LEVEL 6 – UNIT 5 – EQUITY AND TRUSTS
SUGGESTED ANSWERS – JANUARY 2018

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide candidates and tutors with guidance as to the key points candidates should have included in their answers to the January 2018 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 tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate performance in the examination.

SECTION A

Question 1

Fiduciaries include trustees, partners in business, company directors and solicitors. They must not put themselves in a position where their personal interest might conflict with their duty. The court will order fiduciaries 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 fiduciaries in the same way as guilty fiduciaries and that the strict rule may discourage people from accepting the post. Trustees are subject to the strictest fiduciary duties. A more relaxed version of the rules applies to company directors by virtue of the Companies Act 2006.

<u>Boardman v Phipps</u> (1967) was a classic illustration of the principles set out in Lord Russell's statement. The trust property included a substantial shareholding in a private company. Mr Boardman (the trust's solicitor) investigated the affairs of the company, initially on behalf of the trust, and gained useful information. 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.

The majority of the House of Lords held that the Mr Boardman had to account to the trust for his profits 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.

Mr Boardman had been honest. The 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.

In Regal (Hastings) Ltd v Gulliver (1967), directors of a company were liable for having exploited an opportunity which came to them in their position as directors. Their honesty and the fact that the company could not have taken the opportunity due to lack of funds were irrelevant.

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; for example, 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 2

Section 9 of the Wills Act 1837 provides that dispositions intended to have effect on a person's death should be contained in a written will signed by the testator in the presence of two witnesses who then sign the will in the presence of the testator. Secret trusts do not comply with s9 because all the terms of the trust are not set out in the will. Fully secret trusts arise where a will contains an absolute gift to a legatee; outside the will the legatee agrees to hold the legacy on trust. In half secret trusts, the will indicates that there is a trust but does not set out its terms.

In both fully and half secret trusts, the testator must communicate the terms of the trust to the legatee and the legatee must agree. In fully secret trusts, the terms must be communicated before the testator's death (Wallgrave v Tebbs (1855); Re Boyes (1884). In half secret trusts, the terms of the trust must be communicated before or at the time the will is executed (Re Keen (1937); Re Bateman (1970)).

In McCormick v Grogan (1869), it was held that fully secret trusts should be enforced because equity will not allow statute (s.9) to be used as an instrument of fraud. If a fully secret trust were not enforced, the legatee would take beneficially in accordance with the absolute gift in the will. This would be a fraud when the legatee has agreed to act as a trustee and, in reliance on the legatee's agreement, the testator has made a will leaving the legacy to him or her or has left the legacy unrevoked.

However, this does not explain why the secret beneficiary is allowed to benefit. Where the secret trustee refuses to abide by his or her agreement, the secret beneficiary is not defrauded; the secret trustee did not give the secret beneficiary a promise to hold on trust and the secret beneficiary did not rely on the promise to his or her detriment. There is an alternative suggestion that the fraud consists of the trustee's refusal to keep the promise made to the testator on which the testator has relied. Fraud would thus be prevented by refusing to allow the trustee to take beneficially by imposing a resulting trust for the testator's estate.

The prevention of fraud theory does not justify the enforcement of half-secret trusts. The fact that the legatee is to be a trustee is apparent on the face of the will. There is no possibility of X taking beneficially and therefore, no possibility of fraud by X.

The modern explanation why secret trusts are enforced is the '*dehors* the will' theory (Blackwell v Blackwell (1929)). This explanation runs as follows:

- The testator communicates to the secret trustee the terms of the intended trust, and the secret trustee accepts the obligation. This is an *inter vivos* declaration of trust. At this stage the legal title remains with the testator, and the trust is incompletely constituted.

- The testator dies, and the legal title is then transferred to the secret trustee/legatee under the testator's will. The trust is now completely constituted.

This solves the apparent contradiction with s. 9 Wills Act 1837, which requires any trust declared on death to be in the validly executed will. The secret trust is not declared on death: it is an *inter vivos* declaration of trust.

