

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JUNE 2021
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 June 2021 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 lacking 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....'.

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 the extent to which the settlor's intention is relevant when considering the ability of the beneficiaries and/or the Court to vary the terms of a trust established by the settlor.

Approximately one third of the candidates answered this question. Most who did so were able to articulate the principal circumstances in which a variation can be orchestrated, but very few made any real attempt to indulge in the critical analysis that was required enable them to engage in a proper discussion of the relevance of the settlor's intention.

Question 2

This question required candidates to consider the interaction between what might broadly be called 'civil liberties' and two equitable remedies: (a) search orders and (b) freezing orders.

'Equitable remedies' is a self-contained topic; experience over past sessions suggests that candidates who attempt a question on this topic tend to have revised it reasonably well. As a result, performance is generally good but there is invariably a small number of candidates whose answer suggests that they have no real mastery of the topic yet felt unable to find another question in the same section that was more to their liking.

This was the one question where there was perhaps the greatest degree of analysis/application, no doubt as a result of the fact that many of the cases expressly consider the issue raised by the question.

Question 3

This question required candidates to discuss the circumstances in which an intention as to shared ownership of the family home can be express, inferred or imputed. As ever, this topic was very popular with candidates.

However, the fact in this session the topic was included in Section A rather than Section B meant that many answers were lacking in terms of the command words 'critically evaluate'.

Although better candidates correctly articulated the different requirements in relation to express and implied common intention constructive trusts and cited

relevant case law to support their discussion of the relevant principles, they still did not engage in any proper evaluation. Weaker answers were simply far too discursive and tended to put all relevant circumstances into a single 'melting pot'. None of the candidates engaged in any proper discussion of imputation.

Question 4

This question required candidates to discuss the differences between the common law and equitable rules in relation to tracing, including in relation to funds which are mixed in the hands of a fiduciary or innocent volunteer. Less than a third of the candidates answered this question.

In the main, this question was answered reasonably well. Tracing, rather like equitable remedies, is a topic that candidates either seem to embrace or avoid. Consequently, it tends to be answered by candidates who have some confidence in relation to the topic.

SECTION B

Question 1

This question required candidates to discuss charitable purposes, with a final element which related to a possible private purpose trust generally.

Just under half the candidates answered this question, but the performance overall was disappointing. Many were unable to articulate the basic requirements for charity, and others appeared to think that a gift for charity was only good if it was made to an existing charity. Others wrote in only the most generalised terms, with little, if any, reference to statute and/or case law on the specifics.

Question 2

This was by far the most popular question on the exam paper. Only 4 candidates did not answer it.

(a)

This question required candidates to discuss the formalities for a gift of shares, combined with a discussion of how the gift might be saved by the application of the 'best effort' rule or the decision in Pennington v Wain. A number of candidates did not articulate the formalities correctly, and several others did not discuss Pennington v Wain (notwithstanding that, on the given facts, its potential relevance seems clear enough). Some of the application was vague and unsubstantiated.

(b)

This question required candidates to discuss the formalities for a transfer of land on trust. As on previous occasions involving such a disposition, several candidates chose to discuss the formalities for a transfer, or for a trust, but not both – it is unclear why they do not recognise that both elements need to be

addressed. Statutory citation (ie in relation to LPA1925, s 52 and LPA 1925, s 53(1)(b), and also LRA 2002, s 27) was somewhat haphazard.

Question 2(c)

This question required candidates to discuss the requirements for the creation of a fully secret trust. Most candidates dealt with this reasonably well (although a few did not identify it as a secret trust at all, whilst a small number thought it was a half secret trust).

Question 3

This question required candidates to discuss trustees' powers under TA 1925, ss 31 and 32 (as amended). Just under half the candidates answered this question. Most candidates were able to set out the principles well enough (although a handful thought that the question was about investment powers and/or the statutory duty of care). Application was generally poorer, with little guidance being offered as to what factors the trustees should take into account when exercising their discretion.

