitting future members.

In conclusion, although it is possible to construe a gift in such a way as to make it available for the non-charitable purposes of an unincorporated association, it is not possible to the ensure that the gift will continue to be used for those purposes.

Question 3

Historically, the respective beneficial interests of unmarried cohabiting couples in the family home were determined in accordance with well-established 'purchase money' resulting trust principles (Dyer v Dyer (1788) and Bull v Bull (1955)). In the specific context of the family home, cases such as Cowcher v Cowcher (1972) and Curley v Parkes (2004) held that only financial contributions at the time of acquisition were relevant in determining the parties' respective shares; but in Tinsley v Milligan (1994) it was held that later mortgage payments could be taken into account if they were anticipated from the outset.

Subsequently, in both Pettit v Pettit (1970) and Gissing v Gissing (1971), the House of Lords held that it was permissible, where the evidence established the existence of a common intention that the non-owning cohabitee should be entitled to a share in the family home, to impose an implied, resulting or constructive trust on the owning cohabitee (with Lord Diplock stating in Gissing that it was unnecessary to distinguish between those three classes of trust). The parties' common intention could be express or inferred to deliver a result which was perceived as being 'fairer' or 'more just'.

In Lloyds Bank v Rosset (1991) Lord Bridge stated that the requisite common intention could give rise to one of two kinds of constructive trust):

- the **express common intention constructive trust (ECICT)** – an ECICT gives effect to any agreement, arrangement or understanding reached between the parties as the result of 'express discussions between [them] … however imperfectly remembered and however imprecise their terms may have been' (either at the time of acquisition or (exceptionally) at a later date) accompanied by subsequent detrimental reliance.

- the **inferred common intention constructive trust (ICICT)** – in finding the existence of an ICICT 'the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust'.

Unfortunately:

- in practice, ECICTs are infrequent (notwithstanding the notable exceptions in Eves v Eves (1975) and Grant v Edwards (1986)) – cohabiting couples do not typically discuss, let alone reach a concluded agreement, that the non-owning cohabitee will have a share in the family home (see, for example, the judgment of Waite LJ in Midland Bank plc v Cooke (1995)); in addition, there is no clear guidance as to what constitutes 'detriment'

- the qualifying threshold for obtaining the benefit of an ICICT was initially set high, with Lord Bridge stating that it was extremely doubtful whether anything less than direct contributions to the purchase price by the non-owning partner would do (albeit that cases such as Le Foe v Le Foe (2001) relied on obiter dicta in both Pettit and Gissing to permit reliance on indirect financial contributions)

In Stack v Dowden (2007) – a case where the family home was jointly owned, but which is considered now to be of equal application to cases of sole ownership – Lady Hale made clear that allocating shares on the basis of resulting trust principles was no longer appropriate in the context of the shared family home as it gave too much power to the party with greater wealth and simply did not take account of all the features of the modern family.

Instead, and as repeated in Jones v Kernott (2011), the exercise is to "ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it". Financial contributions are relevant, but there are many other factors which the court is entitled to consider. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the title was transferred as it was; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances (whether separately or together or a bit of both); and how they discharged the outgoings on the property and their other household expenses.

When it comes to quantification, the first task is to identify whether the evidence establishes an express agreement; if so, the parties will be held to that agreement. But if it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property "the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property": per Chadwick LJ in Oxley v Hiscock (2005).

In light of the above discussion, it is submitted that it is correct to say that the rigidity of the resulting trust has been replaced by the flexibility of the common intention constructive trust (as explained and applied by Stack and Jones). However, it is perhaps questionable whether, in terms of the question posed, complete certainty has been achieved. It is submitted that any of the following has the capacity to make the outcome in any particular case uncertain:

- the obligation to consider 'all the circumstances' – although this liberates judges from having to determine what factors do or do not enable the non-owning cohabitee to claim a share, it inevitably means that it will become more difficult to predict the outcome in any given case because of the differing circumstances (and, perhaps also, the weight which is to be attached to them) which will exist: flexibility can go hand in hand with uncertainty

- the fact that circumstances can and do change over time, meaning that shares can also apparently change over time (as was the case in Kernott) – this is the so-called 'ambulatory trust' referred to in Stack – again, there is a danger that the process of determining a party's share will become less predictable

