

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2022

LEVEL 6 – UNIT 5 – EQUITY & TRUSTS

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the January 2022 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report**, which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

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 germane to the question posed). This tends to be more prevalent in relation to the Section A questions, where many candidates will 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 the Section B questions, there is little attempt to apply the recited facts to the law and to offer pragmatic explanation or advice. It should be emphasised to candidates that, in relation to almost all the questions on the paper, adopting such an approach will not be sufficient to achieve a pass mark – mere learning/recall must be accompanied by reasoned discussion and/or application.

Candidates are expected to cite statutory provisions and/or case law in relation to legal principles which they refer to. They are also expected to be accurate. No credit is given for statements such

as 'In a decided case...', or 'In the case about...' or 'In [blank] v [blank]....' or 'The Wills Act says....'. Nor will any credit be given for simply listing relevant cases at the end of an answer.

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

CANDIDATE PERFORMANCE FOR EACH QUESTION

SECTION A

Question 1

This question required candidates to discuss whether the existence of separate tests for liability in relation to knowing receipt and dishonest assistance can be justified.

Most candidates articulated the elements of the separate tests correctly (although there was little detail in relation to the relevant cases and propositions emerging from them). However, all candidates struggled to identify how/why the separate tests had evolved and where the areas of difference (justifiable or otherwise) between them existed.

Question 2

This question required candidates to discuss the extent to which the common law and equity are now fused.

Candidates struggled with this question. The discussion was generally superficial and unconvincing – only a couple of candidates made any real attempt to discuss the proposition. The discussion of the role and purpose of equity was generally poor.

Question 3

This question required candidates to discuss whether the distinction between discretionary trusts and mere powers retains any real importance.

Candidates did not deal with this question at all well. Those that attempted it were largely unable to articulate accurately the distinction between a discretionary trust and a power.

Question 4(a)

This question required candidates to discuss the differences between equitable remedies and common law remedies.

Most candidates who answered this question dealt with the basics adequately - the topic of equitable remedies is generally popular with candidates and they appeared to have a good grasp of this subject area.

4(b)

This question required candidates to discuss the extent to which specific performance exemplifies the characteristics of equitable remedies.

This sub-question was handled less well. Many candidates did not articulate correctly either the circumstances in which SP will be granted or the 'special circumstances' in which it may be refused. As a result, they struggled to engage with the premise of the question.

SECTION B

Question 1

This question required candidates to discuss the rights of B and C in relation to A's property as a result of (principally) actions in the case of B and promises in the case of C.

The discussion of constructive trusts in relation to B followed familiar lines – poor differentiation between: (i) express and implied common intention constructive trusts, and (ii) qualification and quantification. However, most candidates arrived at broadly the right conclusion for broadly the right reasons.

Much more surprisingly, and disappointingly, hardly any candidates discussed proprietary estoppel in relation to C, although the topic was clearly 'signposted' by the scenario. What discussion there was did not go into sufficient detail.

Question 2

This question required candidates to discuss the validity of various gifts to different entities for different purposes

Most candidates dealt with this reasonably well, although the discussion of 'charity' in relation to Rydells school was often rather hazy.

Question 3(a)

This question required candidates to discuss the liability of a passive co-trustee in the context of a legitimate delegation of the trustees' powers to a third party.

This question was not handled well by those candidates who answered it. Candidates did not identify the specific circumstances of H's role and the issues that arose out of it.

(b)

This question required candidates to discuss whether the trustees could be removed.

The general discussion in relation to this question was almost universally poor.

3(c)

This question required candidates to discuss whether contingent beneficiaries could be awarded capital and/or income out of the trust fund.

The general discussion in relation to this question was almost universally poor – none of the candidates who answered this question recognised that both beneficiaries were now entitled to income absolutely.

The discussion around entitlement to capital was vague.

Question 4

This question required candidates to discuss formalities and constitution in relation to various lifetime gifts.

As regards the paintings, barely a single candidate referred to the decision in T Choithram International SA v Pagarani (2000) as providing a potential solution.

The discussion of the shares tended to focus on legal title (ie transfer forms and the requirements of the Stock Transfer Act) rather than LPA 1925, s 53(1)(c) and the decisions in Grey and Vandervell.

