CHARTERED INSTITUTE OF LEGAL EXECUTIVES

LEVEL 6 – UNIT 5 – EQUITY AND TRUSTS
SUGGESTED ANSWERS – JUNE 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 June 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

Equity regards the beneficiaries as the true owners of the trust property. Consequently, in some circumstances, the beneficiaries are able to end or vary the trust. A settlor may create a trust to protect the property from vulnerable, extravagant or irresponsible beneficiaries. A variation or termination of such a trust is likely to conflict with the settlor's intentions. However, a change in the beneficiaries' circumstances or new tax laws introduced after the creation of the trust can justify a variation even if it appears to disregard the settlor's intentions.

If all the beneficiaries are sui juris and between them absolutely entitled to the trust property, they can end the trust and divide the trust property between themselves or insist that it is transferred to new trustees to hold on different terms (Saunders v Vautier (1841)). The settlor may have created a trust to protect the trust capital against a beneficiary e.g. by giving the beneficiary a life interest or by imposing a high contingency age. Provided all the beneficiaries are sui juris and in agreement, they can end the trust and divide the trust capital between themselves. The settlor's intentions can be entirely disregarded.

If there are beneficiaries who are unable to consent, an application can be made to the court under the Variation of Trusts Act 1958 to sanction the variation. The court is able to consent on behalf of certain classes of beneficiary namely: persons who are incapable of consenting (e.g. infants), a person who may become entitled to an interest as being at some future date (or the happening of some future event) as a person answering a specified description, persons unborn and individuals who have future discretionary interests under a protective trust where the principal beneficiary's interest has not yet determined (s1(1)). The court cannot consent for beneficiaries who are ascertained and capable of consenting for themselves.

The court will grant the application if it is satisfied that the proposed variation is for the benefit of the person for whom it is asked to consent. The term 'benefit' is not defined by the Act. Case law confirms that the requirement is satisfied by financial advantages (including tax savings as in Ridgwell v Ridgwell (2007)) and also moral and social benefit as in Re Weston (1967) and Re CL (1969). The postponement of the vesting age where the beneficiary is shown to be irresponsible has been held to be for that beneficiary's benefit (Re T's Settlement Trusts (1964)). However, in Wright v Gater (2011) the judge decided that delaying a beneficiary's entitlement was not for his benefit.

The intention of the settlor may be one factor to be taken into account. The settlor (if alive) should be made a party to the application. In Re Ball's Settlement (1968) it was said that the courts can approve variations but not resettlements which destroy the whole intention of the settlor. The judge maintained that the substratum of the trust must remain.

The approach of the courts to the settlor's intention has been somewhat inconsistent. In Re Steed's Will Trusts (1960) the court refused to consent to a variation which removed a protective trust. The evidence showed that the testator had deliberately created a protective trust to prevent any benefit passing to a brother whom she regarded as a parasite. In Re Remnant's Settlement Trusts (1970) the court consented to the deletion of a trust provision which would have forfeited the interests of beneficiaries who were practising Roman Catholics. The court held that this variation was for the beneficiaries' benefit because it would prevent family dissension. However, the alteration to the terms of the trust clearly conflicted with the intention of the testator.

In Goulding v James (1997) the will of the testatrix created a trust for her daughter for life with remainder to her grandson, if he attained the age of 40. The testatrix postponed the son's entitlement because he had not 'settled down'. If the grandson failed to reach 40, his children were to take the estate. The grandson and daughter applied to the court to end the trust. They proposed that they should each receive 40% of the trust capital (contrary to the wishes of the testatrix) with the remaining 10% being held on trust for the grandson's children. The Court of Appeal approved the scheme on behalf of the grandson's children because it was for their benefit. Their lordships said that the court's only concern was whether the arrangement was for the benefit of those for whom it was asked to consent; the intention of the testatrix was of little if any relevance. Re Steed's WT was distinguished.

The purpose of the Variation of Trusts Act 1958 was to put trusts with infant and unascertained beneficiaries on a par with trusts where all the beneficiaries were adult and could end the trust under Saunders v Vautier. It was desirable to give beneficiaries this flexibility to avoid the adverse consequences of changes in the tax laws. In some cases under the Act the courts have deferred to the settlor's intention although this has not been universal. If the courts refuse to depart from the settlor's intention, trusts which have to rely on the Act are not placed on an equal footing with those where Saunders v Vautier applies.

