CHARTERED INSTITUTE OF LEGAL EXECUTIVES

LEVEL 6 – UNIT 5 – EQUITY AND TRUSTS
SUGGESTED ANSWERS – JANUARY 2017

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2017 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 students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on student performance in the examination.

SECTION A

Question 1

Section 53(1)(c) of the Law of Property Act ('LPA') 1925 provides that a disposition of a subsisting equitable interest must be in writing and signed by the person disposing of the same or by that person's agent lawfully authorised in writing. The key question is whether there is a disposition of a subsisting equitable interest. There have been many cases where the parties have tried to transfer equitable interests orally to avoid stamp duty. Oral transfers are effective only if there is no 'disposition of a subsisting equitable interest'. The test seems to be whether an equitable interest which existed before the transfer still exists but in the hands of another.

The most straightforward case is where a beneficiary under a trust (X) transfers his or her equitable interest directly to another (Y). This amounts to a disposition of X's equitable interest because the equitable interest continues to exist but ownership has changed from X to Y. Section 53(1)(c) applies and the transaction is void unless the transfer is in writing signed by X or X's agent.

Section 53(1)(c) does not apply where a legal owner declares a new trust over property because this involves the creation of a new equitable interest as opposed to the disposition of a subsisting equitable interest.

The question whether there had been a disposition of an equitable interest arose in Grey v IRC (1960). Trustees held property on a bare trust for X. X asked the trustees to hold the property on trust for Y. It was held that this was an attempted disposition for the purposes of s53(1)(c); the equitable interest existed before the transaction and it was intended that the ownership would change from X to Y.

In Vandervell v IRC (1967) the House of Lords decided that s53(1)(c) did not apply where the legal and equitable titles were transferred together. Trustees

held shares on a bare trust for Mr Vandervell. At his direction, the trustees transferred the legal title to the shares to a charity. It was held that s53(1)(c) did not apply; Mr Vandervell's equitable interest passed with the legal title automatically without the need for a written document. Although the equitable interest existed before the transaction, it did not exist separately after the transaction because the legal and equitable interests were reunited in the charity.

In a further development of the Vandervell litigation, it was held that the extinction of a resulting trust was not a disposition of an equitable interest and was therefore, outside s53(1)(c).

Difficult questions of interpretation can arise if beneficiaries declare themselves trustees of their equitable interests. Suppose that A, a beneficiary under a trust, declares that he is holding his equitable interest on trust for B. This may amount to a disposition of A's equitable interest. It depends on whether A retains active duties as a trustee of the sub-trust.

If A stays in the picture with active duties to perform as a trustee of the sub-trust, there has been no disposition of A's equitable interest and s53(1)(c) is not applicable. The declaration of trust can be oral.

On the other hand, if A has no active duties to perform as trustee of the sub-trust, A drops out of the picture and the original trustees hold on trust directly for B. In this case, A has made a disposition of A's equitable interest and s53(1)(c) applies (Grainge v Wilberforce (1889)).

In Re Holt's Settlement (1969) it was held that a variation of beneficial interests by the court under the Variation of Trusts Act 1958 did not fall within s53(1)(c). In Re Danish Bacon Co (1971) it was doubted whether an employee nominating a person to receive a benefit under a pension scheme was making a disposition of an equitable interest. In Gold v Hill (1999) nominating a person as a beneficiary of a life assurance policy did not transfer an interest until death and therefore there was no disposition of a subsisting equitable interest under s53(1)(c).

Contracts to transfer equitable interests have given rise to much debate. Some contracts are enforceable by specific performance. If the contract is specifically enforceable, 'Equity regards that as done which ought to be done' and the equitable interest in the property passes to the purchaser under a constructive trust when the contract is made. Section 53(2) LPA 1925 provides that nothing in s53(1) affects the creation or operation of *inter alia* constructive trusts.

In Oughtred v IRC (1960), Mrs Oughtred orally agreed to transfer some shares to her son, P, in exchange for P transferring his equitable interest in another shareholding to her. In the House of Lords, Lord Radcliffe suggested that the equitable interest in the shares had passed to Mrs Oughtred by virtue of a constructive trust as the contract was specifically enforceable. This view was followed in Neville v Wilson (1996).

In conclusion, a disposition of an equitable interest occurs where an equitable interest existed separately before the transaction and still exists separately after the transaction but it has different owners before and after the transaction. Section 53(1)(c) does not apply where there is no separate equitable interest before the transaction (as in a declaration of trust). Further, it does not apply if, after the transaction, the equitable interest does not continue to exist independently (as in Vandervell v IRC where the equitable interest was merged

in the legal title). Constructive trusts appear to provide the means to avoid the formalities of s53(1)(c).

