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 June 2019 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

There are a number of observations as to candidate performance with regards to this paper.

General observations.

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.

Candidates who did less well did not have sufficient knowledge either of statute, or case law and in some cases their answers appeared to be “best guess” rather than founded in understanding.

Candidates were all generally better at the Section B answers than the Section A. They also preferred questions that were split into parts.
<table>
<thead>
<tr>
<th>CANDIDATE PERFORMANCE FOR EACH QUESTION</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>SECTION A</strong></td>
</tr>
</tbody>
</table>

**Question 1**

A question that asked candidates to consider the relationship between equity and the law. Good candidates thought about this in a methodical way and approached it through the historical development of the court of Chancery. Good candidates introduced Earl of Oxford (1615). Most candidates wrote about the maxims and better candidates also considered equitable remedies.

**Question 2**

This was a popular question. The question asked candidates to explain the rule in Milroy v Lord and to consider two exceptions to the rule. Candidates do prefer the split questions and those who did well were able to showcase their knowledge and understanding well.

**Question 3**

This question asked candidates to consider resulting trusts – how they arise and how they are justified. It was a popular question and those candidates getting the better marks set out the types of RT and used case law to underpin their essay. Candidates who did not do so well did not set out the types of RT and their case law usage and knowledge was weak.

**Question 4**

Only one candidate attempted this question about strangers to a trust. It was a fair effort that spotted the main cases in this area of the law but lacked critical analysis and depth.

| **SECTION B** |

**Question 1**

Candidates generally did well with this question which was about constructive trusts to the family home. Better candidates set out the differences between jointly and solely owned property, in these family cases and were able to cite the correct case law accordingly. Candidates who did not do so well tended to focus on quantum without first showing a CT had been established.

**Question 2**

A popular question about trustees’ powers and duties. Better candidates set out both the fiduciary and statutory duties of trustee in the specific situation (i.e. they applied the law to the facts of the scenario). Candidates who did less well were not able to use case law and statute effectively.
Question 3

This question concerned gifts left in a will to potential charities. Better candidates appreciated the requirements for a charity under the Charity Act and that if an organisation was deemed to be charitable it would probably fail as a purpose trust. Better candidates were able to appreciate the special circumstances around poverty trusts and personal nexus.

Question 4

This was a question on tracing. It was split into three parts and candidates were asked to consider the position of three parties. Candidates who did well in this question were able to keep a clear head and follow the scenario. Candidates who did less well, had a scatter gun approach to answering the question with little planning.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 5 - EQUITY AND TRUSTS

JUNE 2019

SECTION A

Question 1

Historical context

Prior to the existence of Equity (which came into being in the 13th century) the courts of law had limited both the types of claims they would hear and the procedure governing the hearing of those claims. The range of allowable claim narrowed and the process of coming to court became technical and fraught with difficulty with jurors often being bribed. As a result, plaintiffs with meritorious claims were often denied relief.

To attempt to counteract this discrepancy remedies could be obtained by petitioning the King, who had residual judicial power to deal with such matters. This function was delegated to the Lord Chancellor. The Chancery evolved into a judicial body known as the Court of Chancery, until by the end of the 15th century the judicial power of the Chancery was fully recognised. The Court of Chancery was in effect developed as a court of conscience to counteract the defects that existed in the common law system. The rules of equity varied from Chancellor to Chancellor until the end of the 16th century.

As equity developed, so did the conflict between it and the common law. Litigants used equity to their advantage often seeking an equitable injunction prohibiting the enforcement of a common law order. If a common law judgment was enforced in disobedience of a common injunction then the person enforcing the judgment could face imprisonment.
In the Earl of Oxford’s Case (1615) the Court of Chancery issued a common injunction prohibiting the enforcement of a common law order. The matter was referred to the Attorney General Sir Francis Bacon when no resolution could be reached between the two courts. Sir Francis upheld the common injunction and stated that, ‘in the event of any conflict between the common law and the law of equity, equity would prevail’.

Lord Ellesmere pointed out in the above case why there was a need for a Chancery. He stated ‘Men’s actions are so diverse and infinite that it is impossible to make any general law which may aptly meet with every particular and not fail in some circumstances. The office of the Chancellor is to correct men’s consciences for frauds, breaches of trust, wrongs and oppression of what nature so ever they be, and to soften and mollify the extremity of law.’

By the 17th century only lawyers were appointed to the office of Chancellor. From 1529 onwards when Sir Thomas Moore was appointed as Chancellor records of proceedings in Courts of Chancery were kept which led to the development of equitable doctrines. Prior to his appointment no such records were kept and decisions made by the Chancellors were discretionary and erratic.

By the beginning of the 19th century the Court of Chancery had become a court of equity. In the case of Gee v Pritchard (1818) Lord Eldon made the comment that,

...Nothing would inflict on me greater pain in quitting this place than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor’s foot.

The primacy of equity as stated by Sir Francis was later enshrined in the Judicature Act 1873 s25 which also joined the courts of equity and the courts of common law into one under the title of the Supreme Court. The Supreme Court was divided into 2 forming the High Court and the court of Appeal. The High Court was further divided under 5 different headings giving rise to the Chancery Division, King’s Bench Division, Common Pleas Division, Exchequer Division and the Probate, Divorce and Admiralty Division. The central feature of these reforms was that every court would now possess the power and have the duty to decide cases in line with common law and equity. Where there is a discrepancy between the common law solution and an equitable one the precedent of the Earl of Oxford’s case (1615) still applies meaning that equity will be paramount in the decision making process. The Supreme Court Act 1981 s49 has embodied this principle and instructed that (1) Every court exercising jurisdiction in England and Wales in any civil cause or matter shall continue to administer law and equity on the basis that wherever there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail.

It would appear that common law and equity were effectively fused together by the Judicature Acts. Ashburner’s view of this was, “The two streams of jurisprudence though they run in the same channel, run side by side, and do not mingle their waters.” Although equity and common law are fused together in that a court is entitled to award equitable remedies or common law remedies or a combination of both within the same court there are still some areas of law where the distinction between legal ownership and equitable ownership still thrive.
One such area is in the formation and management of trusts.

Before the introduction of equity, persons wishing to dispose of their property by way of a trust where faced with the difficulty or passing ownership to their intended beneficiaries without giving them the property outright. Under the common law system, the transfer of the property into the hands of the trustees could only be read as giving full title to the trustees and no account could be given for the concerns of the beneficiaries. The trust system is firmly rooted in equity with the trustees holding the land on trust for the beneficiaries.

In order that the trustees can invest or deal with any of the property the ownership of the property transfers to them under common law rulings, but it is equity that creates a beneficial interest for the beneficiaries to ensure that their right are protected. The trustees have the power to invest or sell trust property, but they act always in the best interested of the beneficiaries. Trustees who beach the trust will be liable to compensate the beneficiaries.

Maxims

To assist the court in making equitable decisions certain maxis of equity have been established. These are not binding rules and do not provide guidance in every situation. They are intended as illustrations based on principles established in recurrent themes.

One such maxim is that it will not suffer a wrong without a remedy. This is of particular importance in trust law, where without the influence of equity the beneficiaries may lose the benefit assigned to them by way of the trust, document. Another maxim is that he who seeks equity must do equity i.e. the person seeking the equitable relief must act fairly towards the person he is seeking the relief from.

There is an imputed intention in equity to fulfil the obligations of the parties. Decisions made on the basis of equity are in personam and enforced decisions are made by means of a personal order against the defendant.

Remedies

There is a difference in the way in which common law and equitable remedies are administered. Common law remedies are available as of right: Equitable remedies are discretionary and awarded at the will of the court and can be affected by the behaviour and position of the party claiming the remedy (“he who comes to equity must come with clean hands”). In the case of Patel v Mirza (2016) Lord Toulson considered the state of the law concerning illegality: "Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left-hand what it takes with the right hand."

