



CHIEF EXAMINER REPORT

JUNE 2024

LEVEL 6 UNIT 5 - EQUITY AND TRUSTS

The purpose of the suggested points for responses is to provide candidates and Training Providers with guidance as to the key points candidates should have included in their answers to the June 2024 examinations.

The suggested points for responses sets out points that a good (merit/distinction) candidate would have made.

Candidates will have received credit, where applicable, for other points not addressed in the suggested points for responses or alternative valid responses.

Chief Examiner Overview

This was a small cohort.

Better performing candidates demonstrated good knowledge and understanding of the relevant law and used references to both statute and case law appropriately to underpin their analysis/explanation.

Candidates who did less well:

(a) did not display sufficient legal knowledge on which to base a reasoned argument or (in terms of the Section B questions) to provide reasoned advice/application, and

(b) cited little or no relevant statute or case law.

Learning/recall must be accompanied by reasoned discussion and/or application if higher grades are to be achieved. This is particularly pertinent in relation to the Section A questions, where candidates are expected to be able (as the case may be) to analyse, evaluate or discuss both sides of a particular proposition.

In relation to the Section B questions, candidates must overcome their reluctance to commit to a conclusion and/or offer a pragmatic explanation or advice.

Candidate Performance and Suggested Points for Responses

It is noted that the low numbers of candidates taking this examination limits the scope for constructive and valid feedback to be given and for firm conclusions to be reached and embraced for positive use by candidates. Therefore, no feedback on candidate performance has been included.

Section A

Question 1	25 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	
<ul style="list-style-type: none">• Discussion of the origin, meaning and ramifications of the equitable maxim (<u>Milroy v Lord</u> (1862)).• Discussion of the formalities regarding gifts/declarations of trust in respect of various assets.• Discussion of the case law which deals with constitution of prima facie imperfect gifts/declarations of trust.• Discussion as to the criticisms/rationale in relation to those authorities.• Discussion as to whether those decisions 'undermine' the maxim or simply reflect the flexibility of equity to do justice in any given situation.	

Question 2	25 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	
<ul style="list-style-type: none">• Discussion of separate elements of 'no profit' and 'no conflict' rules – candidates may illustrate 'inflexible' application of these by reference to cases such as <u>Keech v Sandford</u> (1726), <u>Wright v Morgan</u> (1926) and <u>Boardman v Phipps</u> (1967).• Discussion of how the rules preclude reliance by a defendant on 'good faith' (candidates may refer to 'honesty') and/or 'no loss'.• Discussion of exceptions to the rules (e.g. authorised under trust instrument, consent of beneficiaries, rule in <u>Cradock v Piper</u> (1850), sanctioned by court, etc).• Discussion of instances where correctness of the inflexibility has been questioned/doubted (e.g. speech of Lord Herschell in <u>Bray v Ford</u> (1896) and judgment of Arden LJ in <u>Murad v Al Saraj</u> (2005)).• Discussion of examples where harshness of rules has been/can be mitigated (e.g. <u>Boardman, Holder v Holder</u> (1968), examples from Commonwealth jurisdictions).	

Attempts too limited to provide feedback.

Suggested Points for Response:

(a) 6 marks

- Discussion re: (i) common law remedies (usually damages) and when they will be awarded, (ii) limitations/inadequacy of financial compensation as a remedy; (iii) equitable remedies are discretionary whereas common law damages are available as of right; (iv) existence of (a) equitable maxims, and (b) established principles, to guide the exercise of that discretion; (v) equity acts in personam.

(b) 19 marks

- Nature of decree of specific performance (i.e. an order to perform a contract).
- Operates in personam and requires a defaulting contractual party to perform their part of the contract.
- Only available if the common law remedy of damages is inadequate (with illustrations as to when damages have been held to be inadequate in relation to contracts for the supply of goods, services, land or the payment of money, e.g. Penn v Lord Baltimore (1750), Cohen v Roche (1927), Falcke v Gray (1859), Phillips v Lamdin (1949), Behnke v Bede Shipping Co Ltd (1927), Sky Petroleum v VIP Petroleum Ltd (1974), Beswick v Beswick (1968), Verrall v Great Yarmouth Borough Council (1981), etc).
- Availability of remedy is constrained by:
 - (i) equitable maxims, such as: (a) 'equity will not act in vain', with reference to relevant case law, e.g. Giles v Morris (1972), (b) claimant must come 'with clean hands', with reference to relevant case law, e.g. Coatsworth v Johnson (1886), Franklin v Lord Brownlow (1808)), (c) 'delay defeats equity', with reference to relevant case law, e.g. Re Sharpe (1892), Hughes v La Baia Ltd (2011), Lazard Bros v Fairfield Properties (1977);
 - (ii) established principles (e.g. no remedy if order requires constant supervision, cannot be framed with sufficient clarity, is akin to slavery, or would be unjust, with reference to relevant case law, e.g. Ryan v Mutual Tontine Westminster Chambers Association (1893), Tito v Waddell (No 2) (1987) and Patel v Ali (1984).

Attempts too limited to provide feedback.