- the fact that, in instances where the court cannot identify an express common intention and is unable to imply/infer one from the parties' conduct, it is seemingly permissible to impute such an intention (ie to attribute to the parties an intention which in fact they never had) – this was an exercise that was expressly disavowed in Gissing (albeit in differing terms by each member of the House) and has been a vexed issue in several subsequent cases – as a result of which the court will award such share as it thinks 'fair' (which hardly seems a recipe for certainty)

Question 4(a)

In Bristol and West BS v Mothew (1996), Millett LJ (as he then was) described a fiduciary as 'someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty'.

It is the existence of the duty of loyalty that creates the role of a fiduciary; consequently, a fiduciary relationship can arise across a wide range of circumstances which fall outside the more 'formal' instances of (eg) solicitor/client, company/director, or trustee/beneficiary (A-G for Hong Kong v Reid (1993) and Reading v Attorney-General (1951).

Although there are a number of facets to the duty of loyalty, they are often distilled into two basic rules, namely the 'no conflict' rule and the 'no profit rule' (Bray v Ford (1896)). The operation of these rules was described by Lord Herschall as being 'inflexible'. Strict application of these rules can be found in cases such as Keech v Sandford (1726), Wright v Morgan (1926) and Boardman v Phipps (1966). Strict liability is said to be justifiable on the basis that:

- it provides a deterrent to fiduciaries who might otherwise be tempted to exploit the fiduciary relationship for their own benefit

- it avoids the court having to: (a) identify the appropriate test for liability (ie knowledge, dishonesty or unconscionability) which has, for example, bedevilled the development of the law in relation to accessory liability, and (b) make fact-based assessments in relation to that test (although in Murad v Al-Saraj (2005), Arden LJ doubted whether the evidential difficulties were as great as was sometimes suggested)

The rules, although sometimes harsh in their operation, undoubtedly possess the qualities of simplicity and certainty in terms of the standards which a fiduciary is expected to meet. In addition, the harshness of the rules can be mitigated:

- the trust instrument can authorise acts which would otherwise constitute a breach (such as a right for the trustee to charge for their services or to retain director's fees)
- the beneficiaries can (prospectively or retrospectively) authorise acts which would otherwise constitute a breach
- the court may, exceptionally, exercise its discretion to ignore the breach (Holder v Holder (1967))
- a fiduciary may be awarded remuneration for skill and effort by the court using its inherent jurisdiction (albeit that this will follow a finding of breach) - this will be rarely exercised (so as not to encourage fiduciary breach (Guinness v Saunders (1990)) but may be justified where the fiduciary has acted in good faith and has demonstrated business acumen beyond what is expected of the reasonable businessman (Boardman and Murad).

One final point to note is that the relief granted by the court is not punitive; the consequence of a breach of fiduciary duty is that a transaction is unwound, or a profit is disgorged. The overarching aim of the court's intervention is to restore the fiduciary to the position they would have been in had the breach of fiduciary duty not occurred.

4(b)

Following a breach of fiduciary duty:

- a personal claim entitles the victim of the breach to bring a money claim against the defaulting fiduciary to make good the loss which has been caused – but such a claim is defeated or diluted if the fiduciary is insolvent
- a proprietary claim entitles the victim of the breach to follow a particular item that is trust property or to trace into its proceeds (Foskett v McKeown (2001)) – such a claim confers priority in insolvency and also allows the claimant to recover profits made with the trust property or its proceeds, but it does not assist where the trust property has been dissipated (Re Diplock (1948)) or has been acquired by a bona fide purchaser for value ('equity's darling')

In Lister & Co v Stubbs (1890), the defendant (S), who worked as a foreman for the plaintiff (L), placed orders on L's behalf with a third party in return for bribes. L claimed that investments made by S with the money he received were held on constructive trust for L. The Court of Appeal held that L was limited to a personal claim for the value of the bribes received on the grounds that: (a) a person could not be both a debtor to the principal for the bribe received (the personal claim) and also a trustee in favour of the same person in relation to the same bribe (the proprietary claim), and (b) on insolvency, a proprietary right would unfairly disadvantage the fiduciary's other creditors.