The types of equitable remedies that can be awarded by the courts include injunctions, specific performance, rectification and rescission. With an injunction the courts can either stop the party from doing something or require them to do something. An order of specific performance requires one of the parties to a contractual agreement to complete their part of the contract.
Usually awards of this kind relate to specific articles such as land and will not be awarded where the court cannot supervise the operation of the order. Rectification is concerned with the alteration of contractual documents. An order for rescission is issued with the intent of returning the parties in a contractual agreement to the position they were in before having entered into the agreement. This can be distinguished from the common law award of damages. In an award for damages the intention of the court is to put the parties in the place they would have been in had the contract been completed.

It can be seen from the above that equity was introduced to fill the void that was lacking in common law. Under the common law system, the only available award was damages.

Although equitable remedies are awarded without reliance on legislation for their enforcement there are many ways in which the aims of equitable remedies mirror those of the common law. Under common law the aim is to compensate the plaintiff for any financial losses that have been incurred as a result of a wrong being done to them. Under equity the courts are addressing the situations where monetary compensation may not be appropriate. An injunction may prevent a future monetary loss for the plaintiff. An example of this would be an injunction preventing someone from building a factory on land adjacent to that of the plaintiff. If the factory is allowed to be built the knock-on effect could result in a depreciation of the value of the property of the plaintiff (Jackson v Normanby Brick Co (1899)). Similarly an injunction against a trustee preventing him from dealing with the assets of the trust in a certain way might prevent the beneficiaries from a financial loss on their inheritance.

It could be viewed in some circumstances that equitable remedies may prevent the need for a future claim under common law. This would particularly be the case in the issuing of an injunction. Similarly, an order for specific performance could prevent a claim in the future for breach of contract (Wilson v Northampton and Banbury Junction Railway Co (1874)). Frequently the plaintiff would prefer that the contract was carried out as originally agreed rather than be awarded damages for the non-performance of the contract (Beswick v Beswick (1968)).

**Conclusion**

Although the principles of equitable and common law remedies are different, they are not totally incompatible. Equity and common law remedies together establish natural justice for the plaintiff. On occasions it may seem that the common law and equity conflict. For instance, in the instance of constructive trusts that have been created as the result of mutual wills. In such cases as these the survivor of the deceased might only have a life interest in their own property as they have agreed in the mutual will to hold the property on trust for the beneficiaries. However, if equity did not intervene in this area then the surviving testator of a mutual will could alter their will upon the death of their partner and totally disinherit the beneficiaries that the deceased testator specifically wanted to inherit.

Despite the arguments against equity and the problems caused by the insertion into the Supreme Court Act 1981 that equity should prevail if the two areas of law are in conflict with each other, it is very rare that the judges are placed in such a position, especially since they now have the power to decide issues under either common law rules or equity.
Question 2

(i) The Rule in *Milroy v Lord* (1862)

Turner LJ in *Milroy v Lord* (1862), reaffirmed three methods of making a gift recognised by equity: (1) the donor arranges an outright transfer of legal title to the property (or the outright assignment of an already existing equitable interest); (2) the donor transfer the legal title of the property to the trustee to hold on trust; or (3) the donor declares himself a trustee of the property. Trust in the last scenario will be perfectly constituted once the declaration is made because the property will already be vested in the settlor. Thus, the possibility of an imperfect gift only arises in the first two scenarios, when the formalities governing transfer of property are not satisfied, and the property eventually does not vest in the trustee/donee. Turner LJ’s rule in ‘*Milroy v Lord*’: Equity will not assist a volunteer to perfect an imperfect gift.

In *Milroy v Lord* (1862), Thomas Medley assigned 50 shares by voluntary deed to Samuel Lord upon trust for Milroy’s benefit. Nevertheless, no transfer of the shares was registered in the company’s books following formalities for transferring shares. Because of such failure to observe the formalities required, the trust is incompletely constituted. Similarly, in *Richards v Delbridge* (1874) a donor signed and endorsed on a lease that it had been given to a member of his family. Applying *Milroy v Lord* (1862), the gift was imperfect and unenforceable as the leasehold property was not passed by deed.

To ensure a voluntary settlement valid & effectual, according to Turner LJ, "the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary in order to transfer the property and render the settlement binding upon him... there is no equity in this court to perfect an imperfect gift."

As demonstrated in *Milroy v Lord* (1862) and *Richards v Delbridge* (1874), unless the beneficiary/donee has furnished consideration, it is not possible for him to enforce the trust against the trustee/donor in equity where no vesting has occurred.

(ii)

*Re Rose* (1947)

This case established that if a donor has done everything that can be expected of him to transfer legal title, but the transfer is delayed by the routine operation of the law then the gift is still effective. The principle in *Re Rose* (1947) is also referred to as the "every effort rule". It has been observed that the test in *Milroy v Lord* (1862) was not just reaffirmed but “amplified” in *Re Rose* (1947). The case *Re Rose* (1947), again, was about an ineffective transfer of legal title to shares but this time equitable title held to pass because the settlor had “done everything in his power by executing the transfers to transfer his legal and beneficial interest in the shares to the [donee]."

The facts of the case were that Mr Eric Rose wished to transfer shares in the Leweston Estates Co to Mrs Rose, in consideration of her love and affection. He filled in the share transfer forms on 30 March 1943, and handed them to the Mrs Rosamond Rose, who gave them to the company. The company
directors could refuse to register share transfers. But the company registered the claimants as shareholders in Mr Rose’s place on 30 June 1943. Mr Rose died on 16 February 1947. The Inland Revenue wished to charge a tax, estate duty, on the transfer. It claimed the gift was not effected before 10 April 1943, so the tax was due. This was the relevant date under the Customs and Inland Revenue Act 1881 section 38(2)(a), the Customs and Inland Revenue Act 1889 section 11(1) and the Finance Act 1894 section 2(1)(c). If, however, the transfer took place in March, no tax would be due.

The Court of Appeal held that the transfer took place in March, meaning the taxes were not due. Although legal title passed to the claimants only when the shares were finally registered by the company, the beneficial title passed as soon as Mr Rose completed the share transfer forms. Once he did this he was not at liberty to merely cancel the transfer, and so when he handed away the forms, the shares were held on constructive trust.

Lord Evershed MR distinguished Milroy v Lord (1862) on the basis that there, Thomas Medley could have himself done more to ensure that the transfer was completed, because he did not merely need to leave Samuel Lord with an (unexercised) power of attorney to register the share transfer. Here the donor (Mr Rose) had done everything in his power that he had needed to do to make the transfer effective. Jenkins LJ and Morris LJ both concurred, with the former delivering a concurring judgment.

However, Romer J in Re Fry (1946) refused to perfect an imperfect gift of shares because the testator had not "done everything that was required to be done by him at the time of his death. In this case, Treasury consent was necessary before registration but had not been obtained.

Re Rose (1947) is still good law, its ratio was subsequently approved by the House of Lord in Vandervell v IRC (1967) and applied in Mascall v Mascall (1985).

Pennington v Waine (2002)

A further relaxation of the Milroy v Lord (1862) principle took place later in Pennington v Waine (2002). Here, Ada Crampton, the donor, intended to transfer 400 shares of a company to her nephew, Harold Crampton, and intended him to take up the directorship of that company. Ada died before the transfer could be completed and registered. The beneficiaries of her estate argued that unlike Re Rose, Ada had not done all she could have, because she had not handed the completed transfer form to Harold or the company. Harold contended that the shares were held on trust for him, so that the transfer must be completed.