Question 2

Generally, trusts are valid only if they have beneficiaries who can, if necessary, go to court to enforce them (Morice v Bishop of Durham (1804); Re Astor's Settlement Trusts (1952)). This is known as the beneficiary principle. The key feature of a trust is that the trustees are under a duty to carry it out; a duty can be said to exist only if there is someone who can compel its performance. For

this reason, beneficiaries are essential. The beneficiary principle means that non-charitable purpose trusts are generally void.

In Re Denley's Trust Deed (1969), it was held that trusts which are expressed as being for a purpose are valid if there are ascertainable beneficiaries who can enforce them. A trust to provide a sports ground for employees of a company was held to be valid because the employees derived a sufficient benefit to be able to enforce the trust.

Goff J distinguished purpose trusts where the benefit to individuals was sufficiently direct and tangible to give them locus standi to enforce the trust and those where the benefit was too abstract, indirect, or intangible. The latter are not valid because they offend the beneficiary principle. The trust for the maintenance …of good understanding between nations' and the 'preservation of the independence and integrity of newspapers', which was declared invalid in Re Astor's ST, could be regarded as an example of where the benefit to individuals was too abstract or indirect to give them locus standi to enforce the trust.

Prior to Re Denley, it was thought that beneficiaries had to have a proprietary equitable interest in the trust property in order to enforce the trust. It is unclear whether the employees in Re Denley had such an interest or a mere factual benefit in being able to use the sports ground. As a result of Denley, it is possible that a factual benefit from a trust is enough to allow beneficiaries to enforce it and thereby satisfy the beneficiary principle. The alternative explanation of Denley is that it was a more conventional discretionary trust (Re Grant's WT (1980)).

For the trust to be valid the beneficiaries must be 'ascertained or ascertainable'. It is unclear which certainty of objects test appertains to Denley trusts but if they are discretionary trusts, the given postulant test applies (McPhail v Doulton (1971)): it must be possible to say of any given postulant that s/he is or is not a member of the class of objects. The description of objects must be conceptually certain (Re Baden's Deed Trusts (No 2) (1973)). Denley trusts will fail if the class of objects is too wide to be administratively workable. In District Auditor, ex parte West Yorkshire Metropolitan County Council (1986) a purpose trust for 2.5 million inhabitants of West Yorkshire failed due to administrative unworkability. In Re Harding (Deceased) (2007) it was accepted that a trust for 'the Black community' of four named London boroughs would have been void for administrative unworkability had it been a non-charitable trust. The objection to these trusts may be that members of such a large class of objects would have little interest in enforcing the trust.

In some cases the purpose has been deemed to express the motive for the gift and the beneficiary is entitled to the property absolutely. In Re Andrews Trust (1905), a fund was raised for the education of children of a deceased vicar. It was held that when they ceased full time education, the fund should be divided between them absolutely. The same approach was used in Re Osoba (1979). In both cases, the educational purpose was merely the motive behind an absolute gift to the beneficiaries.

The reasoning in Re Denley was applied in Re Lipinski's Will Trusts (1976) to a gift to a non-charitable unincorporated association on trust to construct new buildings for the association and to make improvements to the said buildings. The judge held that this non-charitable purpose trust was valid because the members of the association were ascertainable beneficiaries who would have a sufficiently direct benefit from the trust to be able to enforce it.

There are some anomalous cases where trusts for non-charitable purposes with no ascertainable beneficiary have been upheld. In Re Hooper (1932), it was held that a trust for the upkeep of various family graves was valid despite the absence of a beneficiary to enforce the trust. In Re Dean (1889) and Pettingall v Pettingall (1842), trusts to maintain specific animals were held to be valid despite the conflict with the beneficiary principle. Trusts for the saying of private masses are also valid (Re Khoo Cheng Teow (1932)).

These exceptions to the beneficiary principle have been described *as* "concessions to human weakness" (Re Endacott (1960)). They are regarded as anomalous and the courts have refused to extend them to similar situations.

While these anomalous trusts are valid, they are unenforceable. There is no beneficiary who can compel the trustees to carry out the trust. The trustees need not perform the trust if they do not wish to do so. For this reason, they are called 'trusts of imperfect obligation'. These trusts conflict with the statement because although they do not have beneficiaries with equitable interests capable of enforcing them, they are nevertheless valid.