In Attorney - General for Hong Kong v Reid (1994), the Privy Council disapproved the decision in Lister. Lord Templeman stated that a bribe or secret commission received by a fiduciary becomes immediately subject to a constructive trust in favour of the fiduciary's principal. He discounted the contrary arguments in Lister on the basis that: (a) there was no objection to two remedies, so long as they did not lead to double recovery, and (b) the fiduciary's creditors would not be disadvantaged by not having recourse to an asset which the fiduciary ought not to have had in the first place. However, Reid was not binding in England and Wales.

In Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (2011), Lord Neuberger MR declined to follow Reid in preference to Lister. He considered that:

- a proprietary claim was only available where the relevant asset was either pre-existing trust property, or was derived from some "opportunity or right" which was "properly" or "beneficially" that of the principal, and

- since a bribe or secret commission was neither of these, only a personal claim was available against the fiduciary in relation to it

The problem with this formulation was that it proved exceptionally difficult to apply in practice.

In FHR European Ventures LLP and others v Cedar Capital Partners LLC (2014), the Supreme Court swept away this difficulty by holding that:

- it was well established that where an agent received a benefit in breach of fiduciary duty, the agent was obliged to account to the principal and to pay a sum equal to the benefit by way of equitable compensation - that represented a personal remedy for the principal against the agent

- however, in cases where this rule applied, the agent was also to be treated as having acquired the benefit on behalf of his principal – this meant that the principal also had a proprietary remedy against the agent and could elect between the two remedies

- a number of authorities suggested that the rule should apply to bribes or secret commissions paid to an agent, so that the agent held them on trust for their principal

- Lister was wrong and should be overruled

The Supreme Court acknowledged that "it was not possible to identify any plainly right or plainly wrong answer to the issue … as a matter of pure legal authority". Instead, the conclusion was one based on principle, practicality and policy. Although the decision represents a significant departure from a long-established position in English law, it brings simplicity and certainty to a topic where the leading authority was widely criticised and difficult to apply.

SECTION B

Question 1

Arturo v Bernard

Arturo should be advised that he is entitled to apply for an order for specific performance against Bernard, the effect of which would be to compel Bernard to carry out his contractual obligation to deliver the case of truffles to Arturo.

An order for specific performance of a contract to supply goods will only be granted where an award of damages (which is the usual remedy for a breach of contract) would not an adequate remedy for the claimant (Adderley v Dixon (1824)). Damages will be regarded as adequate where a suitable alternative can be purchased on the open market (Cohen v Roche (1927), where antique chairs were considered to be ordinary articles of commerce). However, damages will not be regarded as an inadequate remedy where the subject matter is unique (as in the case of land) or the goods to which the contract relates are rare or of special value to the claimant (Falcke v Gray (1859) (Ming vase considered to be of unusual beauty, rarity and distinction) and Behnke v Bede Shipping Company Limited (1927) (ship considered to be of peculiar and practically unique value to the claimant because it precisely met the requirements of German shipping regulations, so allowing the claimant to use it immediately without modifications).

In the present case, the truffles are clearly rare. Arturo doubtless regards them as being an essential component of the menu that he has created (and hence he could claim that they are of special value to him). Arturo might also seek to argue that:

- the short period of notice which has been given by Bernard means that he has little time to source and secure delivery of an acceptable alternative (Sky Petroleum v VIP Petroleum (1974))

- his reputation as a chef would suffer if it came to be known that he had used an apparently inferior product (cf Verrall v Great Yarmouth Borough Council (1981))

If the court were to accept Arturo's evidence, he could expect to be granted an order for specific performance of his contract with Bernard. However, an order for specific performance is a final remedy which may only be granted after a full trial, which inevitably would take place long after the wedding. Arturo should therefore be advised to apply for an interim mandatory injunction, ie an order of the court compelling Bernard to perform his part of the contract in advance of any trial.

Given that the effect of such an interim mandatory injunction would, in the present case, be the same as making an order for specific performance, the criteria for obtaining such an order are more stringent than when applying for an interim prohibitory injunction. The rule established in Shepherd Homes Ltd v Sandham (1971) is that the court must feel a high degree of assurance that at the trial it will appear that the interim mandatory injunction was rightly granted. In practice, this means that the court's conclusion on this issue is likely to follow its conclusion as to how likely it is that specific performance will be awarded at trial.