The Court of Appeal held that the execution and delivery of share transfer forms to an intermediary was sufficient to transfer the equitable interest. Arden LJ, citing Lord Browne-Wilkinson in T Choithram International v Pagarani (2001) in support, held that unconscionability was a trigger causing an interim constructive trust to arise while pending perfection of legal title.

The most controversial or determinative question in Pennington is: what makes it "unconscionable" for the donor to renege on the gift? Arden LJ denied that there is a "comprehensive list of factors" for the court to consider, "it must depend on the court’s evaluation of all the relevant considerations."
Secondly, the court in Pennington somehow wrongly relied on Choithram as authority regarding “unconscionability”. Choithram was based on an uncommon fact that the donor also nominated himself as one of the several trustees in favour of a charitable organization. Mr Pagarani manifested an “irrevocable intention” to create a trust, even if he failed to transfer the property to other trustees, his retention of property would be constructed as one of the trustees thereby constituting the trust. Hence, the maxim “equity regards as done that which ought to be done” would be applicable. Lord Browne-Wilkinson also stressed that in Choithram, there was no breach of the Milroy v Lord (1862) principle as Mr Pagarani had also declared himself as a trustee.

Thirdly, detrimental reliance is required so that “[donor’s] conscience is affected and it would be unconscionable and contrary to the principles of equity to allow such a donor to resile from his gift.” (Banner Homes Group plc v Luff Development Ltd (No. 2) (2000)) Arguably in Pennington, the donee had not incurred any actual “detriment” and also the donor had not gained any “benefit” to justify a finding of unconscionability. Furthermore, the donor in Pennington was never trying to resile from her gift, thus, the test for unconscionability was come from a total hypothetical basis. That is why some scholars considered unconscionability in Pennington as a vehicle for arriving at a desired result.

- **Strong v Bird** (1874)

In this case, Bird borrowed £1,100 from his stepmother. She was living with him and paying him for rent. It was agreed by both parties that the loan was to be repaid by a reduction in the rent, until the loan was settled. Bird’s stepmother only paid the reduced rent twice. Thereafter, she paid the full rent until her death.

On her death, she appointed Bird as her executor and the next of kin now attempted to recover the debt from Bird. The conduct of his stepmother (stopped paying the reduced rent as per their agreement) does not discharge the debt at law because there was no consideration provided for the release. The issue was whether Bird must pay back the loan.

The court held that the appointment of Bird as the executor was an evidence that the loan to Bird was a gift to him. This is because the executor is responsible for calling in debts to the testator's estate. It would be ridiculous for the executor to sue himself for the debt. Therefore, common law rulings cancelled the debt to avoid this anomaly. Furthermore, the stepmother's donative intention had continued until her death.

Therefore, under the rule in Strong v Bird (1874), when a donor makes an imperfect gift during his lifetime, and the donee is subsequently appointed as the donor’s executor or becomes the donor's administrator on intestacy, the gift is perfected because the donee obtains legal title to the donor's property, including the subject matter of the intended gift, in the donee's capacity as executor or administrator. However, there are four conditions for the rule in Strong v Bird (1874):

- (i) The donor must have intended to make an *inter vivos* gift.
- (ii) Such donative intention must have persisted until the donor's death.
- (iii) The donee is appointed the donor's executor (or administrator, *Re James* (1935)))
(iv) The subject matter of the intended gift must have been capable of enduring the death of the donor.

Conclusion

With some exceptions like the "every effort rule" in Re Rose (1952), beneficiaries, who may be a volunteer, will have no claim on trust property under an incompletely constituted or imperfect trust in general according to Milroy v Lord (1862).

The decision in Pennington, could be seen as rational and pragmatic i.e, the court trying to adhere the donor’s intentions.

**Question 3**

**Introduction**

Resulting trusts are trusts created where property is not properly disposed of. Resulting trusts come in two forms: automatic resulting trusts and presumed resulting trusts.

**Automatic Resulting Trusts.**

Megarry VC in Vandervell v IRC (1967) introduced the concept of the automatic resulting trust. Automatic resulting trusts arise from a "gap" in the equitable title of property. The equitable maxim "equity abhors a vacuum" is followed: it is against principle for a piece of property to have no owner. As such, the courts assign the property to somebody in a resulting trust to avoid this becoming an issue. They occur in one of four situations: where there is no declaration of trust, where an express trust fails, where there is surplus property, or upon the dissolution of an unincorporated association. Rules differ depending on the situation and the type of original trust under dispute; failed charitable trusts, for example, have the property reapplied in a different way from other forms of trust.

Automatic resulting trusts where an express trust fails - This includes the situation where there is no valid declaration of trust, where there is surplus property, or upon the dissolution of an unincorporated association. Whatever the reason, when a trust fails the property must be passed to someone. This is an application of the equitable maxim that "equity abhors a vacuum".

A no declaration of trust is perhaps the most straightforward form of resulting trust. It is created when a settlor does not give the form in which the property is to be held. For example, the settlor might give property to the beneficiary to hold for life but fail to explain what is to happen to the property when the holder dies. When this occurs, the property is held on resulting trust for the settlor, as in Vandervell v IRC (1967). This also occurs where a trust is formed over property which requires formality, but is improperly created (for example, a land transfer that does not adhere to the Law of Property Act 1925).

Upon the failure of a charitable trust, the gift may be held on resulting trust for the donor, as in Chichester Diocesan Fund v Simpson (1944), or submitted to variation under the cy-près doctrine. As in Simpson v Simpson (1992), if property is given to somebody who is incapable of acting, it will also be held on resulting trust for the donor.
A resulting trust will also be found where the purposes of a trust have been completed, but there is excess property left over. Judges and academics disagree over what should happen to the property; possibilities are that it should be held for the donors, that it should be held for the beneficiaries (as the donors intended to make an irrevocable gift) or that it should be given to the Crown as *bona vacantia*. A fourth suggestion is that the trustees take the surplus, as in *Re Foord* (1922). The general rule was set out in *Re Trusts of the Abbot Fund* (1900), where it was decided that excess funds will be held on resulting trust for the settlor. There are exceptions to this rule; the general rule is put aside if the court can find intention to benefit specific individuals, as in *Re Osoba* (1978).

Linked to this category is the problem of unincorporated associations. Unincorporated associations cannot hold rights (chattels or land) on their own account and so if they dissolve, the question is what to do with any property that has been transferred to the association. The traditional view, as laid out in *Re West Sussex Constabulary’s Widows, Children and Benevolent Fund Trusts* (1930), is that the members of the association hold these rights on purpose trust. Where the money was raised from identified individuals, the property should be held on resulting trust for donors upon the failure of the purpose trust. Where it is impossible or impractical, the property should be passed to the Crown as *bona vacantia*. The more modern view developed from Walton J’s judgment in *Re Bucks Constabulary Benevolent Fund* (1979). This is that dissolving a society and distributing property to its members is a matter of contract, not trusts law. As such, the contract between the association's members should be the deciding factor in how the property is to be distributed, and there is no need to involve resulting trusts. If the contractual provisions identify how to distribute property, they will be followed; if not, the property will be distributed according to an implied term, usually in equal shares.

Finally, a Quistclose trust is a trust created where a creditor has lent money to a debtor for a particular purpose. In the event that the debtor uses the money for any other purpose, it is held on trust for the creditor. Any inappropriately spent money can then be traced and returned to the creditors. The name and trust come from the House of Lords decision in *Barclays Bank Ltd v Quistclose Investments Ltd* (1970), although the underlying principles can be traced back further. There has been much academic debate over the classification of Quistclose trusts in existing trusts law: whether they are resulting trusts, express trusts, constructive trusts or, as Lord Millett said in *Twinsectra Ltd v Yardley* (2002), illusory trusts.

