1. Do you think the English courts should adopt the remedial constructive trust in light of its utility or should they simply carry on as if the concept can never be accommodated under the English legal system?

**Suggested Answer**

It will be useful to commence answering this question by underscoring the fact that constructive trust is not capable of a precise definition. You may then suggest working definitions. See *Carl-Zeiss Stiftung v Herbert Smith (No 2)* ([1969] 2 Ch 276 at 300 and *Paragon Finance plc v DB Thakerar & Co* [1999] 3 All ER 309. See 16.2 of this chapter. Then move on to discuss that approaches to constructive trust differ, especially between England and the North American countries. Some jurisdictions regard constructive trust as being remedial, while some see it as institutional (see 16.5). Define what a remedial constructive trust is (*Muschinki v Dodds* (1985, 62 ALR 429 at 451) and what an institutional constructive trust means (*Westdeutsche Landesbank Girozentrale v Islington*). Identify and discuss the differences between a remedial and institutional conception of trust and the importance of this distinction. Refer to cases such as *Springette v Defoe* [1992] 2 FLR 388 and *Lonrho plc v Al-Fayed (No 2)* ([1992] 1 WLR 1 to discuss the difference and the significance, if any, between the English courts’ approach and the other common law jurisdictions’ approach (especially in North America). It does seem, however, that this debate is mainly for doctrinal purposes, especially since English courts tend not to follow an institutional approach to constructive trust. See 16.5.4 for a discussion of the point that remedial constructive trust was developed in America (*Pettkus v Becker* (1980) 117 DLR (3d) 257; *Sorochan v Sorochan* (1986) 29 DLR (4th) 1, Can SC; *Peter v Beblow* (1993) 101 DLR (4th) 621). Discuss the effect of remedial trusts as in *Halifax Building Society v Thomas and Another* [1996] Ch 217 at 229 and consider whether they have any advantages over the constructive trust. Then state the objections of English courts to remedial constructive trust.

2. What would you think makes one nature of the constructive trust more advantageous than the other?

**Suggested Answer**

In dealing with this question, students should consider all the points raised in Question 1 above concerning the remedial and institutional approaches to constructive trusts. Particular attention and greater emphasis should be on the courts’ reasoning for preferring one over the other. See in particular 16.6.3, especially the statements of Lord Mustill in *Re Goldcorp Exchange Ltd (in Receivership)* [1995] 1 AC, Lord Browne-Wilkinson in *Westdeutsche*, Nourse LJ in *Re Polly Peck International plc (in Administration) (No 2)* [1998] 3 All ER 812 (all of which tend towards a rejection of remedial constructive trust, by explaining its shortcomings vis-à-vis institutional constructive trust). Counterbalance these with the *Restatement of the Law of Restitution*, *American Law Institute* (1937), Cardozo J in *Betty v Guggenheim Exploration Co* (1919) 255 NY 380 and Brian Dickson, Chief Justice of Canada in
Pettkus v Becker (1980) 117 DLR (3d) 257, all of which explain the advantages of remedial constructive trust.

3. Do you think the explanation given by Millett J in El Ajou for the difference between an action for recovery of profits made from an abuse of fiduciary position (which does make such cases look like remedial constructive trusts) and institutional constructive trusts, which his Lordship claimed is the rationale for such cases, is convincing?

Suggested Answer
Despite their preference for institutional constructive trust, English courts occasionally tend to subscribe, in their judgments, to ratios that seemingly favour or indicate a move towards the remedial constructive trust. Examples abound of circumstances in which it becomes very difficult to distinguish between the ratio of an English court’s judgment from the rationale for holding that constructive trusts are remedial. See 16.5.7 of this chapter, in particular Metall und Rohstoff AG v Donaldson, Lufkin & Jenrette Inc [1989] 3 All ER 14 at 56–8, [1990] 1 QB 391, Re Goldcorp Exchange Ltd (in Receivership) [1994] 2 All ER 806 at 826–7. In some of these cases, there is sometimes genuine difficulty in telling the court’s reasoning apart for supporting institutional constructive trust from those that exist for supporting the remedial one. However, English courts are quick to dispel any thoughts that they are beginning to move towards remedial constructive trust as Millett J made clear in El Ajou v Dollar Land Holdings plc [1993] 3 All ER 717 at 733–4. Thus, it is possible that one is not entirely satisfied by explanations given by courts in favour of institutional constructive trusts. In fact, occasions do arise in which the court might appear to be leaning towards a remedial constructive trust. Yet, one cannot jump to such conclusion given explicit rejection of remedial constructive trusts by English courts.

4. How would you distinguish between the test of dishonest assistance laid down in the Barnes v Addy and Royal Brunei cases?

Suggested Answer
In 16.4 of this chapter the liability of third parties for breach of trust was considered. A third party can be liable in knowing receipt of a trust property or for rendering dishonest assistance to a breach of trust. Students should discuss the main difference(s) of the two bases for third party liability. See Mara v Browne (1896) 1 Ch 199 at 209; Taylor v Davies [1920] AC 636, Barnes v Addy; Royal Brunei Airlines v Tan [1995] 2 AC 378. Then identify where the core distinctions between the two lie. For instance, dishonesty of the person rendering the assistance is sufficient for liability even if the trustee has not done anything wrong. See Lord Nicholls’s statement in Royal Brunei. Compare this with the position in Barnes v Addy. Then consider whether the basis for liability in dishonest assistance is similar or different to knowing receipt, discussed in Re Loftus [2005] EWHC 406 (per Lawrence Collins J, at 172 (15.5.4)). See Twinsectra v Yardley [2002] 2 All ER 377 for what constitutes ‘dishonesty’ and Abou-Rhaman v Abacha [2005] ECWH 2262 (QB), for the principles guiding the dishonesty test.
See Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA [1983] BCLC 325, to understand what constitutes ‘knowing’ for the purpose of liability. At the time of that case these “knowledge tests” were used for both dishonest assistance and knowing receipt constructive trusts. The law has since diverged. Royal Brunei Airlines v Tan [1995] 2 AC 378 insists that “dishonesty” must be proved for dishonest assistance, as we have seen. Actual knowledge, that the property was removed in breach of trust, must be proved for a knowing receipt constructive trust: Re Montague's Settlement [1987] Ch. 264. This was rephrased in Bank of Credit and Commerce International v Akindele [2001] Ch. 437 as “knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt”. Nourse LJ insisted that dishonesty did not have to be proved, for this type of constructive trust.

5. Is there a great difference between the retrospective effect of constructive trusts under institutional and remedial constructive trusts in light of the fact that, under the institutional approach, it is the circumstances of the transaction that fix the time of effect whereas, under the remedial approach, it is the court, through its discretion, that fixes the effect?

**Suggested Answer**
For this question, students should apply the suggestions offered in Questions 1, 2 and 3.