Arturo v Claudia

Arturo should be advised to seek an interim prohibitory injunction restraining Claudia from divulging any information about the menu to Celeb magazine.

The test for granting an interim prohibitory injunction is set out in American Cyanamid Co v Ethicon Ltd (1975) and comprises the following elements:

- Is the claim frivolous or vexatious / is there a serious question to be tried?

  Claudia owes a duty of confidentiality to Arturo – breach of that duty is not a frivolous issue.

- Where does the balance of convenience lie?

  If the injunction were refused and Arturo were later to win at trial, would he be adequately compensated in damages for his pre-trial losses, and could Claudia pay? Release of confidential information would expose Arturo to a civil claim by Wow! and might also cause considerable damage to his personal and professional reputation. The loss to Arturo is potentially substantial (and in terms of loss of reputation and/or business perhaps not even quantifiable in monetary terms), so damages may well not be adequate. There is no evidence as to Claudia's ability to pay.

  If the injunction were granted but Claudia were later to win at trial, would she be adequately compensated in damages for her pre-trial losses and could Arturo pay? Claudia will suffer a financial loss and potentially also a (potentially unquantifiable) loss to her reputation, so damages may well not be adequate. There is no evidence as to Arturo's ability to pay, but his status as a world-renowned chef suggests he has assets.

- Are there any special factors to consider?

  Both Arturo and Claudia may suffer a loss of reputation, but Arturo also has an established business which may suffer (with potentially adverse consequences for the employees of that business).

- On the facts, the balance appears to favour Arturo. Even if the balance were unclear, the court should favour preserving the status quo ante (Garden Cottage Foods v Milk Marketing Board (1984)) by keeping the menu secret – again this favours Arturo.

Claudia appears to have already received a payment of £1,000. If that payment is the result of any breach of confidence by her, Arturo could apply for an account of profits (A-G v Guardian Newspapers Ltd (No 2) (1990). If successful, the court would order Claudia to pay over any profits which she has made from the unauthorised use of confidential information.

Question 2

Wills Act 1837 (WA 1837), s 9 requires testamentary dispositions to be made by Will and to be signed by the testator in the presence of two witnesses, who must then also sign in the presence of the testator and of each other. However, secret trusts are an exception to this requirement.

By his first disposition, Daniel is attempting to create a fully secret trust, given that it appears as an outright gift to Helga and Isla on the face of Daniel's Will. Kasperbauer v Griffith (2000) sets out three key requirements for secret trusts:

- The three certainties (Knight v Knight (1840)) must be satisfied. Certainty of intention appears to be satisfied as Daniel, in his conversation with Isla, expressly asked that she and Helga hold £50,000 on trust for the donkey sanctuary (so certainty of object is also established). However, there appears to be an issue as to certainty of subject matter, because the legacy in Daniel's will is £100,000 and not £50,000. There are two conceivable outcomes: either (a) the discrepancy is treated as undermining the entire gift (with the result that the trust fails completely for uncertainty of subject matter) or (b) the secret trust applies to £50,000 of the £100,000 legacy but not the other £50,000. It is submitted that the latter is the more likely (Re Colin Cooper (1939)). It follows that £50,000 of the legacy is an outright gift to Helga and Isla (apparently as joint tenants, which therefore passes to Helga by survivorship following Isla's death).

- The existence of the trust (Wallgrave v Tebbs (1855) and its terms (Re Boyes (1884)) must be communicated to the secret trustee during the testator's lifetime. This is satisfied as regards Isla, but neither Daniel nor Isla communicated the necessary information to Helga before their respective deaths. Ordinarily, only those secret trustees who are informed of the trust and its terms are bound by it. There is an exception to this rule where the ostensible gift in the will appears to be taken by the secret trustees as joint tenants and communication to one of the joint tenants takes place before the will is executed: in that situation communication to one joint tenant is treated as communication to them all (Re Stead (1900)). However, that exception will not apply here because Daniel only told Isla about the trust after he had executed his Will.