**Presumed Resulting Trusts**

Where property passes between individuals, it is presumed that the relationship between them makes it an outright gift, and thus not subject to a resulting trust in the event of failure; this is known as the "presumption of advancement". A presumed resulting trust occurs where the transfer fails, and there is no reason to assume it was intended as an outright gift. With some relationships this presumption of advancement is applied by default, and requires strong evidence for it to be rebutted.
According to s.60(3) of the Law of Property Act 1925:

“In a voluntary conveyance a resulting trust for the grantor shall not be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee.”

The effect of that subsection has been debated for years. In Lohia v Lohia (2000) it was decided that it meant that the presumption of resulting trust does not apply to gratuitous transfers of land.

In Ali v Khan (2002) the court confirmed that the presumption of a resulting trust on a voluntary conveyance of land has been abolished by s.60(3) Law of Property Act 1925.

Recently, in National Crime Agency v Dong (2017) it was decided that s.60(3) did not affect the presumption of resulting trust, but was merely enacted to deal with technicalities in conveyancing that were no longer needed when the Statute of Uses 1535 was repealed in 1925.

There are several types of relationship where it is automatically presumed to be a gift. Where a father transfers property to a child, it is presumed that the property was an outright gift, as in Bennet v Bennet (1969). There is no similar recognition for a transfer from a mother, something recognised as a gift in Australia. A similar presumption exists where a transfer is made from a husband to a wife, as in Tinker v Tinker (1970).

Presumed resulting trusts do arise, however, in one of three situations; where it is a voluntary gift, where there is a contribution to purchase price, and where the presumption that it was an outright gift can be rebutted. 

Where a gift is voluntary, the assumption for personal property is that it creates a resulting trust on failure, as in Re Vinogradoff (1936). For real property, Section 60(3) of the Law of Property Act 1925 prevents the creation of automatic resulting trusts but does not comment on presumed trusts. In Hodgson v Marks (1971), it is generally agreed that a presumed resulting trust was created over a transfer of real property, although there is some dispute. Where a person contributed to the price of a piece of property, they are presumed to take an equivalent equitable interest in that property; this is the "clearest form of presumed resulting trust", and was recognised by both Browne-Wilkinson in Westdeutsche Landesbank (1996) and Megarry in Vandervell (No. 2) (1974). These principles originated with Eyre CB’s judgment in Dyer v Dyer (1788), where he said that:

*The clearest result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of other without that of the purchaser; whether in one name or several; whether jointly or successive - results to the man who advances the purchase money.*

Thus, where a person contributes to the purchase of the property, they will receive an equivalent equitable interest in any resulting trust that arises. For trusts over homes, a distinct set of rules have arisen that do not apply to other land, because of the additional concerns. For example, while contributing to the mortgage will create an equitable interest, as in Cowcher v Cowcher (1972), contributing to domestic expenses will not, as in Burns v Burns. It must also be demonstrated that the contribution was not made for any
purpose other than acquiring an equitable interest; in Sekhon v Alissa (1989), for example, a mother transferred a house into her daughter's name to avoid capital gains tax. The court ruled that this created a resulting trust; because tax avoidance was the main objective, the mother could not possibly have intended it to be an outright gift.

The last situation where a presumed resulting trust is created is if the court can rebut the presumption of an outright gift. The general philosophy here was set out by James LJ in Fowkes v Pascoe (1875), and is that the judge should base his decision on "[the] story as to how I came to have [the property], and judge that story with reference to the surrounding facts and circumstances". Where the property is money held in a joint bank account, the presumption is that it is a joint tenancy of that account. As such, when one dies the property is passed absolutely to the other, as in Marshall v Crutwell (1875). This presumption can be rebutted in several situations. It will be rebutted when the account, while in the name of both the husband and wife, is used exclusively for the husband's personal use, as in Young v Sealey (1949), or where the joint account exists solely so the husband can guarantee the wife's account, as in Anson v Anson (1953).

Traditionally, when a person sought to rebut presumptions but was required to rely on an illegal act to prove that a resulting trust was intended, the equitable maxim that "he who comes to equity must come with clean hands" was applied; the presumption would take effect, and no resulting trust would be created, as in Mucklestone v Brown (1801). In addition, as in Gascoigne v Gascoigne (1919), where the purpose of the transfer involves illegality, the courts will not uphold it as a resulting trust. This rule was subtly modified by the House of Lords decision in Tinsley v Milligan (1993). Tinsley and Milligan had jointly purchased a house to run as a business, and both accepted that it had been bought to own jointly. Only Tinsley was registered as the owner, however, so that Milligan (with Tinsley's knowledge) could claim state benefits. The House of Lords decided that Milligan could claim an equitable interest, since it was the contribution to the purchase price (a lawful act) which she was relying on, not the associated fraud (an illegal act). Although the purpose of the initial registration had been illegal, the purpose of the purchase itself had not. However, in Patel v Mirza (2016), The Supreme Court held unanimously that Tinsley v Milligan (1993) was no longer representative of the law. Instead, the test should be where a person satisfies the ordinary requirements for a claim in unjust enrichment, they should be entitled to the return of their property and not prima facie be debarred from recovering that property just because the consideration which had failed was an unlawful consideration. Therefore, following Patel, the Court should consider whether the public interest would be harmed by the enforcement of the illegal agreement, taking into account: the purpose of the prohibition which has been transgressed, and whether the purpose would be enhanced by the denial of the claim; any other relevant public policy on which the denial of the claim may have an impact; and whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.

**Question 4**

Strangers will be liable to trust beneficiaries if they do acts characteristic of trustees, knowingly receive trust property or dishonestly assist a breach of trust. Beneficiaries may want to sue a stranger where their trustee is not worth suing or has disappeared. Strangers who consciously interfere in the
performance of trust obligations causing loss to the beneficiaries should be held accountable to discourage others from engaging in similar conduct. However, the courts have refused to extend liability too widely. The equitable remedies against strangers also apply in a commercial context where a third party has wrongfully interfered in the performance of fiduciary duties. It would impede commercial dealings if liability was imposed indiscriminately because business people would have to make extensive enquiries to avoid liability. In *Royal Brunei Airlines v Tan* (1995) Lord Nicholls observed that beneficiaries should not be able to seek a remedy against strangers who unknowingly interfere in the performance of trust obligations.

**Trustee de son Tort**

A stranger to the trust who has control of trust property and does acts characteristic of a trustee is liable as though he were a trustee (*Mara v Browne* (1895)). There is no need to show that the defendant was dishonest.

**Recipient liability**

Strangers are liable if they receive property subject to a trust or fiduciary relationship for their own benefit with knowledge which makes it unconscionable for the stranger to retain or deal with the property (*BCCI v Akindele* (2001)). In this case, the Court of Appeal did not define unconscionability but Nourse LJ said that it was wider than dishonesty, which led to speculation that it might include constructive notice. It must be shown that the stranger had the requisite knowledge before disposing of the property. The lack of definition of unconscionability could lead to uncertainty. The test is difficult to apply. However, it also ensures flexibility; for example, the courts can take account of common business practices which are relevant to the circumstances of the case.

**Accessory liability**

The second case in which strangers are liable is where they dishonestly assist a breach of trust or fiduciary duty (*Royal Brunei Airlines v Tan* (1995)). Lord Nicholls confirmed that the stranger must be dishonest. It is not necessary to show that the breach of trust was dishonest. Lord Nicholls said that dishonesty means ‘conscious impropriety’; it involves advertent conduct. Carelessness is not dishonesty. Dishonesty was defined as ‘not acting as an honest person would in the circumstances’.