Question 2

Trustees owe fiduciary duties not to put themselves in a position where their personal interest might conflict with their duty to the trust. They must not make a personal profit unless authorised to do so. The court will order trustees to surrender any profit without enquiring into the circumstances of the case. The strict liability of fiduciaries has been the subject of criticism on the grounds that it is unfair to penalise honest trustees in the same way as guilty trustees and that the strict rule may discourage people from accepting the post.

Boardman v Phipps (1967) was an example of the application of strict liability. The trust property included a substantial shareholding in a private company. Mr Boardman (the trust's solicitor) decided to investigate the affairs of the company initially on behalf of the trust. He gained useful information about the company by purporting to represent the trust. Subsequently, with the knowledge of the active trustees, Mr Boardman purchased shares in the company with his own funds on his own account. Through skilful management he was able to reorganise the company and make large distributions to all shareholders, including the trust.

By a bare majority, the House of Lords held that the Mr Boardman had to account to the trust for his profits. The majority held that he was liable because he had profited from information which came to him in his fiduciary position. A further ground for the decision was that, had he been asked to advise whether the trustees should obtain a court order allowing them to buy the shares for the trust, he would have had a conflict of interest. The slightest possibility of a conflict was sufficient to make the trustees accountable; it did not matter that the possibility was extremely remote. Mr Boardman had to surrender his shares and profit after being reimbursed with the purchase price.

The decision in Boardman might be considered rather harsh. The defendant had been honest. An active trustee gave evidence that he would not have invested trust money in additional shares and therefore, the possibility of a conflict of interest was extremely unlikely. The trust suffered no loss and actually benefited from the distributions which the company made as a result of the defendant's reorganisation. Nevertheless, the defendant had to surrender his profit to the trust.

Wright v Morgan (1926) is a further example of the harsh operation of the rule; the conflict of interest arose because a trustee purchased trust property; the beneficiaries were allowed to avoid the transaction at a later date despite the fact that the trustee had paid the full market price. As was the case in Boardman v Phipps, it was irrelevant that the beneficiaries had suffered no loss.

In Keech v Sandford (1726), the court justified the strict approach by saying that it is difficult for the courts to ascertain whether trustees have been honest and whether the trust could have secured the profit had it been given the opportunity. It has also been argued that strict liability does not prevent honest fiduciaries from making a personal profit; trustees, for example, can obtain the consent of the beneficiaries (assuming all the beneficiaries are adults) or the court or settlors may grant powers for trustees to make profits in the trust instrument.

The advantage of strict liability is that it acts as a deterrent for other trustees. If trustees know that they cannot retain profits under any circumstances, they will not be tempted to exploit trust opportunities for themselves. Removing all temptation ensures that in all cases, trustees are incentivised to act in the best interests of the beneficiaries and that they are not swayed by their personal interests.

However, the strict approach of the courts may not be as entrenched as would at first appear. In Boardman v Phipps, the House of Lords ordered the trust to pay the defendant generous remuneration for his hard work in changing the company's fortunes. In a powerful dissenting judgment, Lord Upjohn suggested that fiduciaries should not be liable unless there was an actual conflict between their interest and duty e.g. if they deprived the trust of an opportunity which it would otherwise have taken up. In Murad v Al Saraj (2005), Lady Justice Arden doubted whether there were evidential difficulties in determining a trustee's honesty. She remarked (*obiter*) that evidential problems could be avoided by throwing the burden on to the fiduciary to show he was honest, that the trust could not have gained the profit and that the trust suffered no loss.

The strict approach may deter people from becoming trustees or taking up fiduciary roles (especially commercial positions such as company directors). It is likely to stifle entrepreneurism which can be to the detriment of the beneficiaries or those who are owed fiduciary duties. Had Mr Boardman decided not to risk breaching his fiduciary duty by seeking to make a personal profit, the trust would have been denied the profit which it actually derived from the defendants' activities. This was the reason why the Companies Act 2006 adopted a less stringent regime for company directors. The Act provides that directors are not liable if there is no reasonable possibility of a conflict of interest which is closer to Lord Upjohn's more relaxed approach.

Some Commonwealth jurisdictions have adopted a more lenient regime – a director is not liable for profiting from an opportunity if the Board of Directors has already rejected the opportunity on behalf of the company. There are signs that the inflexible rule of equity might be relaxed in the future.