Suggested Points for Response:

(a) 13 marks

- Where a fiduciary makes an unauthorised profit (e.g. A-G for Hong Kong v Reid (1994)), Bristol and West BS v Mothew (1996), Murad v Al-Saraj (2006), FHR European Ventures v Cedar Capital (2014)).
- Where a specifically enforceable contract comes into existence (e.g. Ezair v Conn (2020)).
- Where statute would otherwise be being used as an instrument of fraud (Bannister v Bannister (1948), Lysus v Prowsa Developments (1982)).
- Where profits are derived from illegality, e.g. murder (forfeiture rule), fraud, or bribery (e.g., Re K (deceased) (1985)).
- Where testators have made a single joint Will or mutual Wills, and the survivor attempts to depart from the common agreement/understanding (e.g. Re Goodchild (1997), Healey v Brown (2002)).
- Where the remedy of a constructive trust is required to correct injustice (e.g. Chase Manhattan Bank v Israel British Bank (London) (1979), Westdeutsche Landesbank Girozentrale v Islington LBC (1996)).

(b) 6 marks

- Initial general discussion re how resulting trusts (RTs) arise where property is not wholly disposed of and are of two types: automatic RTs (ARTs) and presumed RTs (PRTs).
- Detailed discussion of PRTs and the situations in which they arise: (i) voluntary conveyance (with reference to LPA 1925, s 60(3), Lohia v Lohia (1920) and National Crime Agency v Dong (2017)), (ii) purchase in name of third party (with reference to, e.g. Bull v Bull (1955)).
- Discussion of how the presumption can be rebutted in specific scenarios.

(c) 6 marks

- Detailed discussion of ARTs and the situations in which they arise: (i) no declaration of trust, (ii) failure of express trust, (iii) failure to dispose of entire equitable interest (including unforeseen events, surplus property, and Quistclose trusts) and (iv) dissolution of unincorporated association.
- Discuss different rules/consequences re each of the above (with reference to cases such as Vandervell v IRC (1967), Chichester Diocesan Fund v Simpson (1944), Simpson v Simpson (1992), Re Foord (1922), Barclays Bank v Quistclose Investments (1968)).

Section B

Question 1	25 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	
<ul style="list-style-type: none">• Brief contextual discussion re no statutory financial relief and no express trust in B's favour (LPA 1925, s 53(b)). B must establish a beneficial interest under LPA 1925, s 53(2).• Discussion of likely inapplicability of resulting trust (RT) to relationship of cohabiting couple. Moreover, B's direct contributions not to purchase price (<u>Curley v Parkes</u> (2004)) and, in any event, would not yield claimed 50% interest.• Detailed discussion re use of, and principles underpinning, express and implied common intention constructive trusts to resolve disputes, including <u>Stack v Dowden</u> (2007), <u>Abbott v Abbott</u> (2007), <u>Jones v Kernott</u> (2011), <u>Lloyds Bank v Rosset</u> (1990), <u>Eves v Eves</u> (1975), <u>LeFoe v LeFoe</u> (2001), <u>Clough v Killey</u> (1996), <u>Hammond v Mitchell</u> (1991), <u>Thomas v Fuller-Brown</u> (1988), <u>James v Thomas</u> (2007).• Recognition that this is a 'sole name' case rather than a 'joint names' case, so statements in leading cases are strictly obiter.• Application to scenario, with particular reference to: (i) absence of initial financial contribution by B (spending money on furniture insufficient), (ii) apparent acceptance B would have had a joint interest but for attitude of mortgage lender, (iii) separate account for mortgage repayments funded solely by A, (iv) any express discussion or implied understanding re ownership of/interest in the property (noting terms of relevant conversations) viewed objectively, (v) subsequent expenditure re cost of extension.• Discussion re quantification of B's potential share, citing relevant authority (see above).• Discussion re possible reliance on proprietary estoppel, citing relevant authority.	

Attempts too limited to provide feedback.

Suggested Points for Response:

(a) 13 marks

- Identification of breach of trust by Cerys, but noting that a personal claim against her is likely to yield little if any recovery due to her bankruptcy therefore recommend a proprietary tracing claim.
- Given that Cerys has mixed trust funds with her own money on two occasions, only equitable tracing is available.
- Mixing £50,000 of trust money with £10,000 of her own money in a current account:
 - Discussion re: (i) need to establish whose money was spent on the valuable Indigo shares and whose money was dissipated on the Jayco shares, (ii) whether Cerys is deemed to have spent her own money first (Re Hallett's Estate (1880)) (meaning that £10,000 of trust money was used to buy the Indigo shares (leading to a pro rata 50% interest in their value) and the remaining trust money was dissipated on the Jayco shares), (iii) whether Re Oatway (1903) can be applied so that the beneficiaries can argue that the whole of the purchase price for the Indigo shares was derived from the misappropriated trust money (leading to a 100% recovery).
- Withdrawal of £17,000:
 - Cerys no longer has the £17,000 or any traceable assets derived from it. A personal claim is likely to be fruitless (see above).
- Mixing £50,000 of trust money with £25,000 of her own money in a current account:
 - Discussion re (i) availability of right to claim a proportionate share of, or a lien over, the car (Foskett v McKeown (2001)), (ii) a lien is the preferred option because this ensures a full recovery, whereas a proportionate share would only yield £40,000).

