Revision Box Questions: Guidance for approach

Revision Box Chapter 1

1. Ensure that you can answer the following questions:
   (a) How did distinctive ‘equitable jurisdiction’ develop within English law?
   (b) What was the impetus for equity’s development?

These are closely related questions requiring you to be able to explain that the origins of a distinctive equitable jurisdiction within English law lies in the arrival of the common law tradition in Britain following the Norman Conquest, and appreciating the nature of custom and practices associated with key tribes up until that point. The common law gradually evolved over centuries after this to put in place a framework of universal rights and entitlements and obligations and duties which underpins the terminology of ‘common law’, and which were enforced by the Court of the King. Equitable jurisdiction developed alongside this as the common law itself evolved, and this was strongly premised on asserting the value of a universal position for law, but being able to respond to the needs of individual claimants on a discretionary basis where it could be shown that strict application of law would result in an outcome which was not just in the particular circumstances. Equity’s concern with matters of justice and good conscience reflect its ecclesiastical origins during times of a ‘church state’ and where the court of the King reflected this. It would be centuries before lawyers came to occupy the position of Chancellor at the heart of equitable jurisdiction.

(c) What was the special court administering equity called and when did equitable jurisdiction cease to be administered separately from the common law courts?

The Chancellor’s ability to apply this individually focused conscience based jurisdiction is what gradually evolved into the Court of Chancery, which continued to be administered separately from the Common Law court until the late nineteenth century when the Judicature Acts were passed.

(d) From your reading so far, what kind of things does equitable jurisdiction appear to do?

As suggested above, Equity’s jurisdiction is associated with providing solutions of conscience and justice where a strict application of the ‘universal’ position applicable at common law would result in an injustice. Today this is most strongly associated with providing flexibility for those whose rights law will recognise, and justice for those without legal rights. However it is also important to remember that in all these situations equity leaves the basic universal position at law intact, and we will see instances where equity plays an important role in supporting legal rights.

(e) In what ways is the operation of modern equity both similar to and also different from its early origins?

Following the fusion of the jurisdictions of law and equity in the nineteenth century they are no longer administered separately and claimants no longer required to pursue
separate routes for different remedies. Equity itself remains a discretionary jurisdiction which is premised on a universal position ‘at law’ which is how it originated. As such it will only provide an alternative for a claimant on a discretionary basis, and because it remains (as it originated) a jurisdiction of conscience, it continues to be mindful of how a claimant has himself behaved. In these regards equity remains very faithful to its origins. However, although it is a discretionary jurisdiction, its application is much more formalised today than it was historically; the principles on which an alternative solution of conscience and justice would be applied remained ‘ad hoc’ until becoming formulated into the maxims and principles of equity.

(f) What is the significance of the so-called ‘maxims’ of equity?

Following on from the above, these provide a guiding framework for the operation of equity today. They acknowledge that even discretionary jurisdiction must be underpinned by principle and clarity, whilst remaining faithful to equity’s interest in securing a just outcome for an individual where one is possible and where this is appropriate whilst reinforcing the supremacy of law in providing a universal framework of rights and entitlements and duties and obligations.

2. From this, consider the following scenarios referenced in this chapter, and in relation to each one:

- identify the ‘injustices’ and/or inflexibility that recognizing only legal rights and/or accessing only remedies at law may present;
- think about the difficulties that might arise from equity intervening in these circumstances to provide a more just/flexible outcome; and
- think about the particular problems that might arise where third parties—those other than the individual defendant and the claimant seeking equity—are potentially affected.

(a) The doctrine of proprietary estoppel, which seeks to prevent a person going back on a representation made to another in relation to property on which the other person has been relied

(b) The doctrine of promissory estoppel, which seeks to prevent a contracting party from reneging on his promise not to enforce his legal rights (such as seeking full payment due under the contract) upon which the other party has relied

In both these scenarios equity is concerned about those who are led to believe something by another and has relied on this, and where there is an attempt to renge on what is said or done. Here equity’s interest in justice and good conscience will hold a person making representations to what he has said or done because not doing so would mean that the position of the party who has relied on what has been said or done will be prejudiced. This is responding to the disadvantage created for a party who has acted in a way which he would not have done so had a different situation been presented to him.

(c) The doctrine of undue influence, which seeks to prevent a party from exerting improper pressure on another in the formulation of legal agreements
Here equity wishes to ensure that when a legally binding agreement is reached between parties that this reflects the will of the parties. Legal agreements are ones which law recognises and will enforce and have far-reaching implications, the import of which must be reflected in genuine agreement to be legally bound. In these circumstances it is considered unconscionable for one party to be able to pressurise another and ‘overbear’ their freewill.

(d) The ‘deserted wife’s equity’, under which a wife’s a right to occupy a family home arises from particular circumstances

As a reaction against judicial attempts to insist that where a claimant cannot establish an ownership interest in a shared family home a ‘deserted wife’s equity’ was capable of binding a purchaser of the property, National Provincial Bank v Ainsworth insisted that any right to occupy the family home in such circumstances amounted to mere equity. Such an entitlement is significantly less strong than what is known as an ‘equitable right’ by virtue of lacking identifiability, stability and permanence required to be binding on purchasers in the light of the need for certainty and confidence in conveyancing.

(e) The personal remedy of specific performance, when one contracting party is unwilling to perform his contractual obligations

(f) The use of an injunction to prevent ‘wrongdoing’ on the part of an individual.

It makes sense to consider these together as they concern equity’s role in the law of obligations, where breach of contractual obligations is a breach of legal rights as far as law is concerned, as is commission of a tort against another. In both situations a remedy is available as of right to the aggrieved party, and this has become primarily an entitlement to a compensatory monetary award to put you either in the position you would have been in had the contract been performed, or in the position you would have been in had the tort not been committed. They both illustrate how equity’s ability and willingness to look at the needs of an individual situation and can provide flexibility for those with legal rights in some circumstances. In the former situation a contracting party can actually be compelled to perform his contractual obligations rather than be able to compensate for not doing so, whilst in the latter, someone who causes harm to another isn’t required merely to compensate for this, but required to desist from it.
Revision Box Chapter 2

1. For very fundamental issues, explain the following:
   (a) What is meant by the term ‘express trust’?

   This is a trust arrangement first and foremost, and so it exhibits what was explained in Chapter 1 in terms of arising where ownership of property separates into distinctive ‘legal’ and ‘equitable’ title to property. In this arrangement, those who hold legal title are subject to a number of duties relating to the property oriented towards ensuring that the benefit or enjoyment of the property is available for another. As we have learned, this happens to property for the most part because this is what is intended to happen. And in the express trust we see a trust of property arising because it is an owner of property’s express intention that it should do so. There is generally an important role for intention in trust creation, but this is where we see in the clearest way a trust arising because this is what an owner of property has expressed that he wants to happen—doing so through his words, and sometimes through a combination of words and actions, or even through his actions alone.

   (b) What ‘roles’ or ‘actors’ can be identified in an express trust arrangement?