SUGGESTED POINTS FOR RESPONSE

LEVEL 6 – UNIT 5 – EQUITY & TRUSTS

SECTION A

Question Number	Suggested Points for Responses	Max Marks
1	<p>Responses should include:</p> <ul style="list-style-type: none">• Discussion of: (i) what constitutes knowing receipt, and (ii) the test for liability (with specific reference to ‘unconscionability’ and detailed discussion of principles established in <u>BCCI v Akindele</u> (2001) and subsequent cases).• Discussion of: (i) what constitutes dishonest assistance, and (ii) the test for liability (with specific reference to ‘dishonesty’ and the more recent cases of <u>Abou-Rahmah v Abacha</u> (2007) and <u>Starglade Properties Ltd v Nash</u> (2010), which put earlier cases of <u>Royal Brunei Airlines v Tan</u> (1995), <u>Twinsectra v Yardley</u> (2002) and <u>Barlow Clowes v Eurotrust</u> (2006) in context).• A discussion of the advantages and disadvantages presented by ‘unconscionability’ and ‘dishonesty’ each in their own right as a touchstone for liability, followed by a comparative discussion and evaluation of the two.	25

	<ul style="list-style-type: none"> • Good students will draw a reasoned and credible conclusion based on the material which they have adduced. 	
Question 1 Total:		25 marks
2	<p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of the separate evolution, principles and function of common law and equity, highlighting the emergence of the latter as a way of correcting the perceived injustices of the former, with reference to eg <u>Earl of Oxford's Case</u> (1615). • Discussion of Judicature Acts 1873 and 1875. Candidates will consider whether these Acts merely fused the courts or also fused the law: see judicial statements in eg <u>Trustee of the Property of FC Jones & Son v Jones</u> (1996), <u>Westdeutsche Landesbank Girozentrale v Islington LBC</u> (1996), <u>Swindle v Harrison</u> (1997) and <u>MCC Proceeds Inc v Lehman Bros</u> (1998). • Discussion of relevant equitable maxims as indicators of the degree of fusion or continued separation (of which 'equity follows the law' and 'equity will not suffer a wrong to be without a remedy' are likely to be the most useful examples). • Better candidates will note the invocation of the former in recent 'family home' cases, eg <u>Stack v Dowden</u> (2007), following on from adoption of the equitable constructive trust as a vehicle for achieving a just result (see eg <u>Hussey v Palmer</u> (1972) and <u>Eves v Eves</u> (1975)) and the rejection of the restrictiveness represented by, eg <u>Lloyds Bank v Rosset</u> (1991). • Discussion of use of equitable remedies in legal actions (eg use of injunctions (citation of any relevant authority can be credited)). • Good students will draw a reasoned and credible conclusion based on the material which they have adduced. <p>Responses may include: Reference to Senior Courts Act 1981, s 49.</p>	25
Question 2 Total:		25 marks
3	<p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of the separate nature of discretionary trusts and powers, and the key distinctions between them. • Discussion of relevant authorities discussing the distinction and/or the process of distinguishing between the two as a matter of construction/interpretation, eg <u>Re Weekes' Settlement</u> (1897), <u>Re Combe</u> (1925) and <u>Burrough v Philcox</u> (1840). • Discussion of the earlier significance of the distinction in terms of certainty of objects, but how that distinction has now largely disappeared following <u>McPhail v Doulton</u> (1971). • Discussion of the residual areas of distinction – eg imposition of fiduciary duties in the case of a trust and the duties, remedies and sanctions which arise as a result. 	25
Question 3 Total: 25 marks		
4(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of differences, eg equitable remedies only available when common law damages inadequate, whether remedies discretionary or available as of right, whether remedy acts in rem 	8