The standard of honesty is objective. However, the assessment of honesty also involves subjective factors. The court will assess how a hypothetical honest person would have acted knowing the facts the defendant actually knows. The court will take account of the defendant’s experience and intelligence, and the circumstances in which the activities occur (such as the usual action taken in that line of business or commerce). The court will place a hypothetical honest person in the defendant’s shoes and consider how that honest person would have acted.

If an honest person would not have adopted the same course as the defendant, then the defendant is dishonest. One aspect of the definition of dishonesty which has caused some controversy is whether it is necessary to show that the defendant knew (s)he was acting dishonestly. In *Royal Brunei*, the Privy Council decided that the courts should assess cases according to an objective standard of honesty. The particular defendant’s view on whether
(s)he was being honest or not was irrelevant. Thus, according to Royal Brunei, a defendant is liable even if (s)he genuinely thinks (s)he has done nothing wrong provided that the objective honest man would regard his or her conduct as dishonest. Defendants should not be excused simply because they have a different moral code to everyone else. The objective test of honesty was temporarily thrown into disarray by the House of Lords in Twinsectra v Yardley (2002) but was later reaffirmed by the Privy Council in Barlow Clowes International Ltd (In Liquidation) v Eurotrust International Ltd (2006) and by the Court of Appeal in Abou-Rahmah v Abacha (2006) and Starglade Properties Ltd v Nash (2010).

In Royal Brunei, Lord Nicholls stressed that the dishonesty requirement for accessory liability ought to be preferred to that of unconscionability. He said that dishonesty is a concept which has a definite meaning, unlike unconscionability. Given that a defendant can be found liable as an accessory without having received any personal benefit, it is appropriate that he or she will be liable only if proved to be dishonest. On the other hand, from the claimant’s point of view, the standard must not be too high or difficult to prove; otherwise, claimants would never win a case. The objective standard of honesty ensures that the bar is not set too high for claimants.

A further point which arose for consideration in Barlow Clowes was whether it was necessary for the defendant to appreciate that he was assisting a breach of trust or fiduciary duty. The Privy Council held that the defendant was liable if he knew he was assisting some illegal scheme; he need not know the details. For example, a stranger who does not know (s)he is assisting a breach of trust but thinks (s)he is helping in an illegal tax evasion scheme would be liable as an accessory.

Conclusion

It is a question of striking a balance between protecting beneficiaries on the one hand and ensuring that members of the public can conduct their business dealings without having to be unduly vigilant on the other hand. The tests of ‘unconscionability’ and ‘dishonesty’ are designed to achieve this equilibrium.

SECTION B

Question 1

This issue deals with implied trusts of the home. This is a sole ownership matter as the property is held in the sole name of Brian at law. There is no express trust in existence (complying with s53(1)(b) LPA 1925) in favour of Alice. Therefore, if she is to obtain an interest in the property, it must be via an implied trust. There is no resulting trust as she did not contribute to the purchase price.

The law on constructive trusts in the family home context is permeated by a tension between the desire of the courts to achieve a result they consider reasonable, using the constructive trust as a flexible remedy to protect the claimant’s financial reliance interest, and the dubious basis for this intervention in the parties’ common intentions. The central difficulty is that the common intention analysis focuses on the parties’ own thinking as the basis for the imposition of a constructive trust, when in fact they will often have given little or no thought to the question of ownership. Lord Diplock
appreciated in Pettitt v Pettitt (1970) that proprietary interests are often not thought about by parties in a relationship when the property is acquired and paid for, but rather only when their relationship deteriorates. The Court cannot ascribe intentions which the parties never had", the majority in the House of Lords in Gissing v Gissing (1970) rejected this approach. Following Gissing, the House of Lords in Lloyds Bank Plc v Rosset (1991) elaborated upon the restrictive approach to finding a common intention. Lord Bridge found that the common intention constructive trust was only to arise in two circumstances: an express agreement between the parties that the beneficial interest in the home is to be shared, or conduct of the parties, in the form of financial contributions from which the court can infer such a common intention, which on the facts were held to exclude a wife’s purchasing furniture and clothes for the family but to include direct and indirect contributions to the deposit, the mortgage instalments, or the general housekeeping expenses.

Following Rosset, a less strict test in relation to the question of quantum of beneficial interest once a common intention to share ownership has been established. Thus in Oxley v Hiscock (2004) the Court of Appeal held that in the absence of an expressed common intention as the proportions in which the beneficial interest should be shared, the quantum of the share is not limited in proportion to the reliance contributions, but will be assessed in accordance with, as Chadwick LJ put it, "a fair share for each party having regard to the whole course of dealing between them in relation to the property".

This broad approach as to quantum was affirmed in Stack v Dowden (2007), which although a joint name case is considered the key authority in this area of law.

The case focusses on the conduct in the whole course of dealing between the parties, with the court inferring the parties intentions via this approach. The list of factors relevant to determining a common intention included "any advice or discussions at the time of transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; 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". In identifying the extent of the parties' beneficial interest in a property, the court was seeking 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. On the issue of quantum the court should take a wide view of what contributions were to be taken into account, yet it is appreciated in Stack that the circumstances in which joint legal titleholders intended their beneficial interests to be different from their legal interests would be "very rare". Stack has been argued to be an exceptional case owing to the large disparity in contributions to the purchase price and the fact that the parties kept their finances unusually separate, yet later cases have not treated it this way (Jones v Kernott (2011)).

The key difference between Stack and Alice and Brian’s case is that Stack was a case of joint ownership. However, subsequent cases have applied the principles set out in Stack to sole ownership cases as so it would seem appropriate that Stack be taken as our precedent here.

According to Stack (as clarified in Jones v Kernott (2011)), there is a two-step process:
(i) the discussion which took place between the parties at the acquisition stage
(ii) quantification of shares if it can be shown that a constructive trust exists. Each stage involves the non-exhaustive list of factors from Lady Hale’s Para 69 statement in *Stack*.

In Alice and Brian’s case, there are a number of relevant factors to take into account when deciding whether Alice has obtained an interest and, if so, how her interest will be quantified.

These include, the reasons why the house was in Brian’s sole name, Brian’s monetary contribution towards the deposit, and Alice’s regular contributions to the account (*Aspden v Elvy* (2010), *Barnes v Phillips* (2015), *Graham-York v York* (2015).

In addition to the property there is also the question of the bank account which is also in Brian’s sole name although it is Alice who has been the main contributor to it. There are similarities here with *Paul v Constance* (1976). In this case, Mr Constance’s marriage broke down, and he moved in with Ms Paul. After a workplace accident he received £950 in damages, and following discussions with a bank manager, paid it into a new joint account. They were unmarried, so the account was just put in Mr Constance’s sole name. He said repeatedly, ‘the money is as much yours as mine’. They paid in joint bingo winnings too, and they made a £150 withdrawal, which they split. But 13 months after Mr Constance died without a will. Ms Paul claimed the account was hers. Mrs Constance reappeared and claimed the money was hers. The Court of Appeal held that the parties’ words and conduct demonstrated that he wished for the money to be held on trust for Mr Constance and Ms Paul jointly. Similar words have been used in our case by Brian (“it’s as much yours as is it mine”) and so it would appear that a court would hold the account to be held on trust for them both.

*Stack* makes it clear that all the circumstances surrounding the purchase of property should be taken into account. In contracts to both *Stack* and *Paul v Constance* (1976), here we have a situation where one of the parties (Alice) is a lawyer. In those circumstances, should we expect clearer conversations about beneficial interests in this sort of case? Does it also make a difference that the bank account was opened following conversations about having a joint account, and seemingly for the purpose of paying household bills? And that the money was from an inheritance to Brian? What is clear is that the courts are unlikely to be willing to find certainty of intention from “loose Conversations” but we do know here that Brian gave all the money in the account to Alice when he closed it. This may indicate that Brian believed she had an equal (or greater) claim to ownership to it. However, because he believed that about the account does not necessarily follow his intentions were the same regarding the property.