- The secret trustee must have accepted the trusteeship – in Isla's case this is clear, but Helga never accepted.

- The testator must have relied on the secret trustee's acceptance. In this case Daniel relies on Isla's acceptance by leaving his existing will, which contains the relevant gift, unrevoked.

In light of the above discussion, it would seem that Helga may indeed be able to retain the entirety of the £100,000 gift, on the basis that (a) half the gift was never subject to the trust and has passed to her by survivorship, and (b) the other half was not impressed with a trust in her hands because she was not told about the trust.

By his second disposition, Daniel is attempting to create a half secret trust in relation to his house. The basic requirements of such a trust were discussed in cases such as Ottaway v Norman (1972) and Kasperbauer v Griffith:

- Intention – this has been discussed previously. Certainty of intention (see Daniel's first email to Gordon), as well as certainty of subject matter (the house) and object (Erin) all seem clear enough.

- Communication – this has been discussed previously, but there is one important distinction between fully secret and half secret trusts: communication of the existence of the trust and its terms must take place before the will is executed (Re Keen (1937) and Re Bateman (1970)). It is not clear from the facts whether this requirement has been satisfied: if it has not, the trust fails (and the house passes with Daniel's residuary estate). However, on the assumption that Daniel executed his Will after Gordon agreed to act as a trustee, it is submitted that it does not matter that Daniel did not inform Gordon of the exact terms of the trust; this is because the method of communication which Daniel has chosen to adopt (an email attachment which is only to be opened after his death) is analogous to the method which was endorsed in Re Keen, where a sealed envelope which contained written instructions to the trustee was handed over on similar terms. It is submitted that it is enough that Gordon is told that the attachment contains the relevant terms and agrees to act as a trustee on that basis.

- Acceptance – this has been discussed above, with the important distinction that acceptance must occur before the will is executed.

- Reliance – in this case Daniel relies on Gordon's acceptance by then making his Will (including the relevant gift)

On the face of it, the half secret trust is valid.

As this is a trust of land, it is necessary to consider the application of Law of Property Act 1925 (LPA 1925), s 53(1)(b), under which an express declaration of trust in relation to land must be manifested and proved in writing signed by the person declaring the trust. Daniel's Will is not sufficient for this purpose (because it does not set out the terms of the trust) and nor will be the attachment to Daniel's second email if Daniel has not signed it. In that circumstance, the trust in favour of Erin can only be valid if it can be argued that LPA 1925, s 53(1)(b) does not apply to it. Ottoway v Norman (1972) is a first-instance decision where a secret trust of a house was upheld, but LPA 1925, s 53(1)(b) is not referred to at all in the judgment and does not appear to have been raised in argument. Re Baillie (1886) suggests that a half secret trust of land cannot be declared orally, but this decision pre-dates the courts' acceptance of the legitimacy of half secret trusts at all (which occurred in Blackwell v Blackwell (1929)), and so is of limited assistance.

The further problem here, however, is that the beneficiary of the trust (Erin) witnessed Daniel's Will. The usual rule is that a person cannot benefit under a Will if they have witnessed it (WA 1837, s 15). However, Re Young (1951) is authority for the proposition that in the case of a secret trust this provision is not engaged because the beneficiary takes under the trust and not under the Will.

Question 3

The flat

Kapil is the absolute owner of the land and has attempted to transfer it to Lionel on trust for Maria – this is one of the three methods of lifetime disposition described in Milroy v Lord (1862). This requires both a valid transfer of the legal title and a valid declaration of trust (ie a declaration which satisfies both the requisite formalities and the three certainties (Knight v Knight (1840)).

Although there is no problem with the three certainties in relation to Kapil's oral declaration of trust, LPA 1925, s 53(1)(b) requires that the declaration should be 'manifested and proved by some writing' and signed by the declarant. The 'writing' does not have to come into existence on the same day as the declaration, so it does not matter that Kapil's text is not sent until the next day (it is submitted that a text would be held to constitute 'writing' for these purposes). However, the absence of a signature is fatal to the validity of the text as written evidence of the trust, and so the trust in favour of Maria is unenforceable.