Non-charitable purpose trusts will be declared void if they offend the rule against inalienability. The trustees must have the power to spend the trust capital within the perpetuity period of 21 years. However, the courts have allowed some trusts which do not appear to comply with the rule e.g. Re Dean where a trust for the maintenance of the testator's horses and hounds for 50 years was held to be valid.

In the main, trusts are valid only if they have beneficiaries to enforce them. The beneficiaries must be legal persons, namely humans or companies. In other jurisdictions, trusts are valid if the settlor has appointed a protector to enforce the trust. The protector does not have to be a beneficiary. This arrangement would make it possible to create a much wider range of non-charitable purpose trusts but it has not been tested in the UK.

Question 3(a)

A freezing order (formerly known as a Mareva injunction) is an 'interim' (or 'interlocutory') injunction granted before a full trial. It prevents a defendant (or third party holding the defendant's assets) from dissipating or removing assets from the jurisdiction. It protects the interests of the claimant by ensuring that, should the claimant be successful, there will be property of the defendant available to satisfy the judgment. However, it can result in extensive harm to a defendant, including loss or disruption of his business and loss of reputation. Accordingly, there are stringent requirements which must be satisfied before a freezing order will be granted.

There is a three-part test to be satisfied (Third Chandris Shipping v Unimarine (1979)). First, the claimant must establish that he has a good arguable case. This is a more stringent requirement than that set out in American Cyanamid Co v Ethicon Ltd (1975) where the test for other interim injunctions was said to be 'a serious question to be tried'. The stricter test ensures that an order, which will seriously infringe the defendant's rights, is not imposed lightly. If, at the date of the court hearing, proceedings have not been commenced, the court will require an undertaking that an action will be filed. Secondly, the applicant must satisfy the court that there are assets against which an order can be made. Initially, a freezing order could be obtained only against assets in the jurisdiction but there is now the possibility of obtaining a worldwide order. The third condition is that

the claimant must produce strong evidence that there is a real risk of dissipation of assets so as to render any judgment the claimant may obtain nugatory.

The subject-matter is normally an identified sum of money or specific assets. The defendant will be permitted to use money for normal expenses including reasonable legal costs of defending the action.

If defendants were given notice of the application for a freezing injunction, they could dissipate or remove the assets thereby thwarting the application and the applicant's chances of enforcing judgment in the case. In the interests of applicants, freezing orders are often made ex parte without granting the defendant a hearing. This imbalance is redressed by requiring the applicant to make full disclosure of all matters which it is material for the judge to know, give particulars of his claim and the points made against it by the defendant (Third Chandris Shipping Corpn v Unimarine SA (1979)). The injunction will be discharged if it is subsequently discovered that full disclosure has not been made.

The court may grant an ancillary disclosure order against the defendant but will protect the defendant by requiring an undertaking from the applicant that he will not use the information revealed by the disclosure order to start civil or criminal proceedings in other jurisdictions. In Den Norske Bank v Antonatos (1998) it was held that a defendant can refuse to provide information which would infringe his privilege against self-incrimination.

The applicant must give an undertaking to pay damages in case the action is not successful (HM Revenue & Customs v Egleton (2006)). If appropriate, the undertaking should be supported by a bond or security. The damages should compensate the defendant for any loss of business profits or other losses incurred due to the freezing order.

(b)

A search order (previously 'Anton Piller order') is also an interim injunction. It prevents a defendant from destroying vital evidence before the trial by allowing the applicant to enter the defendant's premises and search for, examine, remove or copy the articles specified in the order. The courts have to balance potential injustice to the applicant if vital evidence is destroyed and the violation of the defendant's privacy and disruption to business or family.

In Anton Piller KG v Manufacturing Processes Ltd (1976) it was said there are three pre-conditions. First, there must be an extremely strong prima facie case (a higher standard than for other interim injunctions). Secondly, the damage, potential or actual, for the applicant must be very serious. Thirdly, there must be clear evidence that the defendants have incriminating documents or articles and there is a real possibility they will destroy them before the trial. Lord Denning added a fourth requirement in Anton Piller, that the order would do no real harm to the defendant or his case.

'Practice Direction 25A Interim Injunctions' provides the order must be served by an independent supervising solicitor who must explain in everyday language what the order means. The order must be served during office hours so that the defendant can obtain legal advice. The search must take place in the presence of the defendant and a list must be made of any items to be removed and the defendant given the opportunity to check it. Aggravated damages may be awarded for seizing items which are not covered by the order (Columbia Pictures Inc v Robinson (1986)).