Alice continued to make payments towards the mortgage. There are comparisons to be made here with *Jones v Kernott* (2011) although it should be remembered that *Jones* was a joint legal ownership case so the starting point is different. There are also differences in the amount of time that’s passed and the financial/living arrangements for Cerise). Likely to be taken as an inferred common intention to share (Lord Bridge).

Brian’s care of Cerise may also be relevant factor according to Lady Hale in *Stack* (2007). (to what extent should looking after the family be taken into
account when quantifying interests)? In Webster v Webster (2008), the man and woman had lived together for 27 years and had two children. The family home had been registered in the man’s sole name. They kept separate bank accounts and the man paid the mortgage throughout. The woman paid at least some of the bills for furnishings, services and the children’s clothes and food. Both worked but the man’s income was considerably larger than the woman’s. The man died suddenly, intestate, at the age of 54. The woman claimed a beneficial interest in their home and a beneficial interest in company shares vested in the man’s sole name. She accepted that there had been no express discussions as to the beneficial interests each were to have but claimed that the property had been regarded as by both of them as joint property. The court took the view that a considerable degree of caution was needed when considering uncorroborated evidence of events that took place over 20 years ago given that the other party to the transaction was dead. It was impossible to impute a common intention that the property was to be held as beneficial joint tenants, or any common intention that the woman should have any interest in the shares. However, the indirect contributions made by the woman would lead to an inference that she had some interest in the family home, assessed at between 33% and 40%.

On the fact of our case, it seems extremely likely that Alice will be entitled to a share in the property. Indeed, on the facts indicate that she is entitled to at least a half share of the property particularly in light of Brian’s suggestion that they share the sale proceeds.

**Question 2**

Trustees are subject to two sets of rules: trustee/investment duties which involve how they invest/look after the trust fund, and fiduciary duties which involve always acting in the best interest of the beneficiaries.

This trust has a life tenant and three minor remaindermen. The trustees must therefore deal even-handedly between the beneficiaries and must invest with a view to generating income as well as capital growth.

We are told that the Trust Fund is held in a bank account for a period of 2.5 years without any investment being made. It could be argued that a 1.5% interest rate is low (compared to other potential investments), and that this would not ensure income or capital growth.

**Purchase of Tuscan Farmhouse**

The trustees will be personally liable for a reparation claim if they have breached an investment duty and this has caused loss.

Therefore, we need to consider:

i. Is the investment an authorized investment? Applying s3 and s8 Trustee Act 2000 this is unlikely to be an authorized investment unless the Trust Deed specifically allows the Trustees to purchase foreign property.

ii. Have the Trustees attained the appropriate standard of care, as set out in s1(1) of the TA 2000? Faroque appears to be a lay Trustee and will therefore have to meet the standard as set out in s1(1) – such care as is reasonable in the circumstances. Gaia is a Solicitor. She does not specialize in Trust law, but states that she knows “an awful lot”. As such students are likely to conclude that the enhanced duty as set out in s1(1)(a) in relation to special knowledge and skills, and in s1(1)(b) in
relation to professionals are likely to apply. She is therefore expected to use such care and skill as is reasonable to expect of a person acting in her profession, and with the skills and knowledge she purports to have.

iii. The Trustees must, in fulfilling their duty, have regard to the standard investment criteria (SIC) in s4 TA 2000 namely suitability and diversity. The question suggests that the Trust Fund is diverse. There may be an issue in regard to suitability as there is no indication that the property is to be let out, meaning that while there may be capital growth, there is no income for the life tenant.

iv. The Trustees must seek advice from a person they believe to be suitably qualified to give it (s5 TA 2000). On the facts, it does not appear that appropriate advice has been sought or obtained. There is nothing to suggest that Gaia is, or considers herself to be suitably qualified, and this is a substantial chunk of a large trust fund so obtaining advice would be appropriate. There is, therefore, a breach of the duty under s5 TA 2000.

On the facts, the trustees may also have considered irrelevant factors when deciding to purchase the property: we are told that Gaia agrees that Tuscany is a good place to spend the summer, and it appears she “admires” the farmhouse (which she later goes on to purchase). Applying Cowan v Scargill (1985) the trustees should only consider financial factors.

There are, therefore, several breaches of trust.

**Remedy:**
The beneficiaries will request an account and then make a reparation claim to make up any shortfall.

**Liability:**

i. **Measure**

The farmhouse has decreased in value from £350,000 to £300,000.

We have no information to suggest rental income from the property (the money had previously been accruing interest at 1.5% per annum in the savings account). If there is an income being derived that would be accounted for.

ii. **Between Trustees**

Basic rule is that only the Trustee in breach is liable. Here, Gaia appears to have acted on her own without involving Faroque at all. We are told that he is a lay trustee and that he “tries not to get involved”. However both trustees have a responsibility for monitoring their co-trustee and cannot be a sleeping trustee (Bahin v Hughes (1886)).

If the trustees are found to be jointly and severally liable, the beneficiaries have the option to sue either of them or both. Gaia, as a professional, is likely to be a better person for the beneficiaries to sue (we do not have any information as to Faroque’s occupation or income).

If the beneficiaries do sue Gaia she could seek to claim a contribution from him under the Civil Liability Contribution Act 1978. The courts may be reluctant to award a substantial contribution, given that Gaia is the
professional trustee with a self-professed knowledge of trust law, and Faroque has not actively breached the trust.

Defences:
We should consider whether the defence under s61 TA 1925 applies, in that Gaia acted honestly and ought reasonably to be excused. She was approached by the life tenant and asked to purchase a property, and that she did so with the best interests of all beneficiaries in mind. However, this is a difficult defence to satisfy, particularly for a professional trustee. If the defence does succeed she is not liable for the breach, and the beneficiaries cannot sue her.

We should also consider the defence under s62 TA 1925, in that Gaia is approached by the life tenant (who may therefore be argued to have ‘instigated’ the breach). But it is doubtful that the life tenant’s simple request here is enough for instigation. In any case it cannot apply in any event for the remaindermen who are all minors, but if instigation is proved then the life tenant’s interest may be impounded.

As a result, a defence is unlikely to apply and Gaia will be liable to the beneficiaries for the £50,000 loss.

Secret Commission

Receipt of a secret commission is a breach of fiduciary duty, specifically the no profit rule. Liability for a breach of this rule is strict (Williams v Barton (1927)) and Gaia’s intentions or thoughts in relation to the commission are not relevant.

We therefore must consider what type of claim is available.

Applying AG for HK v Reid (1964), FHR v Cedar Capital (2014) a proprietary claim is always available for a secret commission. Therefore the beneficiaries can claim a constructive trust over the money in the account, and then trace into the antique vase.

No defences will be available for this type of claim. Boardman v Phipps (1966) shows that the courts take an inflexible approach to breaches of the no-profit rule.

Investment in shares

Faroque and Gaia will be personally liable for a reparation claim if they have breached an investment duty and this has caused loss.

We need to consider:

i. Is the investment an authorized investment? Yes under s3 Trustee Act 2000
ii. Have the Trustees attained the appropriate standard of care, as set out in s1(1) of the TA 2000? (See above in relation to farmhouse)
iii. The Trustees must, in fulfilling their duty, have regard to the standard investment criteria (SIC) in s4 TA 2000 namely suitability and diversity. The question suggests that the Trust Fund is diverse. Shares are generally considered a suitable investment but see below with regard to the advice from the IFA.
iv. The Trustees must seek advice from a person they believe to be suitably qualified to give it (s5 TA 2000). On the facts, appropriate advice has
been sought by the Trustees from the IFA. This advice has, however, not been followed.