Question 3 (a)

Equitable remedies are available only if the common law remedy (usually an award of damages) is inadequate. Equitable remedies are discretionary whereas common law damages are available as of right. Wide discretions can lead to uncertainty and unpredictability but the courts exercise their discretion to grant equitable remedies according to established principles so that it should be possible to predict the outcome of cases.

Equity acts *in personam* or against the person. A person who breaches an equitable court order such as an injunction or a decree of specific performance is in contempt of court.

When the courts exercise their discretion, they are guided by equitable maxims e.g. Equity will not act in vain, he who seeks equity must do equity. Equitable maxims are general guidelines rather than binding rules.

Question 3(b)

A decree of specific performance is an order to perform a contract.
It is an order *in personam* made against a party to the contract. Provided the defendant is within the jurisdiction, the order can be made even though the

property which is the subject of the contract is elsewhere (Penn v Lord Baltimore (1750)).

As specific performance is an equitable remedy, it is dependent on the common law remedy being inadequate. Contracts for the payment of money are rarely enforced by specific performance because the claimant would be fully compensated by an award of damages. An exception arose in Beswick v Beswick (1968) where specific performance was ordered of a contract to provide an annuity because, in that case, the claimant would have recovered only nominal damages. If the property can be bought on the open market, damages would be an adequate remedy for breach of contract. Specific performance will be granted if the property is unique e.g. land (Penn v Lord Baltimore), rare antiques (Phillips v Lamdin (1949)), or where the product is in short supply and it would be difficult for the purchaser to buy it elsewhere as in Sky Petroleum v VIP Petroleum Ltd (1974).Damages would be a sufficient remedy if the contract was for the purchase of public company shares because they are available on the open market. However, a contract for the purchase of private company shares is enforceable by specific performance because it is less easy to buy unquoted shares from another source.

When the courts exercise their discretion, they apply equitable principles and maxims. For example, a party who has not given consideration for an agreement cannot obtain an order for specific performance due to the equitable maxim 'Equity will not assist a volunteer'.

The maxim that 'Equity will not act in vain' is also influential. Specific performance will be refused if the court cannot ensure that the order will be observed. The defendant must be in a position to observe the order. Specific performance will not be granted where the contract would require constant supervision by the court because the claimant would have to make repeated future applications to the court. For this reason, an order was refused in respect of a contract to appoint a resident porter in Ryan v Mutual Tontine Westminster Chambers Association (1893). In Tito v Waddell (No 2) (1987) it was said that the real issue was whether there was sufficient definition of what had to be done and this approach was followed in Posner v Scott-Lewis (1987) where the court ordered specific performance of an agreement to appoint a resident porter whose duties were well-defined. The House of Lords refused to order specific performance of a supermarket's keep-open covenant in Co-operative Insurance Society v Argyll Stores (Holdings) Ltd (1997). In Giles v Morris (1972) Megarry J suggested that equity would be acting in vain if the court were to grant specific performance of a contract to provide personal services as there was no way of knowing whether the contract was being performed adequately.

In some cases the courts have suggested that applications for specific performance of contracts to grant transient interests are not appropriate because the interest may expire before, or soon after the case is heard. For example, the court did not grant the order in respect of an agreement to enter into a partnership for no fixed term in Hercy v Birch (1804). However, in Verrall v Great Yarmouth Borough Council (1981) the court did grant an order for an agreement to grant a licence of a public hall for a two-day conference. Damages would not have been an adequate remedy because it would have been impossible to book another venue at such short notice.

The courts have exercised their discretion to refuse an order for specific performance where the claimant does not come to equity 'with clean hands' (e.g. where the claimant has breached a covenant as in Coatsworth v Johnson (1886) or where the claimant has breached, or is unwilling to perform, a term of the

agreement (Franklin v Lord Brownlow (1808)). Furthermore, specific performance will be refused if it would cause significant hardship to the defendant or a third party (Patel v Ali (1984)).

A long delay in bringing the action will also act as a bar if it would be unjust to grant the claimant relief (Re Sharpe (1892)). The Maxim 'Delay defeats Equity' applies. In Hughes v La Baia Ltd (2011) the Privy Council noted that delay coupled with prejudice to the defendant would provide a defence in equity. The same approach was taken in Lazard Bros v Fairfield Properties (1977).

In conclusion, specific performance exhibits all the characteristics of an equitable remedy and is strongly influenced by matters of conscience. It plugs a gap where common law remedies are inadequate. Although the remedy is discretionary, firm guidelines exist in the interests of certainty.