   Here we have three identifiable roles. The settlor is an owner of property who becomes a settlor through property owned outright by him being settled which means that benefits of the property will now be enjoyed by a beneficiary. The trustee in this arrangement is required to ensure that the beneficiary can enjoy the property as intended by the settlor.

   (c) If ownership is separated into distinct components in a trust, who holds each type of title and what happens to the original owner of the property?

   The settlor in a trust arrangement no longer has the entitlements of an owner. In the express trust scenario, the person intended to benefit from property which is now ‘trust property’ is its beneficiary who has entitlement to the property ‘in equity’. The person responsible for ensuring a beneficiary will have entitlements as they have been specified by a settlor is the trustee, who acquires legal title when ownership becomes separated. What causes ownership to separate in this way is appreciation by a trustee that although he is formally entitled to the property by virtue of holding legal title to it, that he is not intended to benefit from the property as its owner. With the trustee’s consciousness of this, ownership will separate, and a trustee become subject to a number of duties which are there to ensure he acts as trustee rather than owner, and the beneficiary receives entitlements as intended by an owner-cum-settlor. Once the trust has been created the settlor is no longer a part of the arrangement which now subsists. It is only a beneficiary under a trust who can enforce it, and not the one-time owner of property, and any action as such will be between trustee and beneficiary.

   (d) Why create a trust rather than make a gift of property from the perspective of each of the actors encountered in an express trust arrangement?

   If we think about the trust arrangement alongside the relationship created by a valid and legally binding contract, we can see that the former is a way of giving third parties...
enforceable rights which are ordinarily prevented by the doctrine of privity. As for reasons underpinning trust creation rather than making a gift, it is very important to appreciate that a gift involves an outright transfer of ownership from one party to another. Here, trust creation is associated with owners being able to control the use being made of property which once belonged to them, and at one extreme of this not to have to worry about it in the hands of a minor or an adult who isn’t as responsible as they should be. Generally, creating trusts helps to promote a long-termist view of property, providing assurance that changes over time can be reflected in changing approaches to safeguarding property; and it provides enjoyment for another with peace of mind that this person does not have to be responsible for managing the property. For a beneficiary it provides for enjoyment of property without responsibility for it. For a trustee, this is all about responsibility, certainly in theory, and the position of trustee arose entirely as one of obligation, but as we will discover, today acting as a trustee can be a highly specialised and highly lucrative occupation.

2. In focusing on express trusts directly, explain what is meant by the following:
   (a) An express trust that is ‘fixed’
   (b) An express trust that is discretionary’

An express trust which is fixed is said to arise where a settlor provides instructions on how his property is to be distributed amongst those intended to benefit, by making it clear what share each of them is to have- this may or may not be equal share, but the point is it is the settlor who decides this. In a discretionary trust, trustees are left to determine who is to benefit from the trust property, from a group of potential beneficiaries which has been chosen by a settlor, and from this a trustee also determines what share an individual he has chosen will receive.

(c) A ‘power’, and how ‘powers’ are encountered in the study of trusts.

The creation of a power is the creation of the capacity to act in a particular way, giving the person who holds this the discretion or authorisation to do so. The power to give property in this discretionary way is known as a ‘power of appointment of property’ and is different from the mandatory arrangement put in place by the creation of a trust. We encounter powers in the context of trusts because powers can have the appearances of discretionary trusts, and there are similarities and differences in what is required for each of these arrangements relating to property to be valid ones.

3. In focusing on the introduction given to ‘theory’ and ‘context’, explain:
   (a) What, at this stage, you understand to be the meaning of ‘theory’ and ‘context’ in understanding trusts and the law
   (b) Why it might be important at this stage to appreciate where trusts are commonly to be found.

Theory and context are both useful for understanding how trusts work and where they can be found, and they can assist in this in their respective different ways. Theory helps us to understand what is happening by ‘abstracting’ trusts from much of the reality of what they do and where they are found. Here we think about the legal rules themselves, reflecting on them alongside other key features of law and intellectual approaches to understanding
its key concepts and systems. Context is in many ways the complementary opposite, and helps us explore the limitations of looking at legal rules alone, because of the ways in which they actually operate in the real world. It is for this reason of differences between ‘law in books’ and ‘law in action’ that it is important to appreciate where we can find trusts at work. But this is also important for helping us to theorise how they work, through understanding that some aspects of the way trusts work are easier to explain than others from where they are found in reality, and so having an abstracted overview of what needs to be understood about them is very important.

4. Summarize what you currently understand is meant by the terms ‘mandatory’ and ‘default’ terms as they arise in analysis of trusts law.

This is an introduction to Langbein’s taxonomy of rules found in the law relating to express trusts. Moving from the position that all trusts are mandatory arrangements, Langbein proposes that express trust - where a trust arises from the express intentions of an owner of property that this should happen- creation is highly contractual in nature. This is that an owner of property has plenty of scope to decide what is to happen, and that in furtherance of this, the law will provide a ‘default’ position for when matters haven’t been specified by the settlor. Langbein proposes that alongside this there are rules relating to the creation of an express trust and its ongoing operation which cannot be altered or discounted by a settlor, and will apply whatever his views to the contrary might be. From this Langbein’s classification of mandatory and default rules gives us a framework for analysing the law relating to express trusts.
Revision Box Chapter 3

What can we learn about the fundamental nature of the trust by looking at how certainty requirements relating to intention and to trust property can be satisfied, and what happens when they are not?

Here, you will need to link your study of certainty back to the study of the essence of trusts in Chapter 2 and explain:
– what is meant by the requirement of certainty;
– the function of the certainty of intention requirement within certainty more broadly;
– the key factors underpinning certainty-of-intention rules;
– how trust property becomes significant in the light of what is meant by the requirement of certainty;
– what the rules relating to satisfying certainty in relation to trust property actually are; and
– what the consequences of failing to satisfy certainty in relation to trust property will be and why this is different from the outcome of failure to establish certainty of intention.

Certainty rules in trust creation are there to ensure that it is sufficiently certain that an owner of property does wish to create a trust rather than undertake some other course of action in relation to it. This ‘sufficient certainty’ must be shown in relation to his intention to create a trust, the property he wishes to settle on trust, and those whom he wishes to benefit from this, and together these ‘rules on certainty’ are embodied in the so-called ‘three certainties’. Together they reflect the implications of creating a trust in terms of how this will strip an original owner of his entitlement to the property, and create new rights and obligations for others which are enforceable, and so it is important to establish that this is what is intended at all; and once this has been so, what property is subject to a trust, and thus subject to enforceable obligations; and who is in a position to enforce what has been put in place. Meeting certainty of intention requirements clusters around showing that what was intended was a mandatory arrangement which must be carried out, and which gives rise to obligations to ensure that this happens. It must be clear that this was intended, rather than an out and out gift, and bearing in mind that in both situations an owner will lose entitlement to property, there is also the question of whether an owner of property does wish to deal with his property in such a way at all. If he does, it needs to be clear from what an owner says or does that he can no longer use the property, and the person whom is vested with title to it understands that they are not entitled to the property. Where there is no certainty of intention there is no trust, and the holder of legal title to it is its absolute owner.