	<p>or in personam. Candidates may well not cite any case law, but if they do it can be credited (within the 6 marks maximum available for discussion (as above)).</p> <ul style="list-style-type: none"> Reference to equitable maxims. 	
4(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> Outline of how the remedy of specific performance is consistent with the matters identified in the answer to part (a). Citation of authorities which illustrate that consistency, eg <u>Cohen v Roche</u> (1927), <u>Sky Petroleum Limited v VIP Petroleum Limited</u> (1974), <u>Beswick v Beswick</u> (1968). Discussion of how other equitable considerations/maxims may militate against the award of specific remedy, eg no consideration, want of mutuality, court refusing to act in vain, court refusing to engage in constant supervision, court refusing to endorse a situation which would be 'akin to slavery', court refusing to order a party to trade at a loss, etc. All of the above will be supported by citation of relevant authority. 	17
Question 4 Total:		25 marks

SECTION B

Question Number	Suggested Points for Responses	Max Marks
1	<p>Responses should include:</p> <ul style="list-style-type: none"> A brief contextual discussion re express trusts, resulting trusts and common intention constructive trusts (express and implied). Detailed discussion re express and implied common intention constructive trusts (including citation of relevant authority, and with reference to the factors referred to in <u>Stack v Dowden</u> (2007) and <u>Jones v Kernott</u> (2011)). The discussion must draw a clear distinction between qualification and quantification). Application of the stated law to the facts re Bettina, including: (i) the impact of the transfer into Anton's sole name on her payment of the deposit, (ii) her contributions towards the living expenses, (iii) her payments towards the mortgage, (iv) the apparent absence of any oral discussions and/or common understanding, (v) the possible size of any share. Discussion of the law of proprietary estoppel, with reference to relevant authorities, eg <u>Gillett v Holt</u> (2000), <u>Thorner v Major</u> (2009) and <u>Davies v Davies</u> (2016). Application of the stated law to the facts to identify factors for or against the conclusion that Chris has an interest in the property. Discussion of the award which would be sufficient to satisfy any equity that Chris may have, with reference to relevant authorities, eg <u>Dodsworth v Dodsworth</u> (1973) and <u>Jennings v Rice</u> (2003). 	25
Question 1 Total:		25 marks
2	<p>Responses should include:</p> <ul style="list-style-type: none"> Discussion of Charities Act 2011 meaning of 'charity', with specific reference to advance of education (CA 2011, s 3(1)(b)). Discussion of 'public benefit' requirement, with reference to relevant case law, in relation to whether pupils at the school 	25

	<p>represent a sufficient section of the public: eg <u>Re Compton</u> (1945), <u>Oppenheim v Tobacco Securities</u> (1951) and <u>Independent Schools Council v Charity Commission for England and Wales</u> (2011).</p> <ul style="list-style-type: none"> • Discussion that if the gift fails as a charitable trust, it may be valid as a non-charitable purpose trust for the benefit of ascertainable beneficiaries, with reference to <u>Morice v Bishop of Durham</u> (1804) and <u>Re Denley</u> (1969). • Identification of the Kempston Literary Society as an unincorporated association (UA), using the criteria established by case law (eg <u>Conservative and Unionist Central Office v Burrell</u> (1981)). Discussion of the problems re gifts to a UA. • Discussion of the possible bases on which the gift might be legitimised (eg <u>Re Recher</u> (1972) or <u>Re Grant</u> (1979)). Better candidates may discuss that the gift may be struck down as being capricious or serving no useful purpose, as in <u>Brown v Burdett</u> (1882). • Discussion re secret trust imposed over the residuary estate. Outline of the requirements for a valid secret trust, with reference to relevant case law (eg <u>Wallgrave v Tebbs</u> (1855), <u>Kasperbauer v Griffith</u> (2000), <u>Moss v Cooper</u> (1861) and <u>Re Keen</u> (1937)). • Candidates should conclude that the trust appears to be valid, in which case it is a non-purpose trust which falls with the <u>Re Endacott</u> exceptions (eg <u>Pettingall v Pettingall</u> (1842) and <u>Re Dean</u> (1889), albeit quaere whether a modern-day court would apply the rule against perpetuities more stringently than appears to have been the case in some of the earlier authorities. <p>Responses could include:</p> <ul style="list-style-type: none"> • Reference to Wills Act 1837, s 9. 	
Question 2: Total		25 marks
3(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of trustees' powers to delegate functions, the steps to be taken when delegating and subsequent duties to supervise, with reference to Trustee Act 2000, ss 11, 22 and 23. • Discussion of trustees' duty of care under TA 2000, s 1. • Application of above to the facts. • Discussion that beneficiaries must prove that loss was attributable to breach of duty and not extraneous factors. • Discussion of any possible defence under Trustee Act 1925, s 61. • Discussion of joint and several liability (allowing beneficiaries to sue Hashem alone) and Hashem's right to seek contribution under the Civil Liability (Contribution) Act 1978. 	13
3(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of separate grounds to remove trustees under Trusts of Land and Appointment of Trustees Act 1996, s 19 and also TA 1935, ss 36 and 41. • Application of the above to the facts, with appropriately reasoned conclusions. 	6