Question 4(a)

Equitable tracing is available only to claimants who have an equitable proprietary interest (e.g. beneficiaries under a trust) or those who are owed fiduciary duties (e.g. companies, which are owed fiduciary duties by their directors).

Legal owners who are not owed fiduciary duties have to rely on common law tracing if their property is misappropriated. The courts have shown a willingness to extend the categories of fiduciary relationships to allow the claimant to use equitable tracing e.g. in the much criticised decision in Chase Manhattan Bank v Israel-British Bank *(*1981*)*, it was held that money paid by mistake is held by the recipient on a constructive trust.

At common law, the property which is being traced must be identifiable at every stage of the process. Common law does not allow claimants to trace their property when it is, or has been, converted into money which is then mixed with other money in a bank account or in the purchase of an asset.

Equitable tracing on the other hand can identify the claimant's money in a mixed bank account or where it has been used with other money to buy an asset. Equity imposes a lien or equitable charge over the mixed asset.

In Agip (Africa) Ltd v Jackson, Millett J held that the common law cannot trace money which has been transferred electronically because this transfer is not represented by a physical asset (just a 'stream of electrons'). Equitable tracing can identify money which has passed through a banking system.

Common law tracing leads to a personal claim against the defendant whereas equitable tracing establishes a proprietary interest in the property held by the defendant. A proprietary claim is advantageous if the defendant is bankrupt because it has priority over the defendant's creditors.

The distinctions between common law and equitable tracing show that the two systems of law are not totally fused. Some judges and academics believe that there is no justification for the differences. A person whose property has been misappropriated should have recourse to the same remedies whether he owns a legal or equitable interest in the property.

Question 4(b)

Equity permits tracing into the hands of a guilty fiduciary and an innocent volunteer but the rules are different.

Where a fiduciary buys an asset using a mixture of his own and the trust's funds, it was held in Foskett v McKeown (2000) that the beneficiaries can claim either a proportionate share of the mixed asset or a lien to recover the amount lost. Where an asset has been purchased by an innocent volunteer using a mixture of the innocent volunteer's money and trust money, the beneficiaries of the trust can claim only a proportionate share of the mixed asset which means that they share profits or losses rateably.

Where a guilty fiduciary has mixed trust money with his own funds in a bank account and made withdrawals, it is necessary to decide whose money funded the withdrawals. In Re Hallett's Estate (1880), it was established that a trustee is deemed to spend his own money first. This will not produce the best outcome for the beneficiaries if the first withdrawal was used to buy a valuable asset and subsequent withdrawals have been dissipated and are not, therefore, traceable. In this circumstance Re Oatway (1903) can be used to displace Hallett – the trustee will be deemed to have acted in the best interests of the trust. If it would be best for the trust to presume that the valuable asset was purchased with the trust fund, the asset will be treated as a trust investment and the beneficiaries will have a lien over it.

There is some uncertainty whether the beneficiaries are entitled to any increase in value of the asset or whether they are restricted to the amount of trust money which they have lost. A strict reading of Hallett suggests that they simply have a lien for the amount of trust money lost. However, in Re Tilley's Will Trusts (1967) it was suggested, *obiter*, that the beneficiaries are entitled to a proportionate share of any increase in value.

At first sight, it appears fair to presume everything against a guilty trustee in order to produce the best result for innocent beneficiaries. However, in many cases the guilty trustee is insolvent and the claim is really against the trustee's creditors who are also innocent. The bias in favour of the beneficiaries may not be wholly appropriate in these circumstances.

Tracing depends on the existence of the trust property albeit in an altered form. Once the property has been dissipated, it is no longer traceable. Further, if the balance on the mixed bank account has sunk to nil, the beneficiaries cannot claim any money the trustee pays in subsequently (James Roscoe (Bolton) Ltd v Winder (1915)); subsequent additions remain the trustee's own money unless the trustee has specifically earmarked the money to restore the trust fund.

The rules which apply when an innocent volunteer has mixed trust money with the volunteer's own money in a bank account are less generous to the beneficiaries seeking to trace. The arbitrary rule in Clayton's case (1816) applies – the first money in is the first money out. The rule can be ignored if it would produce an unfair result (e.g.Russell-Cooke Trust Company v Prentis (2003); Commerzbank Aktiengesellschaft v IMB Morgan plc (2004)).

SECTION B

Question 1(a)

The appointment of Brown's was a collective delegation by both trustees. Trustees are not vicariously liable for the defaults of such an agent: s23 Trustee Act 2000 ('TA 2000'). They can only be sued for losses caused by their own breaches of duty.