The *dehors* the will theory explains the decision in Re Gardner (No 2) (1923). The secret beneficiary died before the testator. A legacy contained in a will lapses and fails if the legatee predeceases the testator. However, in the much criticised decision of Re Gardner (No 2), it was held that the legacy should be paid to the deceased beneficiary's estate because he was a beneficiary under a trust created in the testator's lifetime and not a trust contained in a will.

In Re Young (1951), the secret beneficiary witnessed the testator's will. Under s.15 Wills Act 1837, a legacy to a beneficiary who witnesses the will is invalid. However, the beneficiary was allowed to benefit under the secret trust; the judge held that it was not a trust created in the will but one which was declared in the testator's lifetime.

The decision in Re Baillie (1886) is consistent with the lifetime declaration theory; a half-secret trust of land was held to be unenforceable because there was no written evidence of the lifetime declaration of trust in compliance with s. 53(1)(b) LPA 1925.

The dehors the will theory has not been universally adopted for fully secret trusts. If the trust includes land, the *dehors* the will theory would mean that the lifetime declaration would have to be evidenced in writing and signed by the testator to comply with s. 53(1)(b) of the Law of Property Act ('LPA') 1925. However, in Ottaway v Norman (1972) a fully secret trust of land, where the terms of the trust were communicated orally, was upheld despite the lack of writing. The point was not addressed but the decision might be justified on the basis that fully secret trusts are imposed to prevent fraud and are, therefore, constructive trusts, which are exempt from the requirement for written evidence by virtue of s. 53(2) LPA 1925.

If the *dehors* the will theory is correct and the trust is valid from the date of the lifetime declaration (as suggested by Re Gardner (No 2)), this would suggest that the testator cannot change the terms of the trust by revoking or changing his will, yet wills are ambulatory and are freely revocable until the testator dies.

In conclusion, the fraud theory cannot be used to justify half secret trusts. The *dehors* the will theory has found favour in more recent cases but is not free from difficulty.

Question 3

An express trust concerning land must be evidenced in writing which is signed by the person able to declare the trust (s53(1)(b) Law of Property Act ('LPA') 1925. Unfortunately, cohabitants rarely have such written evidence. They have to rely on implied trusts (resulting and constructive) which do not have to be evidenced in signed writing (s53(2) LPA 1925).Many argue that there should be legislation which gives courts a discretion to redistribute property between cohabitants as is the case with married couples who divorce. The courts could take account of non-financial contributions such as giving up work to look after family members whereas principles of property law are more restricted. Successive cohabitation bills based on the matrimonial model have failed to make it to the statute book.

Resulting trusts arise where a person contributes to the purchase price of property bought in the name of another. The claimant's contribution has to be to the initial purchase price; subsequent payments (such as mortgage payments and improvements) will not count (Curley v Parkes (2004)). The claimant acquires an interest which is proportionate to the amount of money contributed in the first place. According to Stack v Dowden (2007) constructive trusts are the preferred method of giving a cohabitee an equitable interest in a shared home.

In order to establish a constructive trust, the claimant must show that the parties had a common intention that (s)he should have an equitable interest and that (s)he acted to his or her detriment in reliance on that common intention (Lloyds Bank v Rosset (1991)). The common intention can be express or inferred.

An express common intention consists of an agreement or understanding that both parties should have an equitable interest. Usually this consists of discussions between the parties at the time of the purchase or exceptionally at a later date (Lloyds Bank v Rosset). There is no clear guidance on what acts suffice for detriment. In Grant v Edwards (1986), Nourse LJ suggested detriment was 'conduct on which the [claimant] could not reasonably have been expected to embark unless she was to have an interest in the house'. Presumably this would not cover non-financial acts such as looking after the home or family. However, Browne-Wilkinson LJ expressed the view that detriment was 'any act done by her to her detriment relating to the joint lives of the parties'. This formulation might include non-financial acts. In Eves v Eves (1975) physical labour decorating and maintaining the interior and exterior of the property was held to be sufficient detriment. Contributions to household expenses thereby freeing the legal owner to pay the mortgage were sufficient acts of detriment in Grant v Edwards.