Once this is clear, it must also be sufficiently certain what of the owner’s property is and is not to be regarded as property. The implications of this is that property which is not subject to a trust can be dealt with freely by the person holding legal title to it, whilst property which is subject to a trust must be dealt with in furtherance of a beneficiary’s entitlement to it. There are two elements to be satisfied here. Firstly whether it is clear that all the property specified or a clear or certain part (proportion) of it is intended to be property subject to obligations; and secondly whether the share of it to be received by a beneficiary is clear and certain. The courts are very strict about the first element but have been criticised for being less so about the second. There is no trust created where there is
no certainty of subject matter, and the precise outcome will depend on whether a transfer of legal title has already taken place or not, and where the latter has happened, then there will be a presumption of what is termed a resulting trust, allowing equitable title to return to the original owner-cum-settlor.

Where there is certainty of intention and certainty of subject matter, it must be clear who is to benefit. This is to help conscientious trustees who are duty bound to ensure beneficiaries receive the property as intended, and also to ensure that it is clear who can come to court to enforce a trust should a trustee refuse to carry it out. Where it is not sufficiently certain who the intended objects of a trust are, it cannot be valid. What is actually required depends on whether a fixed or discretionary trust is being created, but where this is the only ‘certainty’ which hasn’t been satisfied, then a presumption of a resulting trust will arise.

2. What is the significance of Re Baden’s Deed Trusts (No. 2) [1973] Ch 9 in the context of certainty of objects?
– Read the submission to the Court of Appeal by John Vinelott QC, counsel for Baden’s estate, and summarize the main points of his arguments on why the disposition should fail on grounds of absence of certainty of objects.
– Ensure that you understand why, had Vinelott’s core argument succeeded, the implications for the McPhail v Doulton [1971] AC 424 ruling would be considerable and indeed unacceptable. (NB McPhail’s treatment of IRC v Broadway Cottages [1955] Ch 20 is central here.)

This is the case where litigation which had led to the formulation of the test in McPhail v Doulton was returned to the Court of Appeal for application of this test to the facts of the Baden. Central here were the terms ‘relatives’ and ‘dependants’ used in Bertram Baden’s will. It was the term ‘relatives’ which led to the Court of Appeal being unanimous in its rejection of the argument advanced by John Vinelott QC that it could not be shown that any person definitely was or was not within the class, as required by the Gulbenkian test.

As Megaw LJ observed, it would have meant a virtual return to the rejected class ascertainability test – the ratio of IRC v Broadway Cottages, but avoiding that outcome was really the only unanimous feature of the judgment – apart from the unanimous view that Baden’s next of kin should not be permitted to take the case to the House of Lords. Sachs LJ avoided the difficulty by emphasizing that the court was concerned only with conceptual certainty, so that it should not be fatal that there might be evidential difficulties in drawing up Vinelott’s list, effectively destroying the argument. Sachs LJ focused on the onus of proof of someone seeking to establish they were part of the settlor’s chosen class, with Megaw LJ’s test being a rather vaguer one involving a substantial number of objects.

3. Explain what is clear and what is less so about the significance of ‘administrative unworkability’ in determining the validity of express trusts.

Administrative unworkability as it was advanced by Lord Wilberforce in McPhail sets out for us that even a discretionary trust able to satisfy certainty of objects requirements may still be invalidated on grounds it is administratively unworkable. What isn’t clear is what actually amounts to administrative unworkability, and specifically whether this might relate to the size of a class of objects or its breadth and diversity, or combination of the two.

What’s problematic here is that what was said in McPhail was little and highly caveated,
and that much of the case law relates to powers rather than trusts, with the West Yorkshire case which does deal with trusts being far from definitive.

4. Drawing together your thoughts for all these questions and perhaps Q1, consider how certainty rules can be analysed using Langbein’s classification of trusts law rules as ‘mandatory’ rules, and explain why this might be the case.

Classifying certainty rules as mandatory rules sets them out as rules which cannot be negated or varied by the settlor in the creation or operation of an express trust. These particular rules relate to trust creation, and can be analysed as rules which exist to ensure that only arrangements which are intended as trusts, and can properly function as trusts will ever become valid trusts at all, with the implication that once they do so, they give rise to enforceable rights for someone other than the one-time owner of property and impose duties on those who have no entitlement to benefit from the property.
Revision Box Chapter 4

1. Using the chapter materials and further discussion on the Online Resource Centre, explain what is meant by ‘transfer formality’ and ensure that you:
   - understand why any transaction involving a transfer of title from one person to another will require transfer formality;
   - are able to provide examples of why and how transfer formality required will depend on the nature of the property;
   - understand how, in the context of trust creation, transfer formality can be linked to the ‘less visible’ nature of equitable interests in property;
   - understand when transfer formality will arise in express trust creation and when it will not; and
   - understand how requiring transfer formality in trust creation can be seen to protect the interests of each of the ‘trust actors’ identifiable in an express trust arrangement.

This requires us to return to the nature and fundamental importance of ownership in English law and then to the similarities as well as differences entailed in making gifts of property and creating express trusts. Both involve an owner of property permanently and irrevocably giving up the property and his entitlement to exclusive use of it and dominion over it. An owner of property is the only person whom law recognises as holding these entitlements to property, and ownership of property at law is the most important property right in English law, which regards legal title as good against the world. In recognition of the enormous implications of losing ownership, where there is any kind of permanent transfer of legal title law requires this to meet prescribed ‘legal form’ to ensure: the only is seeking to do this with his property, and is not seeking to do something different such as loan his property; that because it is only an owner who is authorised to pass good title to property, that there are no ‘secret dealings’ involving property; and to protect a recipient who can be confident he is receiving good title. This is obviously important for a purchaser who provides value, but even the recipient of a gift does not want to be receiving stolen property! What is required to satisfy formality depends on the nature of the property, with greater formality required by way of writing and registration for real property on account of its uniqueness and high value, and intangible personal property on account of its non-physical existence. In the case of the creation of an express trust, transfer formality requirements must be met as if the transaction were one for value or an outright transfer of title made gratuitously (a gift) to a new owner, but because what isn’t being transferred to a new legal title holder is outright ownership, this can raise difficulties for purchasers when trust property is being sold- it is in this setting that the traditional doctrine of notice and the current regimes for registration of proprietary interests have become particularly important.

2. Explain what is meant by ‘declaration formality’ and, using cases and statutory materials as appropriate, where this is encountered in express trust creation.

When an express trust is created, an owner-cum-settlor when showing his certainty of intention is said to be declaring that property once owned outright is now subject to duty and obligations. This is how we know a trust is intended. There are no prescriptions about making a declaration of trust in writing for the creation of most trusts: written records of
declarations of trust exist widely for providing an evidence trail, reflecting the use of trusts in taxation. For property which is land, s 53 (1)(b) of the Law of Property Act 1925 requires that declarations of trust must be manifested in signed writing, with the statutory provisions and Gardner v Rowe helping us to understand that the declaration itself doesn't have to be made in signed writing, but such written evidence that it has been made must subsist.