Trustees are permitted to delegate certain functions to an agent (s11 TA 2000) and these functions include their investment duties and discretions.

Trustees have duties to appoint the agent in writing and to give the agent a policy statement. The policy statement should have included the clause in the will (which the agent appears to have overlooked). The agent should have been instructed to avoid risky investments. The trustees should have reviewed the agent's performance and the policy statement (s22 TA 2000).

The trustees owed a duty of care (s1 TA 2000) in the appointment of the agent, the preparation of the policy statement and the reviews. Gemma would be expected to exercise such care as was reasonable in the circumstances. The standard would be at the basic level if Gemma is not professionally qualified and did not hold herself out as having specialist knowledge. Otherwise she would be held to the standard of a reasonable professional in her field.

Further information is required to ascertain whether Gemma exercised due care when the financial advisers were chosen. She should have checked the suitability of Brown's and should not have simply appointed the firm without proper enquiry. Furthermore, Gemma owed a duty to be active in the management of the trust (Bahin v Hughes (1886)) and it is no excuse to say that she allowed Megan to make the choice. It is possible that there were further breaches in the provision of a policy statement and the facts suggest they did not carry out reviews as they 'just let Brown's get on with it'.

Gemma will not be liable unless her breaches caused loss. Trustees will not be liable for the effects of extraneous factors such as a downturn in the stock market. However, had the trustees followed the Testator's wishes and avoided company shares for half of the trust fund, there would have been no reduction in value of that half. Some loss at least was caused by Gemma's breaches.

No defences appear to apply to Gemma. Section 61 Trustee Act 1925 ('TA 1925') allows the court to excuse trustees wholly or partly if they acted honestly and reasonably and ought fairly to be excused. The courts are reluctant to excuse passive trustees.

Gemma could be sued for the whole loss because trustees are jointly and severally liable. Megan also committed breaches of duty but it is unlikely to be worthwhile suing her in a personal action due to her bankruptcy.

Under the Civil Liability (Contribution) Act 1978, Gemma could claim a contribution from Megan and the court will order such amount as is just and equitable having regard to their respective responsibilities for the loss. However, Megan's bankruptcy would suggest that Gemma would not recover very much.

1(b)

S19 Trusts of Land and the Appointment of Trustees Act 1996 allows beneficiaries to compel existing trustees to retire and appoint trustees nominated by the beneficiaries. However, all the beneficiaries must agree and they must be aged 18 or over. Freddie is only 16 years of age.

Beneficiaries can apply to the court for trustees to be replaced under s41 TA 1925. The court will intervene if it would be expedient and it would be difficult, inexpedient or impracticable to appoint new trustees without the court's assistance. The court would probably replace Megan (because she is bankrupt and has breached the trust) unless Gemma is prepared to exercise her powers to replace Megan.

Under s36 TA 1925, trustees can replace a trustee who is 'unfit to act' which includes unfitness due to bankruptcy. The replacement is effected by the 'continuing trustees' (in this case, Gemma); it would not require Megan's co-operation (Re Stoneham's ST (1953)). Gemma could not simply remove Megan; she would have to replace her but it would be sensible to appoint a professional to assist Gemma. Section 36 confers a discretion on trustees; beneficiaries cannot compel the use of this provision (Re Brockbank (1948)).

1(c)

Under s31 of the TA 1925, trustees have a discretion to apply trust income for the maintenance education or benefit of beneficiaries who are under the age of 18. However, Freddie cannot complain that he has received no income because the section gives the trustees a complete discretion. The section provides that trustees must pay beneficiaries their share of the trust income after they have attained the age of 18. Therefore, the trustees were correct if they gave David and Eric their shares of trust income.

Under s32 TA 1925, trustees have a discretion to make payments of capital to beneficiaries for their advancement or benefit. The beneficiaries must have an interest in capital which they do in this case. The trustees may advance up to half the beneficiaries' respective shares of capital (in trusts created before the commencement of the Inheritance and Trustees' Powers Act 2014) which must be brought into account when they become absolutely entitled. Payments to David and Eric for their university education would be regarded as being for their advancement or benefit and would therefore be permitted provided they did not exceed one-half of their entitlements. The trustees cannot be compelled to make advancements to Freddie as s32 gives them a complete discretion.