Here, there is a breach of duty in that the Trustees were advised not to invest in oil but have done this anyway.

With regard to the fall in value - Nestlé v NatWest Bank (1988)

Remedy:
The beneficiaries will request an account and then make a reparation claim to make up any shortfall.

Liability:
i. Measure
The oil shares have decreased in value from £100,000 to £75,000.

The gin shares have increased in value from £50,000 to £60,000.

If Bartlett v Barclays Bank (1980) can be applied this would allow the gain on the gin shares to be set off against the loss on the oil shares. On the facts, £150,000 has been set aside and then spent on the shares at the same time. Therefore, it is likely that Bartlett will apply.

If Bartlett is followed, the loss will be £15,000. Otherwise, £25,000.

ii. Between Trustees
Basic rule is that only the Trustee in breach is liable. Here both trustees have acted jointly – potentially only Gaia has breached her (much higher) standard of care (Bahin v Hughes (1886) in relation to Faroque).

If the trustees are found to be jointly and severally liable, the beneficiaries have the option to sue either of them or both. Again, Gaia is a professional trustee and appears to be a more logical person to sue.

If Gaia is sued, she could claim a contribution from Faroque under the Civil Liability Contribution Act 1978. Again, it seems unlikely that she could claim a full indemnity

Defences:
No defences appear to apply on the facts.

Sale of Tuscan Farmhouse to Gaia
This is a breach of fiduciary duty.

No conflict rule/ rule against self-dealing

Fiduciaries are under a duty not to put their own interests in conflict with those of the trust. Here, Gaia has purchased the Farmhouse from the Trust without putting it on the market. As a trustee, Gaia should have been trying to obtain the highest price for the Farmhouse, but as an individual she will have wanted to pay the lowest sale price. As such she is in breach of the no-conflict rule.

We must therefore consider the self-dealing rule (Tito v Wadell (1977)), noting that Gaia is on both sides of the sale (as an individual purchaser, and selling as a trustee).
In this case, the beneficiaries could seek to rescind the sale as a result of the breach. It does not appear that there are any defences here.

**Question 3**

This question concerns the validity of charitable gifts. All charities must comply with the Charities Act 2011, which replaced most of the Charities Act 2006 and Charities Act 1992. The Act sets out the three requirements for a charity:

1. **S1 (1)(a)** - The trust must be exclusively charitable. This means that the gift must be exclusively, and unambiguously, charitable.

2. **S2 (1)(a) Charities Act 2011** - The purpose of the charity must be 'on the s3 list' of charitable purposes

S.3 sets out the thirteen heads of charitable purpose. In order to be deemed charitable, an organisation’s purpose must comply with one of these 13 heads. and,

3. **S2(1)(b)** – The trust must be for public benefit. It is not enough that our potential charity falls within one of the 13 categories on our “good list” in S3 of the 2011 Charities Act. If it not for the public benefit it will not be a charity. There are two elements to public benefit:

   a) The “benefit aspect” which means that the purpose must be beneficial and any detriment must not outweigh the benefit. If it is not clear that a purpose is beneficial the Commission may ask for evidence.

   b) The public aspect by which it must benefit the public in general or a sufficient section of it. Whether a sufficient section of the public benefit may depend on the specific purpose and in some cases people living in a specific geographical area will be sufficient. It is also possible to decide who can benefit by reference to “protected characteristics” such as age, disability or religion. The Commission will decide whether a section of the public is “sufficient” on a case by case basis and there are different rules for poverty charities which may not require the “public” aspect of the test to be satisfied.

Further, any personal benefits received should be no more than “incidental” to carrying out a charity’s purpose.

Therefore in order for Noah’s gifts to be deemed to be charitable gifts, they will need to comply with these requirements.

a) *I give £50,000 to promote the music of the under-rated composer Eddie Mondey and to fund research into what links, if any, there are between his music and the great composers of the past.*

Charitable purposes. Gifts for the promotion of music are capable of being charitable and would fall under s.3(f) - the advancement of the arts, culture, heritage or science. However, this alone is not sufficient to deem the gift charitable.

In addition, the gift must also comply with the public benefit test set out in the Act. A donor’s belief that the purpose for which he makes a gift is for the
public benefit is not relevant. In Re Hummeltenberg (1923) there was not a charitable gift for the training of spiritualist mediums, on the ground that the evidence had not established that spiritualism was for the public benefit. Re Delius (1957) concerned a trust to promote broader public understanding of composer Delius. In this case the court that this was a valid charitable trust because Delius' work was regarded widely as being of high quality and cultural standard. Compare that case to the case of Re Pinion (1965). Here, a legacy in trust to establish a museum to show the testator's art collection was not charitable because the collection was, in the opinion of experts, "a worthless pile of junk" and "atrociously bad" unable to benefit the public and satisfy the requirement.

Therefore, the question in our case is whether Eddie Mondey is a "Delius" or a "Pinion". If the former, it is likely that it will comply with the public benefit requirement but if the later, it will not and the gift will not be a charitable.

The exclusively charitable requirement – it is fair to say that if a gift or trust passes the first two tests it is likely to pass this. However, if after passing the first two tests, the organisation or gift displays any purposes which would not be charitable on their own, the trust fails.

In this case, the validity of this gift as charitable will rest on the gravitas of the composer.

b) I give £500,000 to my trustees to apply for the relief of ex-employees of Easy Money Bank and their families who may have come upon financial hard times.

This would appear to be a gift to relieve poverty and so falls under s3.(a) of the CA. The problem with this gift is that it does not appear to pass the public benefit test in that the benefit must be to the public, or to a section of the public, the beneficiaries must be appropriate to the aims, the opportunity to benefit must not be unreasonably restricted, people in poverty must not be excluded from the opportunity to benefit and finally that any private benefits must be incidental. It is this final point that is at issue here because there is a clear personal nexus between Noah and the intended beneficiaries.

However, the "poverty" category is an exception to the rule on personal relationships laid down in Oppenheim v Tobacco Securities Trust (1950). In Dingle v Turner (1972), a charitable trust was established to help poor employees of Dingle & Co. While the beneficiaries were all linked by a personal relationship (their employer), the courts ruled that poverty is an exception to the Oppenheim rule. Academics Richard Edwards and Nigel Stockwell argue that this is because allowing such trusts to exist relieves the rest of society for having to provide for poor people; as a result, there is "public benefit" in a wider way. The general public benefit rule in the "poverty" category is that "gifts for the relief of poverty among poor people of a particular description" are charitable; "gifts to particular persons, the relief of poverty being the motive of the gift" are not.

It is therefore likely that this gift will be deemed to be charitable.

c) I leave £1 million to establish the Noah McCreedy Centre for Alternative Medicine, which will provide comfort to patients and ease suffering. Patients should be charged, each according to their means.
A gift of this type would appear to fall under s3.(d) CA - the advancement of health or the saving of lives.

This issue here is again one of public benefit if the public are excluded if they cannot afford to pay. Re: Resch’s Will Trusts (1969), concerned a dispute about a large bequest to St Vincent’s Private Hospital. The Charity Commission accepts that Re: Resch (1969) allows high fees to be charged and that indirect benefits (eg to the next-door hospital) can be taken into account in assessing public benefit. However, it contends that the case also provides that the operation of a charity cannot be limited to the rich and that indirect benefit cannot alone be sufficient to show public benefit. In Re Resch (1969) the private hospital provided an overflow facility for the local public hospital. It had never been conducted as a profit-making body although it had made cash surpluses. It charged high fees based on the high cost of medical care. The Privy Council held that this was charitable: there was “no warrant for adding to the condition of sickness that of poverty”. However, “to limit admission to a nursing home to the rich would not be “charitable”.