In order to transfer legal title to land, Kapil must use a deed (Law of Property Act 1925 (LPA 1925), s 52) which satisfies the requirements of Law of Property (Miscellaneous Provisions) Act 1989, s 1. Legal title will not pass until registration of the transfer at the Land Registry (Land Registration Act 2002, s 27(2)(a)). Kapil has executed a transfer deed, but Lionel has not been registered as legal owner at the Land Registry before Kapil died. Consequently, the transfer has not been constituted (Milroy v Lord). As Lionel is a volunteer, equity will not compel the transfer of legal title to him, nor will it treat the failed transfer as a declaration by Kapil that he was holding the flat on trust for Maria, as that was not his intention.

Equity may intervene to save the transfer if it can be said that Kapil has done all that is required of him to transfer legal title, but some other step remains outstanding which is out of his control but may be expected to follow in the ordinary course of events, then the gift is still effective. This is sometimes called the 'Re Rose principle' (Re Rose (1952)), or the 'every effort rule'. However, even though Kapil has used the correct method for transferring legal title, he has not sent it to the person capable of effecting the transfer (ie the Land Registry). In Mascall v Mascall (1984), the Re Rose principle was extended so as to apply in circumstances where the donor has put matters beyond their control. However, in the present case the TR1 form is still with Lionel (Kapil's solicitor and agent), and so was not yet out of Kapil's hands.

Shares in Kempston Bros Limited

Kapil owns a beneficial interest in the 5,000 shares, which are held on bare trust for him by Lionel. In directing Lionel to divide the trust property between Naomi and Oscar, Kapil has failed to identify which parts/elements are to go to each recipient. Ordinarily, this would cause the dispositions to fail (Re London Wine (1986) and Re Goldcorp (1994)), but where the subject matter of a gift is unsegregated intangible property where each element of the gift is exactly the same (as is the case with ordinary shares), then it does not matter that the property for each beneficiary is not identifiable (Hunter v Moss (1994) and Re Harvard Securities (1997)).

In relation to the 2,500 shares for Naomi, Kapil's direction constitutes a disposition of his subsisting equitable interest (Grey v IRC (1960)). As such, it therefore needs to comply with the formalities set out in LPA 1925, s 53(1)(c), ie it must be 'in writing' and signed by Kapil or his agent. Kapil's direction is only given orally, and so it is void. Lionel still has legal title which he now holds on trust for Kapil's estate.

In relation to the gift of 2,500 shares to Oscar, Kapil has directed Lionel to transfer legal title to Oscar absolutely. In that circumstance, Vandervell v IRC (1967) applies and there is therefore no need to comply with LPA 1925, s 53(1)(c). However, the transfer to Oscar has not occurred, and there is no indication that a stock transfer form (as required by Stock Transfer Act 1963, s 1) has been executed. Again, Milroy v Lord indicates that equity will not perfect the transfer to Oscar. If Kapil's instruction to Lionel could be regarded as irrevocable, then Re Rose might apply; however, there is little if anything in the facts to indicate that this was the case.

The Rolls Royce

Kapil intends to make a gift of a chattel, which can only be fully legally constituted by the additional delivery of the chattel (Re Cole (1964)). However, equity may intervene if the circumstances of the intended gift can be considered to be a *donatio mortis causa* (Cain v Moon (1896)). The necessary criteria are that: (a) the attempted gift is made in contemplation of death, (b) the gift is conditional on death, and (c) there is delivery of the subject matter of the gift or something which represents title to it.

Kapil's use of the words "I don't think I'm going to make it", followed by his death shortly after would appear to satisfy the first two criteria. However, there is no delivery of anything which represents title (or dominion) to the car - a handing over of car keys (as in Woodward v Woodward (1992)), or possibly even disclosure of the security code if Parker had not previously known it, might perhaps have been sufficient. However, there is nothing of that kind here so it is submitted that the Rolls Royce car will pass as part of Kapil's estate.

Question 4

Given that William is now bankrupt, a personal claim against him will be of little use to Velma or Zander, since their claims will rank alongside those of William's other unsecured creditors. They should therefore look to pursue whatever proprietary remedies may be available to them in order to follow or trace the funds which William has misappropriated. They may also have personal claims against any third parties who have received any part of those funds.