Search orders are granted ex parte because the element of surprise is essential to prevent the defendant destroying or hiding the evidence. The defendant can apply to the court at short notice for variation or discharge of the order provided the claimant and his solicitor and the supervising solicitor have been allowed to enter the premises although not commenced the search.

In order to safeguard the defendant's rights, the applicant must give an undertaking to pay damages in case the action is not successful.

A search order should not generally require a defendant to disclose information which would incriminate him (Rank Film Distributors Ltd v Video Information Centre (1982)).

In Chappell v United Kingdom (1990) the European Court of Human Rights held that a search order did not infringe a defendant's right under Article 8 of the European Convention of Human Rights (right to respect for private and family life) since the aim of protecting the rights of others was legitimate and the safeguards were sufficient to ensure that action was only taken where it was necessary.

Question 4(a)

Every effort test

In order to make a perfect gift, the donor must transfer the property in the correct manner to the donee. A settlor who wants to create a trust by transferring property to trustees must convey the property to the trustees using the appropriate formalities; otherwise the trust is void and the maxim that equity will not assist a volunteer applies. The every effort test is an exception to this maxim.

The exception has been applied where the donor has done everything necessary to transfer the property but there is an outstanding step to be taken by a third party. For example, the transfer of legal title to company shares is not complete until the transferee is registered by the company. Similarly a gift of the legal estate in land is not effective until the donee is registered at the Land Registry. In these cases, the final stage in the transfer formalities is in the hands of a third party and is outside the donor's control.

Such gifts are effective in equity before the legal title is transferred if the donor has done everything required of him or her to transfer legal title (Milroy v Lord (1862); Re Rose (1952)). In Re Rose it was held that this stage is reached for gifts of shares when the transferor has parted with the stock transfer form and share certificate beyond recall and it lies in the transferee's power to be registered as the new shareholder. Once that point is reached, it is too late for the donor to withdraw. In Mascall v Mascall (1985) a father had executed a transfer deed of land in favour of his son. The father handed the deed to his son but then changed his mind. It was held that it was too late for the father to change his mind because he had done everything he had to do to transfer title and the only remaining step was for the son to get himself registered.

The insistence on some formalities provides time for donors to change their minds. They are not bound until they have parted with the relevant documents. However, the every effort test ensures that a donor's intention to make a gift is not defeated by, for example, the donor's death before registration or the company's refusal to register the donee. The every effort test does not create

uncertainty because there is a clearly defined point at which the transfer is complete in equity.

Question 4(b)

Unconscionability

Unconscionability is a further exception to the maxim that equity will not assist a volunteer.

Proprietary estoppel may prevent a defendant from denying a promised gift. An estoppel arises where the defendant makes an assurance that the claimant will be given property and, in reliance on the assurance, the claimant acts to his or her detriment. In Gillett v Holt (2000), it was said that the three elements are intertwined and the courts favour a broader approach where they consider whether it would be unconscionable to deny the claimant that which was promised or understood.

The issue of unconscionability also arose in T Choithram v Pagarani, Mr Pagarani orally declared that he was giving company shares to 'the Foundation'. The Foundation was a charitable trust; the trustees were Mr Pagarani and a number of other individuals. Mr Pagarani died before formally transferring the shares to the trustees. This appeared to be an incompletely constituted trust and the maxim 'equity will not assist a volunteer' came into play. However, Lord Browne-Wilkinson said that equity will not strive officiously to defeat a gift and the Privy Council held that the trust was valid in equity. Mr Pagarani had done enough to declare himself a trustee (trusts over personalty can be declared orally) and it would have been unconscionable for him to have retracted. This was a sensible decision because, to have decided otherwise, would have defeated the settlor's intention.

Pennington v Waine (2002) concerned an attempted gift of shares. The donor (Ada) wanted to give her nephew (Harold) shares in a company so that he would qualify to become a director. Ada handed the stock transfer form to her agent but she died before Harold was registered at the company. Ada and her agent had told Harold about the gift and the agent had also told him there was nothing which he needed to do. Believing that he had been given the shares, Harold became a director of the company. It was held that the gift was complete in equity because it would have been unconscionable for the donor to have changed her mind.

Arden LJ did not define unconscionability in this context but said it was significant that the donee had been told about the gift and had become a director.