In our case, the fact that fees will be on a “what you can manage to pay” basis may be sufficient to pass the public benefit test provided poor patients pay nothing and therefore not excluded from receiving care. Following this precedent, as the gift here is for the hospital to use for its general purposes, there is a general charitable intention and it is therefore valid.

d) I leave a further £500,000 to promote the playing of sport (e.g. cricket, football, snooker) amongst the youth of Kimpton, so that young people can come together, get fit and find a sense of community.

This gift would appear to call under s.3(g) - the advancement of amateur sport and s.3 (e) - the advancement of citizenship or community development.

This issue here is whether a large enough section of the public is able to benefit from the gift. The public benefit test requires that to be charitable, a purpose must be for the benefit of the public in general or a sufficient section of the public (Verge v Somerville (1924)). When applying the rule that, to be charitable, a purpose must be for the benefit of the public in general or a sufficient section of the public, it is first necessary to identify the class of individuals whom the purpose primarily benefits. Where the purpose primarily benefits the public in general, the rule is satisfied. Where the purpose primarily benefits individuals of a particular description, the question to be asked is whether the potential beneficiaries are a sufficient section of the public. If they are, the purpose satisfies the ‘public’ aspect of the requirement that, to be charitable, a purpose must be for the public benefit.

A purpose can be for the benefit of the public in general or a sufficient section of the public even if only a limited number of persons are capable of availing themselves of its benefits, or are likely to do so (IRC v Baddeley (1955)) and case law suggests that the measure of what is a sufficient section of the public differs as between the descriptions of purposes in section 3 (1) of the Charities Act 2011. The inhabitants of a defined area will normally constitute a sufficient section of the public, unless the area is very small. A class of inhabitants of an area may also constitute a sufficient section of the public.

In our case we have a class limited both by geographical area and by age but according to Verge v Somerville (1924) this would appear to be sufficient given the potential benefit to the community as a whole.
e) I leave £100,000 to promote and encourage kindness to animals.

This would appear to fall under S.3 (k) - advancement of animal welfare.

The public benefit requirement still applies to such a gift. The intended beneficiaries of such a charitable purpose are not actually animals. As with any of the charitable purposes, the intended beneficiaries must be the public or a section of the public. This can be achieved in a number of ways. There are practical benefits to the public from caring for animals that are useful to humanity, but there are also moral benefits to the public from animal welfare. The encouragement of kindness to animals promotes compassion in people. The benefit to the animals themselves is incidental.

In Re Grove-Grady (1929), it was held that “a trust in perpetuity for the benefit of animals may be a valid charitable trust if in the execution of the trust there is necessarily involved benefit to the public”. In Re Grove-Grady (1929), the trust attempted to provide “a refuge [for animals] ... so that they shall be safe from molestation and destruction by man”. This was held not to be a charitable trust because it lacked the public benefit requirement. There seems to be no such issues with Noah’s gift and so it is likely that it would be held to be charitable.

Re Wedgewood (1951) may also be discussed here.

**Question 4**

**Celeste**

**Proprietary claim**

A proprietary claim would not succeed because Celeste has dissipated the money.

**Personal claims**

**Unjust enrichment (common law restitution)**

This is a common law personal action. Celeste has been unjustly enriched because the company lost its money due to fraud. The company can pursue an action for restitution because it was the legal owner of the stolen funds. The property was identifiable at common law up to the point of receipt by Celeste because it had not been mixed beforehand.

Celeste is strictly liable unless she has a defence. The defence of change of position applies if Celeste innocently spent the money in an exceptional and irretrievable manner so that it would be unjust to require her to make restitution (Lipkin Gorman v Karpnale (1991)). It would appear that Celeste was innocent. She may have the defence if she could not have afforded the treatment out of her own funds because her expenditure is irretrievable.

**Recipient liability**

This is a personal equitable action which the company can bring because Celeste received company property transferred to her in breach of the fiduciary duty which Davesh owed to the company. The company would have to prove that she had knowledge making it unconscionable for her to have
spent the money (BCCI v Akindele (2000)). The facts suggest that Celeste did not have actual knowledge. Would a reasonable person placed in her position, have made enquiries? Arguably not, so she would not be guilty of recipient liability and would not have to compensate the company for the £5,000 loss, plus interest.

**Sunita**

**Personal claims**

**Unjust enrichment (common law restitution)**

The company cannot bring an action for unjust enrichment against Sunita because the money was mixed in Davesh’s bank account before it reached her. It must be proved using common law tracing that she received the company’s money and common law tracing cannot identify money in a mixed fund. Common law tracing has to be used because restitution is a legal action.

**Recipient liability**

Did Sunita receive company money in breach of Davesh’s fiduciary duty? Equitable tracing can identify the gift to Sunita as company money. Davesh mixed the company’s £80,000 with £5,000 of his own money and made a withdrawal of £5,000 which he dissipated on his credit card bill. According to *Re Hallett* he is deemed to have spent his own money first. Thus, the £80,000 given to Sunita was the company’s money.

From the facts, it would appear that Sunita’s knowledge made it unconscionable for her to have spent the money (BCCI v Akindele (2000)). She was surprised that Davesh had obtained the money so quickly and should have been suspicious when Davesh told her not to ask questions. At the very least, she has constructive notice (In Akindele, it was said that unconscionability is not confined to cases where the defendant has been dishonest. This prompted speculation as to whether it included constructive notice (despite statements to the contrary in *Re Montagu* (1987) and obiter in *Westdeutsche v Islington LBC* (1996)). Therefore, she is personally liable to the company for the £80,000, plus interest.

**Equitable proprietary claim**

The company can make a claim in equity because Davesh breached his fiduciary duty.

**Sunita’s bank account**

<table>
<thead>
<tr>
<th>Payments in</th>
<th>£</th>
<th>Withdrawals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sunita’s money</td>
<td>50,000</td>
<td></td>
</tr>
<tr>
<td>Company money</td>
<td>80,000</td>
<td>Land</td>
</tr>
<tr>
<td></td>
<td>(120,000)</td>
<td>Architect’s plans</td>
</tr>
<tr>
<td></td>
<td>(10,000)</td>
<td></td>
</tr>
</tbody>
</table>
As Sunita was a wrongdoer on the grounds of recipient liability:

**Re Hallett**

She was deemed to spend her own money first. So she spent her £50,000 and £70,000 of the company’s money on the land. She dissipated £10,000 of the company’s money on the architect’s plans. This is not a favourable outcome to the company

**Re Oatway (1903)**

 Allows the company’s charge to subsist on each and every part of the mixed fund and any asset purchased with it. The company could choose to assert its charge against the land and claim that £80,000 of its money was spent on the land.

According to **Foskett v McKeown (2000)**, the company could claim a proportionate share including any increase in value, so it will be entitled to 2/3rds of £150,000, i.e. £100,000. This would be more favourable than exercising a lien merely for the amount of its loss, £80,000.

**Mike**

Mike could be guilty of accessory liability- he assisted Davesh to breach his fiduciary duty. It must be established that Mike was dishonest – that he did not act as an honest man would have acted in the circumstances (Royal Brunei Airlines v Tan (1995)). The court will take into account Mike’s knowledge and experience. However, the standard of honesty is an objective one. It makes no difference that Mike did not appreciate that he was being dishonest Royal Brunei (1995), Barlow Clowes v Eurotrust (2005) (explaining statements to the contrary in Twinsectra v Yardley (2002)), Abou-Rahmah v Abacha (2006), Starglade Properties v Nash (2010)).

Mike could be personally liable to pay compensation for the missing £85,000.