Velma is the beneficiary of an unadministered estate. Consequently, she does not have legal title and can only pursue a tracing claim in equity, rather than at common law, by virtue of the fiduciary relationship which exists between William and herself as executor and beneficiary respectively (Re Diplock (1951)).

Xena is an innocent volunteer. As a result, the £150,000 which she received can be traced by Velma into Xena's hands and from there into the flat in London. Velma is entitled to claim a proportionate share of the value of the flat, which would include the profit arising from its increase in value (Foskett v McKeown (2001)). Velma's initial contribution to the price of the flat was three-fifths (£150,000 ex £250,000), so she is entitled to three-fifths of its current value, ie (£300,000 ÷ 5) x 3 = £180,000.

The £75,000 given to Yannick has been dissipated and so cannot be traced. Each of Yannick's creditors is a bona fide purchaser for value without notice. Although Yannick has received trust funds, a claim against him based on knowing receipt will not succeed because we are told that he 'had no idea' about the circumstances of the payment to him. Velma will not, therefore, be able to establish the 'unconscionability' requirement identified in BCCI (Overseas) Ltd v Akindele (2000) as the touchstone for liability under this head.

However, despite the fact that Yannick was unaware of the source of the money which was paid to him or the circumstances in which it was taken by William, Velma is still entitled to pursue a personal claim against him (Re Diplock). Velma must first exhaust her remedies against William, following which she can then bring a personal claim against Yannick for the £75,000 which she is unable to trace. Velma will not be entitled to interest on the amount which she claims.

It appears that a 'change of position' defence exists in relation to such a claim (Lipkin Gorman v Karpnale Ltd (1991)). There are two requirements for the defence to be made out: (a) the defendant must have incurred expenditure in reliance on the money they have received, and (b) the expenditure has to have been 'extraordinary' (in the sense of being expenditure that they would not otherwise have incurred). Yannick satisfies (a) but does not satisfy (b); the debts are payments that he would have had to make in any event (Derby v Scottish Equitable Plc (2001)) and so they are not 'out of the ordinary'.

Like Velma, Zander will also have to rely on equitable tracing, given that: (a) he does not have legal title to the money in his trust but is only a beneficiary (which provides him with the necessary fiduciary relationship with William), and (b) the money taken from his trust fund has passed through a mixed bank account (Agip (Africa) v Jackson (1991)).

When William withdraws £100,000 from Zander's trust and pays it into William's bank account, £10,000 is immediately dissipated as it is used to pay off the overdraft and so cannot be traced. The bank is a bone fide purchaser for value without notice (Bishopsgate Investment v Homan (1995)). Zander has a charge on William's bank account for £90,000 (Re Hallett (1880)).

Again, the £35,000 used to pay William's bills goes to one or more bona fide purchasers for value without notice, and so is dissipated and cannot be traced. The balance in the account at this point is £55,000.

The £60,000 which William pays into his account in March will not be deemed to replace Zander's dissipated money (Roscoe v Winder (1915)) given that there is no evidence that this was William's intention, and so it is not available for Zander to trace into. Zander's claim going forward is limited to the lowest intermediate balance on William's account (which in this case is £55,000).

Ordinarily, where a trustee mixes a beneficiary's money with their own, and then makes a payment out, it is presumed that the trustee has acted honestly by using their own money first (Re Hallett). This would mean that £60,000 of William's money and £10,000 of Zander's trust fund is used to discharge the mortgage on William’s house. However, in the present case we know that the remainder of the money in the account (all of which was misappropriated from Zander’s trust fund) is subsequently dissipated (and so is untraceable). In this situation, the principle in Re Oatway (1903) will apply: the presumed order of payments out is reversed, so that £55,000 of Zander’s trust fund and £15,000 of William’s money is presumed to have been used to pay off the mortgage.

Where trust funds are misapplied by a trustee by being used to pay off a mortgage over the trustee’s property, the beneficiary is entitled to be subrogated to (ie put in the shoes of) the mortgagee whose debt has been repaid (Boscawen v Bajwa (1996)). The result is that Zander is entitled to a charge over William’s house for £55,000 on the same terms as the discharged mortgage.

The rest of Zander’s money has been dissipated.