In the absence of an express common intention, the court may infer such an intention from the conduct of the parties. In Lloyds Bank v Rosset Lord Bridge expressed the view that a common intention can be inferred only if the claimant made *direct* payments towards the purchase price or to subsequent mortgage instalments. These acts also satisfy the need for detriment.

In Le Foe v Le Foe (2001) the deputy High Court judge followed dicta of the House of Lords decision in Gissing v Gissing (1971) suggesting that the court might infer a common intention from an indirect contribution to the purchase price. The judge inferred a common intention to share ownership from an arrangement whereby the claimant made substantial contributions to household expenses thereby enabling the defendant to pay the mortgage. Without the claimant's assistance, the defendant could not have afforded the mortgage payments. In Stack v Dowden (2007) Baroness Hale and Lord Walker suggested that Lord Bridge's approach to inferring a common intention was too narrow but these comments were *obiter* because Stack concerned a property which was in joint names. The broader approach recommended in Stack was adopted by the for a sole name case in Abbott v Abbott (2008). However, this decision is not binding because it was a Privy Council case.

A claimant who has not contributed to the acquisition of the property financially but has, for example, looked after the home and/or family will not be able to establish an interest under a constructive trust in the absence of an express common intention. This is to be contrasted with a married partner, who would be able to claim a redistribution of the family's property under the Matrimonial

Causes Act 1973. A *common* intention is a misnomer; often the legal owner has no intention of giving the claimant an equitable interest. It is difficult and costly to gather the evidence to establish a common intention. The parties may have to recall conversations which took place many years previously. Establishing payments through bank statements etc. spanning several years can be challenging. The uncertainty over whether indirect payments to household expenses will lead to an inference of a common intention is unhelpful.

If the claimant establishes a common intention and detriment, the next stage is to quantify the interest. Here the court will take account of contributions which are not financial. In Stack v Dowden, the House of Lords held that if there is no express agreement, the court would infer the parties' intentions regarding the size of their respective shares in the property from the whole course of dealings. Baroness Hale envisaged that many factors could be taken into account to determine the extent of the claimant's intended share: advice or discussions at the time of the purchase, the purpose for which the house was acquired, the nature of the parties' relationship, whether they had children for whom they both had responsibility to provide a home, how the purchase was financed, how the parties arranged their finances, both initially and subsequently, how they discharged outgoings and household expenses, the fact that one party has brought about a substantial improvement to the property.

In Jones v Kernott (2009) the Supreme Court held that if there is no express agreement as to the shares, the court will infer the parties' intentions according to what would be fair having regard to the whole course of dealings. The Supreme Court also recognised that the parties' intentions as to their shares could change over time.

In conclusion, cohabitants seeking to establish an interest in the former family home are at a considerable disadvantage compared with married couples. Some would argue that this is unfair on parties to a longstanding relationship who have contributed by improving the home, bringing up the children of the relationship, working unpaid in a business. Although, such contributions count when quantifying an equitable interest (Stack v Dowden), they do not help a claimant to establish an equitable interest in the first place.

Question 4(a)

The Charities Act s4 provides that for a trust to be charitable, it must have an identifiable benefit and must benefit the public or a sufficient section of the public.

A small section of the public is accepted as being adequate for trusts which relieve poverty. A trust for poor relations will be charitable provided that it is not a gift to named individuals (Re Scarisbrick (1950)). In Re Segelman (1996), a trust for poor relations was held to be charitable; it was noted that the class was capable of increase. The 'poor relations' cases have long been regarded as anomalous but their charitable status was confirmed in HM Attorney General v Charity Commission for England and Wales (2011). In Dingle v Turner (1972), the House of Lords confirmed that poverty trusts for the employees of a company could also be charitable.