Arden LJ suggested that the courts should not be too eager to declare attempted gifts to be void on a technicality because this runs counter to the donor's intention. She relied on Choithram and said that equity should not strive officiously to defeat Ada's intended gift. Critics argue that Choithram should not have been used as a precedent because it was an entirely different case relating to a declaration of trust and not an attempted gift as was the case in Pennington.

In Pennington, giving effect to the gift carried out the donor's intention because she died without changing her mind. She thought that her agent was dealing with the registration of the donee. However, the point at which it becomes unconscionable for a donor to change his or her mind is unclear due to the

uncertainty inherent in the term 'unconscionability'. If it would be unconscionable for the donor to recant once he has told the donee about the gift, then donors do not have any cooling-off period in which they can change their minds.

In Curtis v Pulbrook (2011) the judge suggested that Pennington was a case of proprietary estoppel, which is a recognised exception to the rule that equity will not perfect an imperfect gift. If this is the case, the donor can change his or her mind unless the donee has acted to his or her detriment in reliance on the gift being made.

Pennington has been heavily criticised because donors may no longer be protected against being immediately bound by impulsive gifts and it may lead to uncertainty.

SECTION B

Question 1(a)

The investment in company shares

The beneficiaries may sue the trustees for compensation if they have breached a duty in relation to the investments which has caused loss to the trust fund.

Trustees have a duty to invest the trust fund and may invest it as though they were beneficially entitled (s.3 Trustee Act ('TA') 2000). The company shares were an authorised investment.

The trustees owed a duty to have regard to the standard investment criteria under s.4 TA 2000; they should have considered the suitability of the shares and the need for diversification. Further information is needed as to whether they examined the suitability of the shares for the size of the trust and the nature of the beneficial interests and whether they took account of the level of risk. The fact that they invested the entire trust fund in company shares may suggest that they did not consider the need for diversification.

The trustees will be in breach of trust if they did not obtain advice from someone they reasonably believed to be qualified to advise them under s5 TA 2000. Furthermore, they should have reviewed the investments (s5). They owed a duty to apply such standard of care as was reasonable in the circumstances having regard to the knowledge, skill and any professional expertise they had or professed to have (s.1).Thus, Victor might be expected to exhibit a higher standard of care due to his employment in insurance (depending on his role with the insurance company).

Their duty was to obtain the best financial return for the beneficiaries setting aside their moral, political and social views. A company's environmental record was not a relevant consideration (Cowan v Scargill (1985)).

The trustees are expected to achieve the same level of growth as that which a prudent trustee observing all his duties would do (Nestlé v National Westminster Bank plc (1988)).

The loss resulting from Harold's disappearance

Trustees are not vicariously liable for the agent's defaults (s.23 TA 2000). They are liable only if they have breached a duty in relation to the appointment of Harold which has caused loss.

They were permitted to delegate their 'delegable' functions under s11 TA 2000. As the delegation relates to asset management, the appointment of the solicitor should have been evidenced in writing and the trustees should have given the agent a written policy statement giving guidance on how to exercise the function (s.15 TA 2000). Under s22 they should have reviewed the agent's work and the policy statement from time to time and considered whether to take action.

Even if the delegation itself complied with these requirements, it seems that the trustees may have failed to comply with statutory duty of care in s.1 when selecting Harold (if they were aware of his problems with the SRA) and possibly reviewing his activities, so they will be liable for the loss (s.23).

Tracy's liability

While Victor seems to be the main driving force behind any breaches of trust, Tracy cannot be passive (Bahin v Hughes (1886)). Trustees are under a duty to watch over and correct each other's conduct.

If a breach of trust and loss can be established, both Victor and Tracy are jointly and severally liable. If Tracy is sued alone, she could claim a contribution from Victor under the Civil Liability (Contribution) Act 1978 on the basis of what was just and equitable, measured according to Victor's level of culpability.

Tracy might seek a defence under s.61 TA 1925 on the ground that she acted honestly and reasonably and ought fairly to be excused, but the courts are reluctant to relieve passive trustees.

(b)

Ben has a contingent interest in the trust and this includes an interest in trust income.

Under s.31 TA 1925, the trustees had power to apply the income on Ben's half share of the trust fund for his maintenance, education or benefit. Violin lessons would undoubtedly qualify. The trustees could not pay the income direct to Ben because he is too young to give a good receipt, but they could have paid for the lessons direct or given the money to Ben's parents.