3(c)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of when powers under Trustee Act 1925, ss 31 and 32 are engaged. • Discussion of when and in what amount income or capital must or may be paid to beneficiaries or applied for their benefit, with accurate discussion of the relevant statutory tests and relevant case law (eg <u>Pilkington v IRC</u> (1964), <u>Re Clore's Settlement Trusts</u> (1966) and <u>Re Pauling's Settlement Trusts</u> (1963). • Application of the above: (i) non-payment to Jannatt of her share of income since she attained 18 is a breach of trust, but (ii) any decision re capital is in the complete discretion of the trustees (so she can have no complaints). 	6
Question 3 Total:		25 marks
4	<p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of formalities re gift of chattels (the paintings), with reference to (i) delivery and <u>Re Cole</u> (1964), (ii) presence of intention but absence of delivery, (iii) apparent failure of gift for want of delivery - equity will not step in to perfect it (<u>Jones v Lock</u> (1865)) nor will equity treat it as a self-declaration of trust (<u>Milroy v Lord</u> (1862)). • Discussion whether gift may be upheld by applying <u>T Choithram International SA v Pagarani</u> (2000) - on the basis that it's sufficient that one of the trustees (Keira) already holds the legal title, and so it will be deemed held by Keira (or Martin as her executor) on behalf of all the trustees (so Martin must transfer it to the remaining trustees). • Discussion of formalities re transfer of beneficial interest in shares with reference to (i) Law of Property Act 1925, s 53(1)(c) and relevant cases, (ii) requirement for signed writing, (iii) apparent failure of gift for want of writing. • Discussion whether gift may be upheld – on the basis that Keira's instruction involves the collapsing of a trust in favour of the person who was already the legal owner: see <u>Grey v IRC</u> (1960) and <u>Vandervell v IRC</u> (1967). Better candidates will note that this scenario is distinguishable from the latter because there is no transfer of the legal interest in the shares. • Discussion of formalities re gift of watch to Martin – which may well simply refer to earlier discussion re the paintings (the watch also being a chattel) – and apparent failure of gift for want of delivery. • Discussion whether gift may be upheld on the basis of the rule in <u>Strong v Bird</u> (1874) (as applied to gifts in <u>Re Stewart</u> (1908)), given the fortuitous vesting of the legal estate to Keira's assets by virtue of Martin being her executor - the gift fails during Keira's lifetime, but on her death Martin automatically holds legal title to all of her property (including the watch). This will constitute the gift as long as other conditions are met, ie (i) intention to make an immediate gift, and (ii) the intention continues until death: see <u>Re Freeland</u> (1952). 	25

	<p>Responses could include:</p> <ul style="list-style-type: none"> • Candidates may discuss certainty of subject matter in relation to the gift of the paintings. There is nothing in the question to suggest uncertainty, but the words ‘my collection’ may be sufficiently ambiguous to justify discussion. Credit may be given if the topic is discussed in sufficient detail (eg reference to <u>Knight v Knight</u> (1840)). • Candidates may discuss <u>Mascall v Mascall</u> (1985), <u>Re Rose</u> (1952) or <u>Pennington v Waine</u> (2002) in an attempt to display knowledge. However, none is relevant to the scenario and no credit should be given. • Candidates may discuss <i>donatio mortis</i> cause re the gift of the watch, but there is no evidential basis for this in the scenario. Keira’s operation is described as routine, so she would have had no expectation of imminent death and so no relevant ambiguity. No credit should be given. 	
Question 4 Total:		25 marks