Charitable trusts must be for public benefit because they enjoy tax relief. Individuals should not be permitted to benefit their relations or employees at the expense of the taxpayer. However, poverty trusts are regarded as being sufficiently altruistic that they are not subject to such stringent rules as other charitable trusts.

Question 4(b)

The public benefit requirement is particularly rigorous when applied to trusts to advance education. There is no presumption of benefit. A trust seeking charitable status must prove that it has an identifiable benefit.

In Oppenheim v Tobacco Securities Trust Ltd (1951) it was held that a group will not constitute a section of the public if the members are numerically negligible or linked by a personal nexus. A personal nexus exists if the members of the group intended to benefit are related to a particular individual (Re Compton (1945)) or employed by a common employer (Oppenheim) or members of an association such as a trade union.

The strict approach is justified because charities enjoy various tax exemptions and individuals should not be able to claim tax benefits for non-altruistic trusts for e.g. their own relatives or as a payment in kind for their employees. However, the personal nexus bar produces anomalies as Lord MacDermott pointed out in his dissenting judgment in Oppenheim. He maintained that the group of 110,000 employees in Oppenheim was a sufficient section of the public. He argued that it was strange that inhabitants of a town numbering less than 110,000 would constitute a section of the public but employees of a large company would not, despite being more numerous. He pointed out that the definition of 'personal nexus' was arbitrary; trusts to educate students at a university or a private school are charitable, despite the fact that the students (or their parents) are linked by contract with the university or school.

A trust to advance education is charitable if it is expressed to be for the benefit of a public group but the settlor expresses a (non-binding) wish that the trustees show preference for relations or employees linked by a common employer (Re Koettgen (1954)). It is hard to justify this decision. In Caffoor v Income Tax Commissioner for Colombo (1961) Lord Radcliffe observed that the Koettgen decision came close to contravening the principle established in Oppenheim.

The personal nexus test prevents certain trusts securing the tax privileges of charitable status, and at the same time it denies them the trust law advantages such as exemption from the beneficiary principle, the rule against inalienability and the certainty of objects requirement. Lord Cross, in Dingle v Turner (1972), advocated the introduction of two separate tests of charitable status. The first test would exist purely for determining whether the trust should enjoy tax benefits and would deny these benefits to personal nexus trusts. The second test would be used to decide whether the trust was charitable for all other purposes and in this context, there was no reason for barring personal nexus trusts.

Private schools will not be able to demonstrate public benefit if they exclude 'the poor' i.e. people of moderate means (Independent Schools Council v Charity Commission for England and Wales (2011)). Children whose parents can afford the school fees are not a sufficient section of the public. In order to be charitable, the school must make more than a *de minimis* or token provision for the less well-off. Such provision should focus on direct benefits which could include scholarships, bursaries and arrangements giving students from local state schools access to the school's facilities and teaching staff. It is questionable why poverty should play a part in the public benefit test when it does not appear in the Charities Act or previous case law.

SECTION B

Question 1

The trust property

Celia owned an equitable interest in the trust property. The trust became a bare trust on Celia's thirtieth birthday. However, the trustees do not appear to have transferred legal title to the trust property to Celia.

Section 53(1)(c) LPA 1925 provides that in order to be valid, a disposition of a subsisting equitable interest must be in writing and signed by the person disposing of the same or by their agent authorised in writing.

As a beneficiary under a bare trust, Celia was entitled to direct the trustees to hold on trust for another. According to Grey v IRC (1960) a direction to trustees to hold on trust for another is a disposition of the equitable interest and must comply with s53(1)(c). Celia's oral direction was ineffective. The equitable interest will pass as part of her residue to Oxfam.

Shares in Ellco Ltd

In order to transfer legal title to shares, Celia should have sent a signed stock transfer form and the share certificate to Simon or the company. Legal title does not pass until the transferee is registered at the company. In this case, Simon has not acquired legal title.