However, the trustees' refusal to grant the request is not a breach of trust. While the beneficiary is a minor, s 31 gives the trustees a discretion to apply income for his maintenance, education or benefit. Beneficiaries cannot force trustees to exercise their discretions. The court will not intervene if the trustees acted in good faith and properly considered whether to exercise the discretion.

Thus, neither Tracy nor Victor are liable for their refusal to apply trust income for Ben.

(c)

Victor cannot retire under s.39 TA 1925 because he will not leave two trustees in office. Trustees can retire under s.36 TA 1925 provided they are replaced. The continuing trustees make the new appointment. The continuing trustees are Tracy (and Victor, if he is willing to join in). Tracy could thus block the retirement by refusing to co-operate in the appointment of the new trustee.

In any event, a trustee who retires does not cease to be liable for his breaches of trust committed while in office.

Question 2

Beth will have to establish that Adam held the legal title to the house on trust for her. The presumption is that a sole owner of the legal estate is also the sole equitable owner. The burden will be on Beth to prove that she has an equitable interest. Unlike express trusts, resulting and constructive trusts can be created without writing (s53(2) Law of Property Act 1925).

Beth cannot claim an interest under a resulting trust because she made no direct contribution to the purchase price at the time of purchase (Curley v Parkes (2004)). The payment for furniture was not a contribution to the purchase price. In any event, constructive trusts are more appropriate for determining the interests of cohabitees (Stack v Dowden (2007)).

To establish a constructive trust, Beth will have to show 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.

An express common intention exists if there was an 'agreement, arrangement or understanding' that the house should be shared beneficially. Adam's statement that he would treat it as Beth's home may have been intended to be a statement that she could live there, but not an agreement that she should have a beneficial interest. However, Beth could argue that there was a common intention that the house would have been in joint names but for the mortgagee's stance. In Grant v Edwards (1986) the party who would become the sole legal owner of the house explained that it would be better not to convey it into joint names because it would prejudice the claimant's divorce. This was sufficient evidence of an express common intention that the house was jointly owned. The court reached a similar decision in Eves v Eves (1975). Grant and Eves are controversial decisions. Arguably, the 'excuse' why the house is not in joint names shows that the legal owner had no intention of sharing the beneficial interest.

If the court decides there is insufficient evidence of an express common intention, Beth will have to persuade the court to infer a common intention which may prove difficult. In Lloyds Bank v Rosset, Lord Bridge said that a common intention could be inferred only from direct contributions to the price such as paying the deposit or some of the mortgage instalments. Beth's payments for for furniture and household expenses were not direct contributions.

Beth might argue that her substantial contributions to household expenses were indirect contributions to the purchase price because they freed up Adam's resources to pay the mortgage. Indirect contributions were not sufficient for the court to infer a common intention in Gissing v Gissing (1971) nor Tackaberry v Hollis (2007). However, in Le Foe v Le Foe, the High Court judge felt able to infer a common intention from the wife's substantial contribution to household expenses pursuant to an agreement that the parties would share the mortgage and expenses equally with one paying the mortgage and the other paying the general household expenses. There have been *obiter dicta* suggesting the Lord Bridge's statement ruling out indirect contributions might be too narrow (House of Lords in Stack v Dowden).

If Beth is able to establish a common intention (whether expressly or by inference), her payment of the household expenses will also suffice for detrimental reliance (Grant v Edwards).

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 when the property was acquired. If there is no evidence of any such agreement or discussion, the court will infer the parties' intentions 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.

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.

It is arguable that the parties intended to have equal shares at the beginning (because it would have been a joint purchase had it not been for Beth's credit rating). The fact that they opened a joint account and Beth's contributions to the joint account will be significant according to Stack v Dowden.

Beth could argue that she should have a remedy through 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 her detriment. The three elements are intertwined and the courts are favouring a broader approach where they consider whether it would be unconscionable to deny the claimant what was promised or understood (Gillett v Holt (2000)).

Arguably, Adam made an active assurance that Beth could live there. In any event, Beth will contend that he made a passive assurance because he stood by and watched her act to her detriment believing that she had an interest.

Beth acted to her detriment by contributing substantial sums to the joint account. Adam may argue that she did not incur this detriment in reliance on the belief that she had a share of the house but rather she was just paying her way in which case there will be no estoppel.