3. Using cases and statutory materials as reference points, ensure that you understand the way in which the courts have approached ‘dispositions’ in the context of formality, and what this reveals about how and why express trusts are created.

This requires understanding of s 53(1)(c) of the LPA 1925 requiring ‘disposition of an equitable interest…’ to be ‘in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will’. This core idea brings into very sharp relief the importance of the tax angle for understanding why a large number of express trusts are created. Key case law here is Grey v IRC (1960), the Vandervell litigation and Oughtred v IRC (1959). Grey concerned whether ‘disposition’ should be interpreted narrowly or broadly for the purposes of the legislation; with Vandervell showing how complex the very idea of a disposition can be where property confers more than simply ‘value’, and where there are ‘purchase options’ involved, with Oughtred v IRC – in concerning disposition in the light of specifically enforceable oral contracts for transferring subsisting equitable interests - being what the Textbook materials term almost entirely a pure taxation case, rather than one that illustrates any particular policy rationale for formality requirements.
Revision Box Chapter 5

1. In understanding the significance of Milroy v Lord (1862) 4 De GF & J 264 in transfers of property from one person to another (intended as outright transfers or transfers of nominal legal title to a trustee), consider the key decisions in Jones v Lock (1865) LR 1 Ch App 25 and Richards v Delbridge (1874) LR Eq 11.
   (a) Look at the facts surrounding the two cases and the reasons for the decisions reached.
   (b) Ensure that you understand why their outcomes followed from application of Milroy.
   (c) Relate the results and their reasonings back to the proposition that equity functions so as to provide flexibility and to prevent injustice, and also to protect and support legal rights.
   (d) Respond to the proposition that, in the course of carrying out these functions, tensions can arise between supporting the supremacy of legal rights and achieving justice for a claimant.

The importance of Milroy here flows from Turner LJ’s insistence that in order to be valid any transfer of title to property from one person to another must satisfy law’s requirements (which as we saw in the previous chapter are determined by the type of property and not the nature of the transaction), or in absence of this satisfy equity that the owner of property has done all in his power to effect the transfer. In both Jones and Richards there was no effective transfer at law, and because it couldn’t be shown either that the owner of the property had done all in his power to effect the transfer, there was not scope for equity to recognise the transfer, according to the requirements set out under Milroy. We can link this with the supremacy of ownership manifested in legal title underpinning formality requirements- that law will only recognise property has a new owner when formality has been complied with, and equity supports this position through requiring that an owner of property has done all that he can meaning that law’s recognition is merely an outstanding inevitability. That is the basic position as far as protecting legal rights is concerned but the case law has blurred this in different ways; certainly in the much-criticised Pennington v Waine (2002) approach, but the more highly favoured Re Rose approach is also problematic here. It is also so that these cases reveal tensions in the position whereby at some point before a legal owner has done all that he can to effect a transfer of legal title to another that he permanently and irrevocably loses the right to the property in favour of a volunteer recipient (who is either a would be outright owner, or a beneficiary under an express trust).

2. To be sure that you understand the mechanics of a self-declaration of trust and also its implications, after reading the judgment in Pennington, Chothram (T) International SA v Pagarani [2001] 2 All ER 492, read Rickett (2001) 65 Conv 515.
   (a) Explain in your own words what you understand to be Rickett’s views on this decision, indicating whether or not you agree, and why.
   (b) Consider whether, in your studies of equity’s role in transfers of property, you have encountered any evidence that equity has ever striven officiously to defeat a gift.
(c) Consider whether Jones and Richards could be seen as examples of where equity has officiously striven to defeat a gift, or whether you think that these outcomes were the only possible result in the circumstances.

(d) Explain, giving reasons for your views, whether you think the courts should adopt a more cautious approach or a more liberal approach to finding that a trust has been constituted.

This requires you to express your views on whether this was a sound decision given the implications of creating an express trust, and how similar creating a trust and making a gift can be, and can be perceived to be, even though their mechanics and effects are quite different. Explaining whether you think equity has ever striven to defeat gifts/creation of trusts requires you to reflect on the cases where we might see equity as being extremely generous such as in Choithram as well as others such as Re Rose and especially Pennington. It also requires you to engage with ‘harsh cases’ cases such as Jones and Richards and if you think they are examples of such unduly harsh decision making to explain why this is so in the light of why law requires transacting with property to be in prescribed form at all, and using this to come to a view on whether the courts should be applying strict approaches or more relaxed ones, and for whom.

3. Consider whether you think there are any dangers in adopting an approach that treats making gifts and express trust creation as ‘the same’ (or substantially the same), indicating what these might be.

This requires you to engage with examples of how the cases seem to consider gift making and trust creation in very close proximity, with all the cases mentioned up to now being clear examples of such an approach. This may be justifiable given the similarities surrounding the creation of trusts with making outright gifts, but what about the differences? The creation of a trust is a mandatory arrangement which must be carried out; it is enforceable by persons who have provided no consideration, and imposes duties on another to ensure the settlor’s wishes are carried out. Are these latter factors given sufficient weight in the cases?
Revision Box chapter 6

1. Drawing on the materials in the chapter and using them as illustration, ensure that you can answer the following questions.

(a) Why has equity developed implied trusts alongside express ones declared by a settlor?

The origins of the express trust lie in supporting the ability of an owner of property to create enforceable rights and duties relating to property, with a strong emphasis on preventing injustices arising which can be related to common law recognising only the interests of those holding legal title to it. The same basic premise of preventing injustices arising from the ownership of property applies in the creation of implied trusts, but these responses to injustice arise in situations where an owner hasn’t expressly wished to create enforceable rights for another party, with these being capable of arising without an owner even knowing about them, or actually contrary to his expressed intentions.

(b) Why can the existence of implied trusts be seen as a particularly bold development in the context of the ownership of property?

The idea that property rights can be created and which interfere with a legal owner’s exclusive right to use his property as he wishes make even express trust creation contentious conceptually if we think about ownership of property as the king of property rights. That this interference with ownership can arise where an owner hasn’t expressly wished to create enforceable rights for another party, with these being capable of arising without an owner even knowing about them, or actually contrary to his expressed intentions, is even harder to reconcile with the supremacy of ownership of property in English law.

(c) Why has equity developed two quite different types of implied trust?

2. In relation to resulting trusts, explain the following.

(a) What key feature underpins all resulting trusts and how does this explain the way in which they operate?

(b) How can this be illustrated by reference to actual examples of where they can be found?

In all resulting trust scenarios the original owner of property is both the settlor and beneficiary under a resulting trust where this is presumed to arise. This can arise in situations where an original owner has sought to give his property away and finds himself the beneficiary under a resulting trust (in a Dyer v Dyer, Westdeutsche type A situation), or when he seeks to create an express trust which either doesn’t ever satisfy validity requirements (e.g. through not satisfying certainty rules), or because after creating a valid express trust it becomes impossible to carry out the arrangement (e.g. the beneficiary’s education is now completed and settled property remains unexhausted by this purpose), with the latter fitting Westdeutsche type B ‘failed trust’ scenarios. And all resulting trusts are premised on the presumed intention that in the circumstances the original owner would wish to retain an interest in the property or have it returned to him, and as with all
presumptions, the presumption of a resulting trust will be rebutted where there is evidence to the contrary.