In Milroy v Lord (1862), it was held that equity regards the transfer as complete if the transferor has done everything necessary for them to do in order to transfer legal title. According to Re Rose (1952), this point is reached when the transferor parts with the stock transfer form and share certificate beyond recall. In this case, the every effort test is not satisfied because Celia has not handed over the share certificate

Equity will also regard the transfer as complete if the stage has been reached when it would be unconscionable for the transferor to change his or her mind (Pennington v Waine (2002)). Pennington is a controversial decision. Lady Arden said that it was impossible to lay down a definitive list of factors making a withdrawal from the attempted gift unconscionable. The factors in Pennington itself were: the donor intended an immediate gift, she had told the donee of the gift, the company's auditor had told the donee that there was nothing he needed to do, the donee had become a director on the faith of the intended gift. In Curtis v Pulbrook (2011), the judge said that Pennington was a case of proprietary estoppel, which applies where a person acts to their detriment in reliance on an assurance that they should have an interest in property. The loan will not be regarded as detriment because it was made before Simon was told of the gift. The facts do not tell us whether Simon has acted to his detriment. If he has not, it is unlikely that the promised gift will be saved and the shares will pass to Oxfam.

The paintings

Celia intended to make an outright gift of the paintings to Peter. Chattels can be transferred by physical delivery or by deed (Jaffa v Taylor House Gallery (1990)). The letter is unlikely to satisfy the requirements for a valid deed in s. 1 LP (MP) Act 1989 (in writing, shows that the parties intend it to be a deed and witnessed). The paintings have not been delivered to Peter.

As Celia's executor, Peter automatically acquired legal title to Celia's assets when she died. Under Strong v Bird (1874), the gift is perfected if Celia intended an immediate unconditional gift in her lifetime and did not change her mind before she died. The facts suggest that Celia intended an immediate gift but that her intention did not continue until her death. Celia's will leaving the paintings to Bill indicates that she changed her mind. Therefore, Peter cannot rely on Strong v Bird and the paintings will pass to Bill.

The every effort test is not satisfied because Celia did not take the necessary steps to transfer title to the paintings. (There is no suggestion of unconscionability.)

Park House

Celia intended to transfer Park House to Judith to act as a trustee. For the trust to be valid, Celia must make a valid declaration of trust and transfer the property to the trustee in the correct manner in order to constitute the trust.

In order for a declaration of trust over land to be enforceable, the declaration must be evidenced in signed writing (s53(1)(b) LPA 1925). The letter would suffice assuming that Celia signed it.

A deed is required to transfer the legal title to land (s52 Law of Property Act 1925) and the transferee must be registered at the Land Registry. This has not occurred. However, Celia did all that she needed to do in order to transfer legal title because she handed the deed to Judith. In these circumstances, equity regards the transfer as complete (Mascall v Mascall (1984). Judith can attend to registration. Having effectively created a trust, Celia was not able to dispose of Park House by will to Bill.

Question 2

(i)

In order to be valid a declaration of trust must have the three certainties (intention, subject matter and objects) (Knight v Knight (1840)).

A trust can be created without the use of the word 'trust' but the testator's words must impose a binding obligation on the trustee to deal with the property in a particular way. It has been held that precatory words expressing a wish or a hope do not demonstrate an intention to create a trust (Re Adams and the Kensington Vestry (1884); Lambe v Eames (1871)).The court will ascertain the testator's intention from the whole will (Comiskey v Bowring Hanbury (1905).

The word 'knowing' does not impose a binding obligation on Fatima to pay her mother's rent and expenses. Fatima could keep the entire £50,000 for herself.

If Aziz intends to impose an obligation to provide for his mother, the will should state that Fatima is to hold on trust for Zeinab.

A trust is void if the trust property or the share of the beneficiary is uncertain. It is acceptable to provide an objective formula for calculating the amount to be given to the beneficiary (Re Golay's Will Trusts (1965), where "a reasonable income from my other properties" was held to be ascertainable by objective means).

There may be an objective formula to ascertain the amount to be paid in respect of Zeinab, namely the usual sums which Aziz has paid out over the last few years, the amount of rent and usual outgoings.