Question 2(a)

Fatima intended to make an outright gift of the shares to Aalia. A gift is invalid if the property is not transferred properly. In order to transfer shares, the transferor must hand over a signed stock transfer form and the share certificate to the transferee. The transferee will acquire legal title when he or she registers as the new owner at the company. In this case, legal ownership has not passed because Aalia was not registered at the company. 'Equity will not perfect an imperfect gift' nor will it construe a failed gift as a declaration of the donor as trustee (Milroy v Lord (1862)).

Gifts are regarded as complete in equity if the donor has done everything necessary to be done by him or her to transfer title (Milroy v Lord; Re Rose

(1952)). However, in this case Fatima did not do everything necessary because she did not part with the stock transfer form and share certificate beyond recall.

The controversial case of Pennington v Waine (2002) may assist Aalia; equity will treat the gift as perfect if it would have been unconscionable for the donor to have changed her mind. The facts in this case are not dissimilar; the donor has told the donee of the gift and she has acted upon it by resigning from her job and spending her savings on a holiday; there is no suggestion that Fatima changed her mind. The only distinguishing feature is that in Pennington the donor and donee had instructed a third party to see to the transfer formalities and believed that they had done all that was needed.

Pennington is a controversial case. In Curtis v Pulbrook (2011), the judge suggested that it was based on proprietary estoppel – where the donee has acted to his or her detriment in reliance on an assurance, so that it would be unconscionable for the donor to deny the assurance.

If it is held that Pennington or proprietary estoppel does not save the gift, it will pass to the residuary beneficiary under Fatima's will.

2(b)

Fatima tried to create a trust over the house with Imran acting as trustee. It was necessary to declare the trust effectively and constitute it by transferring the property in the appropriate manner to the trustee.

The letter would appear to be an effective declaration in that the trust has been evidenced in writing and (presumably) signed by Fatima in compliance with s53(1)(b) LPA 1925.

As for constitution, the transfer of legal title occurs when the settlor has executed a transfer deed in favour of the trustee (s52 LPA 1925) and the trustee has been registered at the Land Registry. Fatima executed the deed (which presumably complied with s1 Law of Property (Miscellaneous Provisions) Act 1989) but Imran has not been registered. In Mascall v Mascall (1985), it was held that the every effort test will apply if the only outstanding step is registration. Here, Fatima put the transfer deed beyond her recall and has therefore done all that was required of her; Imran can attend to registration. The trust is completely constituted in equity.

2(c)

Gifts of property which are to have effect on a person's death must be in a valid will executed in accordance with s9 of the Wills Act 1837. The trust for Zain did not appear on the face of Fatima's will and therefore, did not comply with s9.

It would appear that Fatima tried to create a fully secret trust - the gift to the trustee appears in the will but there is no mention of a trust.

To be valid, the testatrix must communicate the fact of the trust and its terms to the trustee before she dies (Wallgrave v Tebbs (1855)). Fatima communicated the fact of the trust to Pasha before her death but she did not communicate the terms of the trust at this time. The identity of the beneficiaries was communicated by a sealed envelope handed over before she died but with instructions that it was not to be opened until after her death. In Re Keen (1937) a half secret trust was held to be valid where the testator handed over a sealed envelope containing the terms of the trust with a direction that the envelope was

not to be opened until after the testator's death. This principle probably applies to fully secret trusts also.

The secret trustee must agree. Silence on the part of Pasha would be regarded as acceptance (Moss v Cooper (1861)).

Although fully secret trusts do not comply with s9 of the Wills Act 1837 the trust will be enforced because equity will not allow statute to be used as an instrument of fraud (McCormick v Grogan(1869)). Alternatively, the secret trust is enforced because it arises outside the will ('*dehors* the will'); the trust is declared during the testatrix's lifetime and constituted by the will passing legal title to the property to the trustee (Re Young (1950); Re Snowden (1979)).

To be valid a trust must have certainty of intention, subject matter and objects (Knight v Knight (1840)).

Fatima exhibited certainty of intention to create a trust for Zain because 'You are to give' are obligatory words. The trust will be void if the subject-matter is uncertain. Unfortunately, Fatima did not specify an amount to be given to Zain. It could be argued that there is an effective objective determinant of the quantum, as in Re Golay's Will Trusts (1965). On the other hand, it might be held that 'whatever he needs to live comfortably' is not capable of ascertainment in which case the trust will fail.

The fact that Zain witnessed the will does not cause him to lose his legacy under s15 of the Wills Act 1837 because the trust operates *dehors* the will (Re Young).

If the trust for Zain fails due to uncertainty of subject-matter, the Court may decide that the amount passing to Fatima's children is also uncertain (Boyce v Boyce (1849)). If this is the case, it is likely that the £100,000 will be held on resulting trust for Charles.