The remedy for proprietary estoppel is in the court's discretion. In Jennings v Rice (2003) it was said that the court had to ensure that justice was done between the parties and that the remedy was proportionate. The court may award a share in the house or monetary compensation for Beth's detriment or occupation rights.

Question 3

Legacy (a)

Hana tried to create a discretionary trust because the trustees are to decide which objects will benefit from the £100,000 and to what extent. (The trust is not charitable because it is not a purpose trust to advance amateur sport).The trust can be valid only if it has the three certainties (Knight v Knight (1840).

The issue is whether the objects are certain. The test for discretionary trusts is the given postulant test: the trust is void unless it can be said with certainty whether any given postulant is or is not a member of the class of objects (McPhail v Doulton (1971)). The majority in Re Baden's Deed Trust No 2 (1973)

decided that conceptual certainty was necessary for the trust to be valid. In other words, the settlor had to define the class of objects in clear language. Evidential uncertainty, which would arise if, for some reason, some people could not prove that they were within the class, would not cause the trust to fail. Sachs LJ said that the burden was on the applicant to prove that he was within the class and if he could not, he was outside. Megaw LJ said that the given postulant test was satisfied if one could say that a substantial number of people were within the class even if, as regards a substantial number of others, it had to be said that they were outside or could not prove that they were within it.

'Deserving British athletes' is not conceptually certain.

Even if the trust satisfies the certainty of objects test, it will fail if it is administratively unworkable. In McPhail v Doulton, Lord Wilberforce said that the trust was unworkable where the definition of the objects was "so hopelessly wide as not to form anything like a class". He gave 'the residents of Greater London as an example'. In R v District Auditor ex p West Yorkshire CC, a discretionary trust for the residents of West Yorkshire was void because they numbered 2.5 million.

A discretionary trust must not be capricious (i.e. where the settlor had no rational reason for creating such a trust and, therefore, the trustees have no rational basis for distributing the funds). Hana's trust is unlikely to be capricious because she was clearly interested in athletics.

If the trust is void due to uncertainty of objects or administrative unworkability, the £100,000 will pass as part of residue.

Legacy (b)

This legacy was given to a charity which no longer exists. A gift to an unincorporated charity is construed as a trust for the purposes of the charity (Re Vernon's Will Trusts (1971). If the purpose is still capable of being pursued, the Charity Commission will draw up a scheme applying the money for that purpose. Stop Poverty Now could be given the money if it intends to run a foodbank in Acton.

Acton Foodbank's assets were transferred to Stop Poverty Now. The bodies have, therefore, amalgamated. Under Re Faraker (1912) the Charity Commission may sanction a scheme whereby the legacy would be given to Stop Poverty Now provided it is satisfied that Acton Foodbank has not been destroyed by the amalgamation.

If Acton Foodbank is not continuing in any form, the legacy has suffered initial failure. The legacy may be applied cy-près (for similar charitable purposes) if the testatrix had a general charitable intention. It is difficult to find a general charitable intention where the testatrix has gone to the trouble of selecting a particular body which has existed (Re Harwood (1936)). However, a gift to a named body which had existed was applied cy-près in Re Finger's Will Trusts (1972) but, unlike here, there were other gifts to charity in the will.

If the gift cannot be saved under Vernon or Faraker, it will probably fail and pass as part of residue.

Legacy (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 gift to Maaz did not appear on the face of Hana's will and therefore, did not comply with s9.

It would appear that Hana tried to create a half-secret trust because the trust is mentioned in the will but not the identity of the beneficiary. Half-secret trusts are valid because they operate outside the will.

To be valid, the testatrix must communicate the terms of the trust to the trustee before the will is made (Blackwell v Blackwell (1855)). Communication by a sealed envelope which is not to be opened until after the testatrix has died is acceptable (Re Keen (1937)). The communication must be as stated in the will. The secret trustee must agree. Silence would be regarded as acceptance (Moss v Cooper (1861)). It would appear that all the requirements for a half-secret trust have been satisfied.

However, Maaz, the secret beneficiary predeceased the testatrix. Normally, if a beneficiary dies before the testator, the legacy lapses. However, this may not apply to Maaz's gift. Secret trusts are said to operate outside the will; they are declared in the testator's lifetime when the terms are communicated to the secret trustee. The trust is only constituted on the death of the testator. In Re Gardner (No. 2) (1923), the legacy was paid to the secret beneficiary's estate on the basis that the trust was effective in the testator's lifetime when the terms were communicated and the trustees accepted. The decision has been criticised because the trust is not effective until it is constituted which does not occur until the testator's death and therefore the legacy on trust for the predeceased beneficiary should lapse. If Re Gardner (No 2) is followed, the residue will be paid to Maaz's estate. If the decision is not followed, the residue will pass on Hana's intestacy.