To avoid all doubt, it may be better to specify an amount to be held on trust for Zeinab or create a discretionary trust for Fatima and Zeinab and leave a letter of wishes advising the trustee that Aziz wants him to pay his mother's rent and outgoings from the trust funds.

(ii)

Unincorporated associations have no legal personality and cannot, therefore, hold property or receive gifts. However, the courts have devised ways of construing legacies to unincorporated associations, enabling them to be valid.

Aziz intended the club to hold the legacy on trust to carry out a purpose. The purpose benefits the members. In Re Lipinski (1976), it was held that such trusts are valid and fall under one of two constructions.

- First it could be construed as a gift to the members as an accretion to the club's funds to be dealt with in accordance with the rules. This construction was used for an outright gift to a club in Re Recher (1972). Also, see Re Horley Town Football Club (2006). In Re Lipinski, it was held that the construction could be applied equally to a trust for a purpose which benefits members especially where the resulting property will belong to the members.

  There will be no perpetuity problems provided the club's rules allow members to wind up the club and spend the club's funds or divide them between themselves (Re Grant (1980)).

- Alternatively it may be valid as a trust for a purpose which brings a sufficiently direct and tangible benefit to ascertainable beneficiaries (the members) who would be able to enforce the trust as in Re Denley (1969). The members of the club would all be ascertainable and there would be no problem with the rule against inalienability because the whole of the fund would be spent on the construction of the changing rooms.

It is likely that this trust is valid.

(iii)

This is a discretionary trust- trustees are bound to distribute. The testator has used the obligatory word 'shall'.

The certainty of objects test for discretionary trusts is the given postulant test: can it be said with certainty whether any given postulant is or is not a member of the class of objects (McPhail v Doulton (1971). This requires conceptual or linguistic certainty. Evidential uncertainty occurs where a claimant cannot prove that he falls within the description but this does not lead to failure of the trust (*Re Baden's Deed Trusts* (No 2) (1972).In Re Baden, Stamp LJ decided that if you had to say of any individual that you did not know whether or not he fell within the class of objects, the trust was void. The other judges disagreed. Sachs LJ insisted that the description of the objects must be conceptually certain but the burden was on the claimant to show that he fell within the description. If he could not do this, either because he was outside the description or because it was not known whether he was in or out, the trust could still be valid. Thus, 'don't knows' did not lead to failure if the description was conceptually certain. Megaw LJ held that the trust was valid if one could say of a substantial number that they fell within the class even if, as regards a number of other objects, it had to be said that they were outside or it was not known whether they were in or out.

Even if the description of the objects is certain, the discretionary trust will be void (due to administrative unworkability) if the definition of the beneficiaries is "so hopelessly wide as not to form anything like a class" (per Lord Wilberforce in McPhail v Doulton). Lord Wilberforce used "the residents of Greater London" as an example. In R v District Auditor ex p. West Yorkshire MCC (1986) a discretionary trust for 2.5 inhabitants of West Yorkshire was held to be void due to administrative unworkability.

A discretionary trust which is capricious (irrational) will be void.

In this case, the gift of residue would probably be void because it does not satisfy the given postulant test. There are no objective criteria to indicate who would be a 'worthy young cricket player'. Also the number of young cricket players may also lead to failure of the trust due to administrative unworkability. Capriciousness is not an issue because Aziz clearly has a love of cricket.

The words 'worthy' and 'young'" are too vague. Mr Bell should be more specific e.g. 'members of the under 21 England cricket squad' or require trustees to run an annual tournament and award prizes to the winners or give to a charity or other organisation which promotes young cricket players.

Question 3

(a) whether they can claim remuneration and get the assistance they suggest;

Trustees must not profit from their trust, so they can claim payment only in closely-defined circumstances.

Payment was not authorised by the will.