(b) 6 marks

- Discussion re: (i) trustees are not vicariously liable for the defaults of their co-trustees, but (ii) a claim may 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.
- Dionte has breached his duties by leaving the running of the trust and control of the trust property to Carys. His failure to watch over Cerys could have facilitated her misappropriation of trust money. Passive trustees are jointly and severally liable with a defaulting trustee (Bahin v Hughes (1886)), so Dionte could be sued for the full loss suffered by the trust fund and interest.
- Possible defences are: (i) an exclusion clause in the trust deed, or (ii) Trustee Act 1925, s 61 (unlikely to succeed because although he may have acted honestly, he did not act reasonably and should not fairly be excused).

(c) 6 marks

- Introductory discussion potential liability of a stranger to a trust for knowing receipt.
- Discussion of the relevant principles and case law relating to recipient liability, including discussion of the merit or otherwise of the test of 'unconscionability' expressed by Nourse LJ in BCCI v Akindele (2001).
- Application to the facts of the scenario, with particular reference to Kerry's suspicions and her decision to spend the money quickly.

Attempts too limited to provide feedback.

Suggested Points for Response:

(a) 7 marks

- Clause 1 is a gift to an unincorporated association (UA). A UA has no legal personality and so cannot receive gifts.
- Discussion of ways of legitimising this gift, with reference to Re Recher (1972) - an outright gift to a club is likely to be construed as a gift to the members (so long as they are ascertainable) as an accretion to the contractual fund to be dealt with in accordance with the rules of the club. Therefore, it does not offend the beneficiary principle.

(b) 11 marks

- Clause 2 is an attempted purpose trust to continue to run Fonteyn House School. This has the potential to be a charitable purpose if it satisfies the requirements of Charities Act 2011 (CA 2011).
- Discussion of CA 2011, ss 2 and 3(1). Recognition that purpose may fall within CA 2011, s 3(1)(b) (advancement of education) and s 3(1)(f) (advancement of arts and culture). Purpose must also be exclusively charitable and for the public benefit.
- Discussion re whether those two elements are satisfied in the context of: (i) a fee-paying private school, (ii) are only 85 pupils, (iii) school is open to the public, (iv) financial assistance available for pupils whose parents are less well-off (Independent Schools Council v Charity Commission for England and Wales (2011)).
- Charitable status would be advantageous because: (i) without it, the gift in clause 2 is void (it offends the rule against inalienability), and (ii) there would be significant tax benefits in relation to both inheritance tax and income tax.

(c) 7 marks

- Clause 3 is a non-charitable purpose trust. As such, it would ordinarily be void for the want of a beneficiary to enforce it: Morice v Bishop of Durham (1804).
- However, a trust for the maintenance of a grave is good, so long as it is limited to the perpetuity period: Pirbright v Salwey (1896), Re Endacott (1960).
- The trust is a trust of imperfect obligation - the trustees can carry out the trust if they wish but cannot be forced to do so. If they do not, the £50,000 will form part of residue.

Question 4

25 marks

Attempts too limited to provide feedback.

Suggested Points for Response:

- Discussion of rules relating to fully secret and half secret trusts, with reference to relevant case law and statute throughout (e.g. Rouchefoucauld v Boustead (1897), Blackwell v Blackwell (1929), Re Snowden (1979), Re Young (1951), Re Gardner No.2 (1932), Ottaway v Norman (1971), Re Baillie (1886), Wills Act 1837, ss 9 and 15).
- If legacy (1) is a half secret trust, then there is an issue re the timing of the communication of it: this should have happened before the Will was made (Kasperbauer v Griffiths (2000), Blackwell (above) support this statement).
- However, although the use of the word 'trust' is far from being essential, the testator's words must impose a binding obligation on the trustee to deal with the property in a particular way. Precatory words expressing a wish or a hope do not achieve this (Re Adams and the Kensington Vestry (1884), Lambe v Eames (1871)).
- Application: the words 'in the hope' do not impose a binding obligation on the trustees. So this is not a valid half secret trust. But Irvine v Sullivan (1869) is authority for the proposition that precatory words should be ignored, in which case this would appear to be a valid fully secret trust (communication being permitted after the date of the Will: Blackwell (above), Re Keen (1937)).
- Although the fully secret trust was only communicated to one of the trustees, this is good where the trustees were intended to take as joint tenants: Re Stead (1900).
- Discussion re whether the trust fails because it does not satisfy LPA 1925, s 53(1)(b) re trusts of land – likely to be upheld on the basis of Ottaway (above) and re Baillie (above)).
- Legacy (2) is a half secret trust. The timing of communication is good, as is Ruslan's acceptance and the form of communication (Re Keen (above)).
- Wills Act 1837, s 15 precludes a witness from being a beneficiary. But, on the basis that a (half) secret trust operates 'dehors' the Will, it is unaffected by the Act (Re Young (above)). Sonya therefore takes the £40,000.