3. Using the materials above and also textbook accounts of ‘constructive trusts’, return to Re Rose, Rose v IRC [1952], and consider whether the trusts that arose from equity’s recognition of property transfers that were incomplete at law should be regarded as constructive trusts. Here, you should consider:
   – the basis of constructive trusts strongly apparent from ‘constructive trusts theory’; and

4. Using the materials explain the characteristics of constructive trusts said to be substantive institutional and remedial, and consider English law approaches to the latter type.

Both questions require you to have an understanding of how constructive trusts are different from resulting trusts in terms of how they arise and how they are theorised. There is said not to be an agreed universal theory of constructive trusts, but there is broad agreement that they arise from some kind of unconscionable conduct relating to the property, and which justifies its owner being compelled to use the property subject to entitlements to it which have arisen for another. As part of this there is contention about the nature of constructive trust which is recognised in English law, with the orthodox view being it is a substantive institutional response which vindicates an existing right, rather than a remedial one creating rights. Beyond this controversy the Re Rose type use of a constructive trust forces us to question whether we agree that constructive trusteeship is imposed to reflect some type of wrongdoing, or whether we need to find a different way of explaining it: the latter might be that it is unconscionable for an intended recipient not to receive property, but this requires engaging with debate on balancing the interests of an owner with those of a volunteer recipient.
Revision Box Chapter 7

1. Using the decisions in Hobourn Aero Components Ltd’s Air Raid Distress Fund [1946] Ch 86, aff’d [1946] Ch 194, West Sussex Constabulary’s Benevolent Fund Trusts [1971] Ch 1, and Re Bucks Constabulary Fund Friendly Society (No. 2) [1979] 1 WLR 93, identify and explain the following.
   (a) What is meant by the term ‘unincorporated association’?
   (b) What issues arise in the operation and ‘winding up’ of unincorporated associations?
   (c) What is the competing ‘basis’ for responding to the needs of unincorporated associations to be found in the law of trusts and contract law?

The basic premise of an unincorporated association is that it is an organisation with no distinctive legal identity which is separate from the persons involved with it, and accordingly no distinctive capacity to hold property. This raises issues of how such bodies are able to hold property they need to utilise during their lifetimes for their operations, and what happens to that which remains unspent when they cease to exist. From this basic position comes the idea of two key rival theories of how property is held when an association exists and how what happens to it after cession is premised on this. The key cases point to the difficulties at the heart of finding that the association operates as a trust, given the difficulties associated with trusts which are ones for purposes, where these purposes are not charitable ones, and the attractions of a contractual analysis, pointing to entitlements relating to property as being those of the existing body of members. But the cases also point to difficulties arising where there are no contractual benefits to speak of and the text suggests that it cannot be assumed that the courts have finally resolved the issue in favour of a contractual basis for the holding of funds.

2. In relation to pensions, explain the reasons why trusts are considered such an appropriate mechanism for structuring pension arrangements and how this reinforces the understanding that you have gained about trust arrangements thus far.

This approach requires you to understand the key features of the trust arrangement, and centrally the separation of ownership of property into distinctive equitable and legal estates. From this you need to appreciate that in a trust arrangement equitable entitlement is associated with benefit, with legal title embodying the duties which are associated with trusteeship. This is key to understanding the attractions of the trust model for pensions provision, alongside how we have suggested settling property on trust allows safe-keeping through limiting free disposal of property for a very long period of time- a generation or more. This basic understanding allows us to think about how these benefits can be made available for large numbers of people and then allow pooling of assets and risk, with assets being managed by those subject to fiduciary duties. The key difference with a pension arrangement is that a beneficiary in this scenario is not a volunteer recipient of another’ generosity but actually a contributor to his asset pool. All these factors contribute to the way pensions are governed by a matrix of trusts law and special statutory provision.

3. From reading the decision in Air Jamaica v Charlton [1999] 1 WLR 1399 (PC), ensure that you understand why:
   – the contributory pension fund was being wound up;
the fund was deemed to be in surplus;
there were three competing viewpoints on what should happen to the surplus; and
the Privy Council ultimately ruled as it did.

This case arose following the closure of an occupational contributory pension scheme on account of the company’s privatization, where employees were made redundant, and although many were re-hired this involved new pension arrangements. It was the winding up of the original scheme which was the subject of the litigation, in the light of a surplus remaining: the large balance remaining in the original fund upon privatisation, where there been no further contributions nor deductions made, with the surplus sum (i.e. not subject to any liability under the scheme) being US$400 million. The key issues clustered around the basis of entitlement to this in determining actual entitlement to it, with this reflecting the distinctive features of pensions arrangements arising from how the contributor beneficiary is not in the same position of a typical beneficiary under a trust. With these issues at the interface of contract and trusts—was the basis of entitlement the contract of employment or the trust at the heart of the scheme— it was found that the surplus was held on resulting trust, being treated as provided as to one half by the employer and one half by the employees, with the company’s failure to dispose of the funds being a classic incomplete disposal resulting trust.
Revision Box Chapter 8

1. Explain why trusts law has become so significant in determining questions of disputed home ownership.

As the materials explain, outside the very narrow confines of relationship breakdown amongst married parties or ones in a civil partnership, there is no statutory framework of property entitlements and there is a very weak cultural tradition of coming to formal agreement about the ownership of a home during the lifetime of a relationship. The courts are left to make determinations ex-post, often between parties whose relationships have broken down, or where another party- commonly a lender- is looking to claim the property following default on mortgage repayments. Equity becomes involved for two reasons: firstly beneficial ownership of the home is that which is valuable (legal title relates for formal entitlement), and where a claimant has no legal rights to a home, their claim can only be one in equity. As for why trusts law, implied trusts have traditionally been applied in response to these situations, apart from a brief period of judicial favour for proprietary estoppel, where following Stack v Dowden (2007), favour for trusts has been restored. There is plenty of scope for applying express trusts here, with this strongly supported in conveyancing practice, but this remains uncommon, and implied trusts are able to fill the breach through their ability to avoid formality requirements for declarations of trusts of land set out in s 53(1)(b) Law of Property Act 1925.

2. Explain why the resulting trust might actually be a very limited way of establishing a proprietary interest in a shared home for someone without legal title, using the theoretical basis for this type of implied trust to do so.

Resulting trusts can only apply to property which once belonged to a claimant, and then they are limited to arithmetical value of that passed to another in respect of a shared home (or a proportion of the overall value reflecting this). Constructive trusts have their basis in conduct which would make it unconscionable for the legal owner to deny the interests of the claimant and are not dependent on the claimant's financial contributions in order to arise, and don't have the same quantification limitations as those associated with resulting trusts, and overall thus provide a more flexible solution.