Section 29 Trustee Act 2000 allows professional trustees (ie acting in a professional capacity) to charge reasonable remuneration for services they provide to the trust

A professional trustee is one who acts in the course of a profession or business which consists of or includes the administration of trust or aspects of such administration and s/he provides such services to the trust – s28(5). Hana is an accountant but does her work include the administration of trusts? If so, she is entitled to reasonable remuneration, if her co-trustee Stephen, agrees in writing.

Stephen would not be regarded as acting in a professional capacity because his professional work does not include the administration of trusts. If Stephen wishes to charge fees he would need to seek authorisation from the court (which is unlikely to be granted unless there are some special circumstances justifying payment). He cannot get the beneficiaries' consent because Zach is under 18.

Trustees are, though, entitled to out-of-pocket expenses in administering the trust under s.31 TA 2000.

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

Trustees must appoint the agent in writing and give the agent a policy statement. The trustees should review the agent's performance and the policy statement (s22 TA 2000).

The trustees owe a duty of care (s1 TA 2000) in the appointment of the agent, the preparation of the policy statement and the reviews. They would be expected to exercise such care as is reasonable in the circumstances. The standard would be higher for Hana; she would be held to the standard of a reasonable professional in her field.

The trustees will be liable for losses caused by the agent if they breached the above duties (s23 Trustee Act 2000).

Trustees can appoint additional trustees under s36(6) of the Trustee Act 2000. The investment adviser would be able to charge fees if the other trustees agreed (s28 Trustee Act 2000).

(b) whether Hana and Stephen can and should make the payments requested by Rebecca and Zach;

Under s31 Trustee Act 1925, trustees have a discretion to pay trust income for the maintenance, education or benefit of beneficiaries who are under 18. Zach's drama lessons would be regarded as falling within s31. However, beneficiaries cannot force trustees to exercise discretions. Beneficiaries aged 18 or more have the right to be paid trust income. Therefore, the trustees should have paid Rebecca the income on her half share from her eighteenth birthday.

Rebecca has an interest in remainder in capital but she is not entitled to be paid her half of the trust capital until she satisfies the contingency. Under s32 TA 1925 as amended by the Inheritance and Trustees' Powers Act 2014, it is possible for trustees to advance the whole share of a beneficiary who has an interest in capital. The payment must be for her advancement or benefit (which paying her expenses while at university would be). She must bring any payments into account when she becomes absolutely entitled.

The exercise of the power of advancement is at the trustees' discretion. Beneficiaries cannot insist that they exercise their discretion. The trustees' reason for their refusal was incorrect, however, and they could be in breach of their duty to consider whether to make the advancement.

(c) whether the beneficiaries can end the trust or compel the trustees to retire.

Under <u>Saunders v Vautier,</u> if all the beneficiaries are *sui juris* and between them absolutely entitled, they can agree to end the trust and call on the trustees to transfer the trust property to them in such shares as they agree. However, such an arrangement is not possible here because Zach is under 18.

The beneficiaries could apply for the court to consent to a variation or revocation of the trust on Zach's behalf under s1(1) (a) Variation of Trusts Act 1958. The court will not consent unless the variation is for his 'benefit'. The courts do not approve of young beneficiaries receiving money too early. In Re Holt the court approved a scheme where the beneficiary's entitlement was delayed in terms of age but this disadvantage was offset by a prior life interest being surrendered.

The settlor's intention is not a significant factor (Goulding v James) but the proposed arrangement must not be a complete resettlement (Re Ball's ST); it must not destroy the substratum of the trust which it would not in this case.

The Beneficiaries cannot appoint new trustees or remove the existing ones (s.19 TOLATA 1996 does not apply as Zach is only 16 so cannot give valid consent). They could apply to the court under s41 TA 1925 on the grounds that it would be difficult, inexpedient or impracticable to appoint new trustees without the court's intervention and that it would be expedient for the court to act. There does not appear to be any reason for the court to make an order.

Question 4(a)

Georgina

Clearly, Georgina has breached her duties as trustee but a personal claim is unlikely to yield the full amount of the loss due to Georgina's bankruptcy. A proprietary claim, on the other hand, will have priority over her creditors.