Question 4

This question required candidates to discuss the alternative bases on which a gift to an unincorporated association might be upheld, and also the existence of any factors which might cause it to fail. Only 3 candidates answered this question. Only one candidate demonstrated a reasonable degree of understanding of the topic. The low number of candidates answering the question, and the poor performance of those who did, is a little surprising. The principles in play are well-established, and the facts of the scenario were not unduly complex or novel.

**SUGGESTED POINTS FOR RESPONSES
LEVEL 6 – UNIT 6 - EQUITY & TRUSTS**

The purpose of this document 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 2021 examinations. The Suggested Points for Responses 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. Candidates and learning centre tutors should review this document in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate's performance in the examination.

Section A

Question Number	Suggested points for responses	Max Marks
Q1	<p>An answer which consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against the proposition set out in the question.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of capacity of <i>sui juris</i> beneficiaries to vary regardless of settlor's intention (eg <u>Saunders v Vautier</u> (1841)) • Discussion of court's jurisdiction under Variation of Trusts Act 1958 in relation to beneficiaries who lack capacity, and relevance of settlor's intention in that scenario • Discussion of 'benefit' criterion, with reference to relevant case law (eg <u>Ridgewell v Ridgewell</u> (2007), <u>Re Weston</u> (1967), <u>Re CL</u> (1969), <u>Re T's Settlement</u> (1964), cf <u>Wright v Gator</u> (2011)) • Discussion of extent to which the settlor's intention has or has not been taken into account, with reference to relevant case law (eg <u>Re Steed's Will Trusts</u> (1960), <u>Re Remnant's Settlement Trusts</u> (1970) and <u>Goulding v James</u> (1997)) 	25
Question Number	Suggested points for responses	Max Marks
Q2(a)	<p>An answer which consists of reasoned analysis for and against the argument that the remedies (and the safeguards surrounding them) are consistent with the notions identified in the question.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • General discussion re nature of a search order • Discussion of <u>Anton Piller KG v Manufacturing Processes Ltd</u> (1976) - with correct articulation of relevant test - and other relevant case law 	13

	<ul style="list-style-type: none"> Detailed description of safeguards for the defendant A reasoned evaluation <p>Responses may include:</p> <ul style="list-style-type: none"> Discussion of ECHR, Art 8 / <u>Chapell v United Kingdom</u> (1990) 	
Q2(b)	<p>An answer which consists of reasoned analysis for and against the argument that the remedies (and the safeguards surrounding them) are consistent with the notions identified in the question.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> General discussion re nature of a freezing order Discussion of <u>Third Chandris Shipping v Unimarine</u> (1997) - with correct articulation of relevant test - and other relevant case law Detailed description of safeguards for defendant A reasoned evaluation 	12
Total: 25 marks		

Question Number	Suggested points for responses	Max Marks
Q3	<p>An answer which consists of reasoned analysis of law relating to implied constructive trusts of the home, with particular emphasis on when/how something other than an express intention as to the sharing of the beneficial interest is to be discerned.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> 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)) in relation to both qualification and quantification) Identification of a move away from strict approach in <u>Lloyds Bank v Rosset</u> (1990) (but perhaps already anticipated by cases such as <u>LeFoe v LeFoe</u> (2001)) Discussion of imputation, the nature of any role that it has to play and whether that role is limited to quantification or also applies re qualification 	25

Question Number	Suggested points for responses	Max Marks
Q4	<p>An answer which consists of reasoned evaluation, offering critical opinion/analysis supported by reasoned consideration of relevant case law.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of the common law rules re tracing and the limitations from which they suffer • Discussion of the equitable rules, comparing and contrasting the wider scope that it is available when compared to the common law rules <p>Responses may include:</p> <ul style="list-style-type: none"> • Discussion of the uncertainty in some instances as to whether the equitable rules permit a claim for a proportionate share or only a charge • The apparent arbitrary nature of the rule in <u>Clayton's Case</u> (1861) re mixed funds in a current bank account, and the willingness to ignore the rule if it leads to an unfair/unjust result. 	25