3. Explain the restrictions placed on the use of constructive trusts in establishing a beneficial interest that can be seen embodied in Lloyds Bank v Rosset [1991] AC 107.

Following a period of concern about the lack of principled application of constructive trusts in resolving disputed home ownership, this seminal House of Lords' decision is authority that constructive trusts can only be applied to meet the needs of justice in this context where: there is an express agreement between the parties of a common intention that beneficial ownership of the property is to be shared by them; or where in absence of an express agreement to this effect, the parties' common intention to share ownership of the property can be inferred from their conduct (in terms of the contributions made by them).

4. What does the Supreme Court decision in Jones v Kernott [2011] UKSC 53 say about establishing an interest for:
(a) those who hold joint legal title to a home?

This endorses the position set out in Stack v Dowden, that holding legal title jointly means that both parties also own the house in equity, with the presumption being that sharing in equity is equal to mirror the position at law.

(b) the situation in which a claimant is not the home’s legal owner?

This acknowledges that there is a different starting point for claimants who are not legal owners, and that this requires a common intention to share ownership being found - in other words, this appears to endorse the basic position of Rosset.
Revision Box Chapter 9

1. Ensure that you can explain what is meant by a 'secret trust' and what its origins are.

A secret trust has its basis in a Will being a public document, and a testator wishing to make provision in his Will for someone(s) he does not wish to name. This can be done by a fully secret trust meaning a gift is left in your Will to someone who is actually intended to hold it for someone entirely different whom your Will does not name at all as a beneficiary, or a half-secret trust, so called because the testator says that they are leaving behind a gift in their Will for someone who knows what the purpose is without actually specifying in the Will what the purpose is.

2. Explain what the law relating to secret trusts can reveal about:
   (a) the significance of formality in the creation of trusts; and
   (b) the significance of implied trusts for addressing injustices arising from property and its ownership.

The law relating to secret trusts is important for understanding formality because on the one hand it reinforces the manifest purpose of formality for providing certainty and clarity in transactions involving property, because in this instance Wills which do not satisfy statutory formality will not be valid. However, secret trusts also reveal for us how Wills formalities can effectively be avoided. Here, equity will allow the clear provisions of the Wills Act 1837 (as amended) to be avoided on the basis that justice requires this, and so this provides a further setting for looking at how implied trusts are capable of interfering quite radically with apparent entitlements to property- even as they are set out in the public documentation of the Will.

3. Explain what is meant by 'fraud enforcement'.

Although there are some important differences between secret and half secret trusts, analytically they are often treated as being very similar. Here, it is conventionally regarded that equity will utilise implied trusts on the basis of fraud theory or in the pursuit of fraud enforcement: this is that it would be fraudulent for someone who is named to take the property beneficially if what he actually agreed to was to confer the benefit to someone different who is not named, and so the person named will be required to apply the property in favour of the person not named. Here we can see that an injustice would arise if the only reason property had been left to someone named is that this reflected an unwritten understanding that someone else was to benefit.

4. Explain what the decision in McCormick v Grogan (1869) LR 4 HL 82 reveals about resulting trusts in the context of secret trusts

This case, is authority for the justification for enforcement of secret trusts, with the House of Lords holding that that the courts will in principle enforce secret trusts. On the facts of the case the secret trust alleged was not enforced, but it is clear from the judgment that had the facts been different such an arrangement would have been enforceable by the excluded beneficiary. Given what we learned about resulting trusts arising where the settlor’s wishes cannot be carried out, you will need to explain the importance of
presumed intention for a resulting trust to arise, and look at arguments clustering around the position of residue legatees, pre and post Executors Act 1830 positions, and policy arguments in favour of enforcing secret trusts.
Revision Box Chapter 10

1. Ensure that you can identify the key stages in the development of English charity law from 1601 to the present, and from this answer the following questions.

(a) What does each stage in this ‘history’ reveal about the relationship between property and its ownership, and the support of worthy causes?

The origins of charity are strongly connected with the church state in place which dominated English social and legal culture until Tudor times when a nation state gradually came into being. In the 19th century we see the modern state starting to come into being, and even ideas of ‘state welfare’ ahead of the blossoming of the welfare state in the early part of the 20th century. Charity’s origins are closely connected with the medieval church, when the church dominated social and economic life and as part of this was central to responding to the needs of vulnerable community members and local causes. The dismantling of the church state in Tudor times and a substantial population increase required the state to take an interest in worthy causes, which is where our first modern charity law hails from. The explosion of Victorian philanthropy would provide charity law with its next crucial phase, and in between charity law had to be very active in managing the tensions embodied in the need for wide support of worthy causes and how this often left a private donor’s relatives and dependants aggrieved.

(b) Why did equity become involved in charitable giving?

Those (primarily religious) organisations which assisted those in need in medieval times would benefit the wider community on the basis that it would otherwise be for the community to provide support for these purposes. So where persons wished to make gifts to worthy causes, either inter vivos or under their Will, there became a strong interest in enforcing such gifts. Here equity, given its own roots in church doctrine, started to enforce charitable giving by imposing on the conscience of donors to carry out their giving as they had promised to do so.

(c) What are the two key sources of litigation in the sphere of charitable giving and what are the reasons behind each?

Historically, charitable giving has always been a source of opposition from kin of donors who see themselves as rightfully entitled to family property. And as the state evolved into a nation and then modern state with the capacity to raise taxation and the need to do so, the body responsible for collecting taxes – today this is the HMRC- also became very prominent in litigation.

(d) What is the ‘twist’ in the operation of the Mortmain legislation?

The Mortmain statutes were part of a very pro-kin era of charity law, whereby there was a strong disposition to strike out charitable giving. This had the effect of actually increasing what was recognised at law as charitable.

(e) Explain the long-standing significance of the Statute of Elizabeth 1601.
This was the first modern charitable statute, and its pre-amble for provided the basis for the seminal modern classification of charitable purposes for defining charity at law under Special Purposes of the Income Tax v Pemsel (1891), and it continued to be very important in the recognition of new purposes up until 2006 when the first statutory definition of charity was introduced, with the main 1601 statute being repealed long before this.


Prior to enactment of the Charities Act 2006, these two cases provided important statement on the evolving nature of charity and law which needed to accommodate this through recognition of new purposes as appropriate.

(g) What are the key advantages flowing from charitable status?

Charitable purposes are purposes which are publicly enforceable, historically by the Attorney-General exercising his parens patrae jurisdiction, and increasingly the Charity Commissioners and now Charity Commission; charitable purposes can exist indefinitely; once property has been given to charity, this is regarded as a permanent gift to charity, even if an original purpose cannot be carried out. Charitable organisations and gifts made to them attract favourable tax treatment.

2. Ensure that you can explain the background to the reform of charity law by the Charities Act 2006, and the similarities and key differences between this and the enactment of the Charities Act 2011.