Georgina has mixed trust funds with her own money on two occasions. Only equitable tracing can identify the claimant's money in a mixed asset. The beneficiaries can use equitable tracing because they have an equitable interest in the property.

(i) A year ago, Georgina mixed £40,000 of trust money with £10,000 of her own money in a current account from which withdrawals were made. It is necessary to establish whose money was spent on the valuable shares and whose money was dissipated on the Lowco shares.

In Re Hallett's Estate (1880), it was established that a trustee is deemed to spend his/her own money first. This would mean that Georgina's money (with only £10,000 of trust money) was used to buy the Hillco shares and the remaining £30,000 of trust money was dissipated on the Lowco shares and cannot be traced.

Re Oatway (1903) qualified the principle in Re Hallett; the trustee will be presumed to have acted in the best interests of the trust and the beneficiaries' charge subsists over the mixed fund and any asset purchased with it. Thus, the beneficiaries could claim that £20,000 of trust money was spent on the Hillco shares and recover the increased value of £30,000.

(ii) Georgina no longer has the £17,000 or traceable assets. A personal claim would be pointless due to Georgina's bankruptcy.

(iii) Three months ago, Georgina mixed company money with her own funds and used the mixed fund to buy an asset. In Foskett v McKeown (2001), it was held that the beneficiary can either claim a proportion of the asset corresponding to the proportion of purchase money which it contributed, or a lien over the asset to secure a personal claim for the loss. In this case it would be better to claim a lien for £50,000 which the company can enforce by demanding a sale of the yacht. A proportionate share would allow the company to claim two-thirds of the yacht (only £40,000).

Question 4(b) Kaye

Trustees are not vicariously liable for the defaults of their co-trustees but an action can be brought against them if they do not play an active part in the management of the trust, or if they do not ensure that trust property is under their joint control. Kaye has breached her duties by leaving the running of the trust and control of the trust property to Georgina. Kaye's failure to watch over Georgina could have led to the misappropriation of trust money. Passive trustees are equally liable according to <u>Bahin v Hughes</u> (1886). Kaye could be sued for the losses suffered by the trust fund and interest. Unless there is an exclusion clause in the trust instrument, she is unlikely to have a defence. She will be unable to rely on s61 TA 1925 because, although she may have acted honestly, she did not act reasonably and should not fairly be excused.

Kaye will be jointly and severally liable with Georgina. Therefore, she could be sued for the entire loss.

(c) Jessica

Jessica received trust money for her own benefit in breach of trust. According to <u>BCCI v Akindele</u> (2001), it is necessary to show that the defendant's knowledge made it unconscionable for her to retain the property or deal with it. Nourse LJ suggested that unconscionability was wider than dishonesty which has led to speculation whether constructive knowledge is sufficient. Jessica's conscience may well have been affected, given her suspicions about the payment. She probably recklessly refrained from asking questions or deliberately shut her eyes which would almost certainly be enough for unconscionability. If so, then she will be a constructive trustee and personally liable to pay the £17,000.

A proprietary claim is not available as all the money has been dissipated.

Harry

Harry assisted Georgina's breach of trust and will be liable as an accessory if he was dishonest (<u>Royal Brunei Airlines v Tan</u> (1995)). Dishonesty means not acting as an honest person (with the same knowledge and experience as Harry) would have acted. The standard of honesty is an objective one. It makes no difference that Harry did not appreciate that he was being dishonest (<u>Royal Brunei</u>, <u>Barlow Clowes v Eurotrust</u> (2006) explaining statements to the contrary in <u>Twinsectra v Yardley</u> (2002); <u>Abou-Rahmah v Abacha</u> (2007); <u>Starglade Properties v Nash</u> (2010)).

In <u>Barlow Clowes</u>, the Privy Council held that it is not necessary to show that the third party knew he was assisting a breach of trust. It is enough if he is aware that he is participating in some illegal scheme.

Harry will be liable to pay the trust compensation of £107,000.