Question 3

Legacy (a)

A trust is charitable if it is for one of the purposes listed in s.3 Charities Act 2011, it is exclusively charitable and it has a sufficient element of public benefit. This trust has a charitable purpose (s. 3(1)(b) – the advancement of education). There are no non-charitable purposes to prevent it from being exclusively charitable.

The trust must have an identifiable benefit (which this does) and the benefit must be to the public at large or a section of the public.

The scholarships are not available to the public at large and the pupils of Anbury School may not be a sufficient section of the public. The number of people who will benefit is not negligible and they are not linked by a personal nexus which would prevent charitable status (Re Compton (1945); Oppenheim v Tobacco Securities (1951). However, the court or Charity Commission may decide that children of parents who can afford to pay the fees may not be a sufficient section of the public. In Independent Schools Council v Charity Commission for England and Wales (2011), the Upper Tribunal held that a trust which excludes the poor (people of moderate means) cannot be charitable. Further information is needed on whether the school offers a significant number of non-fee-paying places to children who would otherwise be excluded on account of their parents' means. If

so, they would have access to the scholarship fund set up by Mary's will and the trust may be charitable.

If there is insufficient public benefit, the trust will be a non-charitable purpose trust. These are normally void as they offend the beneficiary principle (Morice v Bishop of Durham (1804)). However, a private purpose trust is valid if it gives ascertainable individuals a sufficiently tangible benefit that they are able to enforce the trust (Re Denley's Trust Deeds 1969)). In this case, the pupils of Anbury School would derive a sufficient benefit to be able to enforce the trust.

To avoid offending the rule against inalienability, it must be possible to spend the capital within 21 years and courts prefer to see express provision for the application of capital to take effect within the perpetuity period. The terms of the gift limit the duration to 20 years which is within the perpetuity period.

Legacy (b)

This legacy creates a discretionary trust.

Trusts must satisfy the three certainties (of intention, subject matter and objects) (Knight v Knight (1840)). The objects may not be sufficiently certain. The test for discretionary trusts is the given postulant test (McPhail v Doulton (1971)) – it must be possible to say with certainty whether any given postulant is or is not a member of the class of objects.

The description of the objects must be conceptually certain. In Re Baden's Deed Trust (No 2) (1973) the Court of Appeal had to apply the test. The judges had differing approaches:

Stamp LJ said that, in applying the test, it is necessary to be able to say whether any given person was or was not a member of the class. If one had to say of any given person that one did not know whether they were in the class or not, then the objects were uncertain and the trust would fail.

Sachs LJ held that the given postulant test demands conceptual certainty but not evidential certainty. Sachs LJ said that the burden was on the candidate to show that he was in the class; if he could not (either because he was definitely outside or because it was uncertain whether he was in or out) then he fell within the 'is not' part of the given postulant test. Thus, a group of 'don't know candidates' would not cause the trust to fail provided the definition of the class was conceptually certain.

Megaw LJ concluded that the given postulant test is satisfied if, 'as regards a substantial number of objects, it can be said with certainty that they fall within the trust, even though, as regards a substantial number of other persons…. the answer would have to be …it is not proven whether they are within or without'.

Arguably, this trust is invalid because the words 'talented', 'young' and 'great promise' are conceptually uncertain.

Administrative workability is a further reason why this trust may fail – where the class is so hopelessly wide as not to form anything like a class e.g. the residents of Greater London (Lord Wilberforce in McPhail). In R v District Auditor ex. p. West Yorks CC (1986), it was held that a discretionary trust for 2.5 million inhabitants of West Yorkshire was void due to administrative workability.

The £100,000 will pass as part of residue to Robert.

Legacy (c)

An unincorporated association is not a legal person capable of holding property. However, the courts have found various ways of construing gifts to unincorporated associations in order to find that they are valid.

This legacy is likely to be construed as a gift to the existing members as an accretion to club funds to be dealt with in accordance with the rules of the club (Re Recher's WT (1972)). The gift will not offend the beneficiary principle because the members are the beneficiaries. Further, the legacy will not offend the rule against inalienability provided the club has a rule allowing members to dissolve the club and share out the assets between them (or they have the power to introduce a rule to this effect) (Re Grant's WT (1980)).