The Charities Act 2006 represented an important new direction in charity law in placing the legal definition of charity on a statutory footing. This involved retaining some traditional approaches and introducing some radical new ones. At the heart of this was a reform movement seeking to bolster public confidence in charity and charitable giving by tightening up requirements associated with being charitable and retaining charitable status, but also increasing the size of the charitable sector by liberalising the legal regime, and especially so for smaller organisations. The Charities Act 2011 did not alter the law from the 2006 Act, but it consolidated it and tidied it to make it simpler and more accessible.
Revision Box Chapter 11

1. Ensure that you can identify the three key requirements for achieving charitable status at common law, and that you are able to relate these to the ‘special’ status of charity and the key advantages of charitable status.

These are that a purpose must be a purpose with ‘charitable character’; a purpose for public benefit, and not have factors disqualifying it from achieving charitable status by virtue of being political, being for the benefit of individuals, or geared towards profitmaking.

2. Ensure that you can comment on the envisioned relationship between the Charities Act 2006 and the common law relating to the legal definition of charity that it replaced. Would you agree that the 2006 Act was envisioned as a project of ‘continuity and change’?

The analysis of the Charities Act 2006 as a project of continuity and change originates in the way the reform movement leading to it pointed to traditional directions which had served charity law well, and which should be continued in a new regime which would both bolster public confidence in charity, and also enable the charitable sector to grow; and also traditional directions which needed to be replaced with different approaches to serve better these twin objectives underpinning reform of the law. Continuity can be seen in continuing requirements of a purpose being exclusively charitable, and also the basic requirement that a purpose is one for public benefit. Continuity can also be seen in the statutory list of charitable purposes in how a new ‘catchall’ heading designed to accommodate new purposes mirrored the Pemsel approach. Change can be seen in the expansion of the definition of religion, the removal of the presumption that a purpose is beneficial rather than detrimental to the public for the purposes of establishing public benefit, and that proving public benefit is an ongoing rather than once and for all requirement.

3. Ensure that you can comment on the purpose of the Charities Act 2011 and give examples of how this has changed the appearance of the legal definition of charity as under the 2006 Act.

Examples can be found throughout the parts of the legislation relating to the legal definition of charity, but the clearest example of this can be seen in the changed appearance of cy-près provisions.
Revision Box Chapter 12

1. Ensure that you are able to explain what is meant by ‘cy-près’ in the context of English charity law in terms of:
   – what the term actually means; and
   – what the facility for cy-près reveals about the significance of charitable activity within English society.

   This term’s literal translation is ‘as close as possible’. Here it refers to the position whereby property, once given to charity is permanently a gift to charity, even if the original purposes cannot be carried out, because it will be applied ‘as close as possible’ to what was originally intended. The idea is to avoid frustrating donors’ intentions any more than necessary, but this is also about the power of the charitable gift and the importance of the support which law confers to charity, which is itself underpinned by the manifest importance of the charitable sector in Britain.

2. Ensure that you can explain how cy-près operated at common law and what has changed about this as a result of charities legislation dating from 1960. In doing so, identify:
   – the continuing significance of the wishes of the donor; and
   – the emphasis given to other considerations in making use of property dedicated to charity.

Understanding that this doctrine is centrally concerned with fulfilling donors’ wishes helps us to appreciate the traditional approaches applied in applying cy-près, which also requires us to distinguish between cases of initial and subsequent failure of a charitable gift/purpose. That emphasis on donors’ presumed intention regarding his property was always couched in the core idea that giving to charity is a once and for all occurrence has over time given greater emphasis within the operation of cy-près to the efficient operation of charitable enterprises. As the equitable doctrine became formalised under statute commencing with the Charities Act 1960 it has become clear that notwithstanding continuing reference to ‘the spirit of the gift’, promoting the efficient use of property dedicated to charity has meant cy-près would sometimes operate at the expense of the donor’s intentions, with this latter consideration influencing the development of law in the light of purposes which fell short of becoming impossible or impracticable and were instead outmoded or outdated.
Revision Box Chapter 13

1. In looking at the decision in Boardman v Phipps [1967] 2 AC 46, a case study for considering when liability will arise and when it should, ensure you are able to answer the following questions.

(a) What is meant by a fiduciary relationship? Explain its key features.

A fiduciary relationship is said to exist where in a relationship between two parties, one party – the fiduciary – is expected to act unequivocally in the interests of another – the principal. This relationship of utmost obligation gives rise to what is known as the duty of loyalty and from this a fiduciary is not permitted to act in ways where his personal interest could conflict with that of his principal.

(b) What does this case suggest for the status of an unauthorized gain or profit in circumstances in which there is no wrongdoing and actual conflict of interest, and even absence of scope for conflict of interest?

(c) What do the majority and dissenting judgments reveal about the proper scope of fiduciary accountability?

Boardman suggests that any in circumstances where connection can be established between occupying a fiduciary position and making a profit, liability to account to the principal for that profit will arise. The judgments collectively suggest equity will strive to ensure that fiduciaries cannot profit from a fiduciary relationship in any circumstances, even in the absence of conflict of interest with duty, or even any tangible possibility of conflict arising.

(d) What arguments can be made both in favour of liberalizing the rules relating to profit-making and in maintaining a hard line against profit-making?

Arguments in favour of a very hard line are longstanding, and traceable in the modern law to the early 18th century. The asymmetries in the relationship between fiduciary and principal have been a cornerstone justification for the principle of fiduciary integrity manifested in the duty of loyalty. Other reflections on the cases, and particularly Boardman, suggest that allowing trustees who act in good faith to profit from showing entrepreneurial endeavour can deliver real benefits for the trust, and thereby for beneficiaries, and should thus be permitted.

2. In looking at the Supreme Court decision in FHR European Ventures LLP & Ors v Cedar Capital Partners LLC [2014] UKSC 45, ensure that you are able to answer the following.

(a) What different approaches can be taken to fixing liability for an unauthorized gain by a fiduciary?
(b) What are the justifications for each of these approaches, and the merits and limitations associated with them?

These questions are encouraging you to think about the relative attractions and limitations of a personal liability framework and liability attaching by way of constructive trust for responding to breaches of fiduciary governance where a profit has been made. The former is a much less extensive remedy, being an award for equitable compensation, and is confined to the unauthorised sum made, whilst a constructive trust mechanism allows for the recovery of profits made from the application of the unauthorised gain, such as investment in a portfolio of property.

(c) What does the law concerning liability attaching to an unauthorized gain or profit by a fiduciary now appear to be, and does it appear to be settled?

With the key decisions in FHR and the earlier contentious ruling in Sinclair v Versailles (2010; 2011 in the Court of Appeal), the position of the law follows from how breaches can be categorized in one of three ways: Type A involves misappropriation of a principal’s property; Type B the misappropriation of property rightfully belonging to the principal; and Type C where a fiduciary obtains other property in breach of duty – Type C. Sinclair had ruled that Type C breaches, including secret commissions or bribes should give rise only to a claim for equitable compensation. Although the Supreme Court in FHR conceded that it wasn’t possible to determine definitively the position for a secret commission conceptually as a matter of pure legal authority a strong corpus of practical considerations and ones of principle supported the case for a bribe or secret commission giving rise to a constructive trust in favour of a principal. This does appear to re-establish the orthodox position, and the contrary position in Sinclair was surprising as well as contentious for many. However, by its own admission the FHR Supreme Court ruling does not definitively clarify the position of secret commissions, and it also leaves unresolved the policy considerations attaching to cases involving an insolvency where there are likely to be competing creditor claims to an asset pool too small to satisfy all claims against it.
Revision Box Chapter 14

1. Joining the materials from this chapter with the previous chapter’s introduction to trusteeship, ensure that you can answer the following.