Section B

Question Number	Suggested points for responses	Max Marks
Q1	<p>An answer which consists of a reasoned evaluation of each disposition, based on a detailed discussion of the relevant law and the application of that law to the given scenario</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of Charities Act 2011 and relevant case law re meaning of 'charity' • Discussion of Charities Act 2011 and relevant case law re 'public benefit' requirement • Detailed application of the above to each clause • A reasoned conclusion in relation to each disposition <p>Responses could include:</p> <ul style="list-style-type: none"> • Recognition that any clause which 'fails' as a charitable trust and which was not a valid purpose trust (which might possibly be the case re (b)) would see the sum in question fall into residue – however, no credit for a discussion about purpose trusts (not the subject of the question) 	25

Question Number	Suggested points for responses	Max Marks
Q2(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of formalities / constitution re gift of shares (including Stock Transfer Act 1963, <u>Milroy v Lord</u> (1862) and <u>Pennington v Waine</u> (2002)) • Detailed application of the above to the particular gift with a reasoned conclusion as to validity <p>Responses may include:</p> <ul style="list-style-type: none"> • Discussion of criticisms re <u>Pennington v Waine</u> 	7
Q2(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of formalities / constitution re transfer of land on trust (including Law of Property Act 1925, ss 52 and 53(1)(b), <u>Mascall v Mascall</u> (1985) and <u>Re Rose</u> (1952), completion by registration at HMLR under Land Registration Act 2002, s 27)) • Detailed application of the above to the particular gift with a reasoned conclusion as to validity 	7
Q2(c)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of Wills Act 1837, ss 9 and 15, and common law requirements for a valid fully secret trust (eg <u>Wallgrave v Tebbs</u> (1855), <u>Kasperbauer v Griffith</u> (2000), <u>Moss v Cooper</u> (1861) (etc), and in particular <u>Re Keen</u> (1937) and <u>Re Young</u> (1970)) • Discussion of three certainties (<u>Knight v Knight</u> (1840)) with reference to certainty of subject matter • Detailed application of the above to the particular gift with a reasoned conclusion as to validity 	11
Total: 25 marks		
Question Number	Suggested points for responses	Max Marks
Q3	<p>An answer which consists of a reasoned evaluation of each scenario, based on a detailed discussion of the relevant law and the application of that law to the given scenario</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of when the 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 	25

	<p>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))</p> <ul style="list-style-type: none"> Detailed application of the above to the scenarios in relation to both Lois and Maxwell, including discussion of: (i) factors for and against the exercise of the discretion in relation to each of them, and (ii) alternatives to direct advance (eg buying a flat for Maxwell in the name of the trustees and giving him a right to reside) Reasoned conclusion/advice as to whether the trustees can accede to the relevant request, and whether there might be any conditions/safeguards that could/should be implemented <p>Responses may include:</p> <ul style="list-style-type: none"> Discussion as to whether ballet school is 'university' (and therefore querying if Lois is satisfying the contingency) – only to be credited if recognition that it isn't, but it doesn't have to be: there is no time limit on when Lois graduates from a university. 	
Question Number	Suggested points for responses	Max Marks
Q4	<p>An answer which consists of a reasoned evaluation of each scenario, based on a detailed discussion of the relevant law and the application of that law to the given scenario</p> <p>Responses should include:</p> <ul style="list-style-type: none"> Identification of the Club 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 difficulties that arise in relation to dispositions in favour of a UA as a result of the absence of legal personality Detailed discussion of the differing theories that have been put forward to validate a disposition to a UA as a gift or a trust Detailed application of the above to the scenario (including consideration of whether the degree of control exercised by the National Association disqualifies the gift entirely, see eg <u>Re Grant's WT</u> (1979)) Reasoned conclusion/advice as to whether the Committee can proceed with its proposal 	25

	<p>Responses may include:</p> <ul style="list-style-type: none">• Recognition that the gift does not create a valid private purpose trust	
--	--	--