Question 4

The house

Crystal

Crystal will have to establish that Ben holds the legal title to the house on trust for himself and her. The presumption is that, as the sole legal owner, Ben is also solely entitled to the equitable interest. It appears that there is no written evidence of a declaration of trust signed by Ben and therefore Crystal cannot claim an express trust which complies with s.53(1)(b) LPA 1925. She made a direct contribution of £20,000 to the purchase price at the time of purchase which would give her an interest under a resulting trust of a one-twenty-fifth share (Curley v Parkes (2004)). It has been held however, that constructive trusts are more appropriate for determining the interests of cohabitees (Stack v Dowden (2007)).

Crystal will argue that there was an implied constructive trust in her favour. She will have to show that there was a common intention that she should have an interest in the house and she acted to her detriment in reliance on that common intention (Lloyds Bank v Rosset (1990)). The common intention may be express or implied. There was no discussion to give rise to the 'agreement, arrangement or understanding' required for express common intention.

In Lloyds Bank v Rosset, Lord Bridge said that a common intention could be inferred from direct contributions to the price such as paying the deposit or some of the mortgage instalments if sufficiently regular but he doubted whether anything less would do. Crystal paid £20,000 at the time of the purchase and she paid the mortgage instalments for a year. Therefore, it is likely that the court will infer a common intention that she should have an equitable interest. Her payments will also suffice for detrimental reliance on the common intention.

The next step is to quantify her interest. In Stack v Dowden the House of Lords said that the court will look at the whole course of dealings between the parties to determine the extent of a claimant's beneficial interest under a constructive trust. The size of each party's share will be what was said or agreed at the time the property was acquired. If there is no evidence of any such agreement or discussion, each will be entitled to that share which the court considers the parties intended each to own, having regard to the whole course of dealing between them in relation to the property. Baroness Hale envisaged that many factors could be taken into account to determine the nature of this intention including: discussions at the time of purchase, the nature of the parties'

relationship, how the parties' arranged their finances, and how the parties discharged outgoings on the property.

According to Stack v Dowden, the opening of a joint account, Crystal's contributions to household expenses and her direct contributions at the time of the purchase and to subsequent mortgage payments will be significant in determining her share.

In Jones v Kernott (2011) the Supreme Court adopted the same approach but it was held that if the court cannot ascertain the parties' intentions as regards their shares, the court will ascertain what would be fair having regard to the whole course of dealings. In Jones v Kernott, it was acknowledged that the parties' common intention regarding their shares could change.

Will

Will is unlikely to succeed in a claim for an equitable interest under a constructive trust. The parties did not express a common intention that he should have an interest, merely that he could live there. According to Lord Bridge in Rosset, the court will not infer a common intention from anything other than direct contributions to the purchase price or the mortgage. In Stack v Dowden, their lordships suggested that Lord Bridge's view may be too narrow. However, these observations were *obiter* because Stack concerned a property which was in the joint names of the parties.

The trend towards inferring a common intention from wider circumstances than those envisaged by Lord Bridge may lead the court to infer a common intention from the substantial amount of construction work which Will carried out. In this case however, the work may have been in lieu of rent.

Will may succeed in a claim for proprietary estoppel. A claimant can use proprietary estoppel as a cause of action if the defendant made an assurance on which the claimant relied to his detriment. The three elements are intertwined and the courts are favouring a broader approach namely: would it be unconscionable to deny the claimant what was promised or understood (Gillett v Holt (2000))?

Ben gave an active assurance that, in exchange for the building work, Will could live in the house rent-free for as long as he liked. Will has relied on these words to his detriment. The detriment need not be financial but must be substantial (Gillett v Holt). There have been several successful claims for proprietary estoppel based on the claimant working for nothing in reliance on the assurance (e.g. Gillett v Holt).

The courts have a discretion over the remedy. They may not fulfil the claimant's expectation. In Jennings v Rice (2003), the Court of Appeal said that it had to ensure that justice was done between the parties and should order a proportionate remedy. The court is unlikely to fulfil Will's expectation that he can live there for as long as he likes because this would be unpractical in the circumstances. It may order compensation.

The Greencom shares

Ben has correctly transferred these shares so Crystal is the legal owner. A voluntary transfer of personalty between unmarried partners gives rise to the presumption of resulting trust (this is not one of the relationships to which the presumption of advancement applies).

According to Tinsley v Milligan (1993), Ben's illegal motive (deceiving his creditors) will not prevent him from relying on the presumption of resulting trust However, in the more recent case of Patel v Mirza (2016) the Supreme Court held that this approach should no longer be used. The courts should exercise a discretion and should refuse a remedy if it would be harmful to the integrity of the legal system. The court would take into account the seriousness of the illegality, whether it was intentional and the culpability of the parties. This approach may prevent Ben from recovering the shares.