Question 4(a)

Yasmin

- Recipient liability

Yasmin received trust property for her own benefit in breach of trust. A personal equitable action on the grounds recipient liability will succeed if Yasmin had knowledge making it unconscionable for her to have dealt with the trust property (BCCI v Akindele (2001)). Unconscionability is wider than dishonesty (Akindele). This has led to speculation that it may include constructive knowledge. The beneficiaries may be able to show that Yasmin had constructive knowledge that the money came from the trust because she deliberately did not draw obvious inferences from the facts. £60,000 is an extraordinarily large gift. If the beneficiaries establish recipient liability, Yasmin will be personally liable to pay compensation of £60,000.

- Equitable proprietary claim

If the extension has not enhanced the value of the house, the money has been dissipated and the beneficiaries will have to content themselves with a personal claim.

On the other hand, if it has added to the value of the house, an equitable proprietary claim may lie. If Yasmin is a guilty recipient, the beneficiaries may

claim a lien or a proportionate share of the house (Foskett v McKeown (2001)). The lien may be enforced by a sale of the house. If Yasmin is innocent, the court may refuse a lien over the house because it would be inequitable to compel the innocent volunteer to sell (Re Diplock (1948)).

(b)

James

A personal claim for constructive trusteeship may lie against James on the ground of accessory liability. He assisted Aziz to breach the trust and is liable if he was dishonest (Royal Brunei Airlines v Tan (1995)). In Tan, Lord Nichols said that dishonesty meant not acting as an honest person (possessing the same skill and knowledge of the facts as the defendant) would have acted. Subsequent case law suggests that a person can be dishonest even if they do not appreciate that this is the case (Barlow Clowes v Eurotrust (2006); Abuo-Rahmah v Abacha (2007); Starglade Properties v Nash (2010)). James is probably liable for £60,000 because an honest stockbroker, knowing that he was acting for a trust, would have made more enquiries before paying the money to Yasmin.

(c)

Aziz

The beneficiaries will want to pursue a proprietary claim because it will have priority on Aziz's bankruptcy whereas a personal remedy will rank alongside the claims of Aziz's creditors.

When Aziz purchased the shares in NYZ plc, he used an opportunity belonging to the trust. He breached his fiduciary duty because he placed himself in a position of conflict of interest and made a personal profit. It is no defence for Aziz to say that the trust could not have made the profit. In Keech v Sandford (1726) the trustee was liable even though he could not have gained the profit for the trust. In Boardman v Phipps (1967) the fiduciary was accountable even though the possibility of the trust acquiring the profit was remote and the trust had lost nothing. Also, it is irrelevant that the trust has suffered no loss. The trustee should be stripped of his profit.

It would appear that Aziz is accountable for his profit. AS noted above, a personal claim will be pointless due to Aziz's bankruptcy. However, according to FHR European Ventures LLP v Cedar Capital Partners LLC (2014) Aziz holds the profit on a constructive trust for the beneficiaries who will be able to pursue a proprietary claim.

Aziz has mixed £40,000 of trust money with his own funds. Beneficiaries of a trust are able to use equitable tracing which can identify trust money in a mixed fund. The £10,000 paid to creditors has been dissipated. The beneficiaries will seek to establish that the shares and the car belong to the trust. In Re Hallett (1880) it was held that a trustee is deemed to spend his own money first. This would mean that the shares belonged in part to Aziz and he dissipated the trust money on debts. It would be preferable to use Re Oatway (1903) where the court held that the beneficiaries' charge subsists on each and every part of the trust fund and any asset purchased with it. Re Oatway would allow the beneficiaries to claim a lien over the shares and the car.

It is not clear whether, applying Re Oatway, the beneficiaries could recover the increase in value of the shares. Foskett v McKeown suggests that they would be entitled to the profit but this case did not deal with withdrawals from, a mixed bank account.

The trust cannot claim the £10,000 paid in later because the balance on the account was previously reduced to nothing and they cannot claim anything over the lowest intermediate balance (Roscoe v Winder (1915)).