(a) In what way can the duties of a trustee under an express arrangement be seen as a measure of a beneficiary’s entitlements under it?

This takes us back to the very outset when we first encountered the express trust. Here an owner of property will transfer legal title to it to a person intended to take responsibility for the property in order that this property may be used for the benefit of another. Here a trustee becomes subject to a number of enforceable duties to ensure that this will happen as intended.

(b) How can the duties of a trustee be explained in reference to the ‘life cycle’ of an active trust?

The lifecycle of an active trust can be seen as three key phases: the creation of a trust, the operation of a trust once it has come into being; and a trust coming to the end of its life, or the end of a trustee’s involvement with it. There are duties for a trustee at each phase. A trustee will be particularly active in the activity phase that is after the trust has validly come into being, and prior to it coming to an end, where he will be particularly busy managing the trust property in terms of safeguarding assets and helping them to grow and ensuring that any administrative matters associated with this are complied with. It is also the case that as a trust comes into being, a trustee will have responsibilities, such as to ensure trust property is properly vested in him, and to ensure legal formality necessary to achieve this is complied with. A trustee will incur responsibility for ensuring that a trust coming to the end of its life is properly wound up, and there are also provisions governing his cession of involvement with a trust which will continue to be active, as well as provisions to end the involvement of a trustee deemed unsuited to carry on with a trust which is active.

(c) What issues arise where there are a number of beneficiaries under a settlement?

This requires you to think about the trustee’s involvement with an active trust, and how safeguarding trust assets is a central part of the duties he incurs here. This is closely connected with numbers of beneficiaries in how it requires us to think about balancing the needs of different types of beneficiaries at different points in time: here you will need to elaborate on how the interests of so-called life tenants and remaindermen are balanced as well as what might need to be done for a beneficiary who is a minor.

(d) How do rules relating to the administration of an active trust seek to balance the entitlements of a beneficiary with equipping the trustee actually to carry out the trust?

Here we see rules which try to provide some balance for the position whereby trustees are duty-bound to administer the trust in furtherance of a beneficiary’s entitlement to trust property, but that doing this diligently and conscientiously involves a great deal of work. Just because a beneficiary is entitled to benefit from the trust property, it does not mean
they are entitled to control how the trust is administered or even have access to information about how the trustee acts and particularly how he might (or might not) exercise the powers he has available to him to carry out the trust. Here rules relating to how a beneficiary might challenge a trustee’s actions, and what documentation he might inspect to try to glean information try to reflect that a beneficiary is in a position of enforced reliance upon a trustee, but it also acknowledges that a trustee must be given the ‘space’ and support to undertake this. This can be seen in the key cases of O’Rourke v Darbishire (1920) Re Londonderry’s ST (1965); Schmidt v Rosewood Trust (2003); Re Beloved Wilkes’ Charity (1851); Tempest v Lord Camoys (1882, and Klug v Klug (1918).

2. Ensure that you understand the nature of trusteeship in the twenty-first century by reference to:

– growing dissatisfaction with the legal framework for trusteeship dating from the latter years of the twentieth century;
– the rise of the ‘professional trustee’; and
– the way in which the Trustee Act 2000 can be seen to embody two key trends—that is, increased liberalization and also accountability—and how these aims can conflict.

This requires you to reflect on the origins of trusteeship and the nature of trustee providing the basis for equity’s longstanding governance of trusteeship and then the explosion of developments during the nineteenth century reflected through new statutory provision as well as occurring through case law. The rise of the professional trustee- that is a person who offers trusts services by way of a business or profession- is in many ways the antithesis of the respected and esteemed amateur who traditionally became a trustee out of obligation and who as a matter of strict rule was not entitled to be paid. The rise of the professional trustee has produced two narratives for law reform which are quite different from one another, both of which can be seen in the Trustee Act 2000 and the jurisprudence which predates this which remains relevant as we try to understand the import and effect of the legislation. On the one hand there is the liberalising agenda, calling for reform on account that highly skilled professional trustees should not be subject to constraints applied – for good reason- to those taking up trusteeship as duty-bound amateurs. Here the safeguarding of trust assets, which arguably is trusteeship’s most important and certainly visible aspect, illustrates longstanding dissatisfaction that professional experts should not be subject to the constraints which quite properly apply to those duty-bound to protect trust property but who lack any expertise and often experience in such matters. This can be seen in how the general power of investment under s 3 of the Act allows a trustee to make any investment as he could do if he were absolutely entitled to the property. The accountability agenda approached law reform from the angle that those who command heavy fees for their services, doing so on the basis of purported expertise should be held to higher standards than the duty-bound amateur, with the s 1 duty embodying this key idea. The net effect of increased liberalisation and increased accountability is not easy to calibrate, with the widespread use of trustee exemption clauses being widely believed to have diluted the intended effect of increased accountability.
Revision Box Chapter 15

1. From reading the materials on the variation of express trusts, ensure that you can answer the following questions:

(a) What is meant by ‘variation’ of a settlement?

The chapter’s starting point is that although the theme of a trustee carrying out a settlor’s instructions is a strong one, that circumstances can arise when there can be considerable variation of what the settlor initially instructed if doing so would promote efficient administration of the trust or is considered necessary to preserve the value of the beneficiaries’ entitlements. This can take place as an extension of a trustee’s powers, or even by way of a substantial alteration in the beneficial interests falling due under a trust. At its most extreme, there are also circumstances in which beneficiaries themselves by their collective agreement can bring the trust to an end altogether, and in a slightly less extreme version of this, can collectively agree to give a trustee enhanced powers to deal with the trust as it is.

(b) What issues arise in decisions to vary trusts and what, if any, policy considerations arise as a result?

(c) In what circumstances will a variation of an original settlement be sought?

The materials under (a) helped to explain the different ‘levels’ of departure from a settlor’s original intentions which are possible, and this helps us to understand both the circumstances in which variation of a settlement might be sought and also the policy issues which can be found here. For parts (b) and (c) it is important to understand that just as the creation of many express trusts occurs in the context of tax planning, so does much variation activity. This in and of itself raises meta questions of the morality of tax planning alongside the legality of it. Tax planning is of course the lawful counterpart for tax evasion. It is lawful to structure one’s tax affairs to reduce exposure to taxation, but the demands on public finance, and particularly what is known as the ‘tax gap’ (the divide between what’s needed by public finance and what is collected from taxpayers) means this is itself controversial. This can be seen captured in Lord Denning’s observation in Re Weston’s Settlements (1969) that whilst the avoidance of tax may be lawful, it is not yet a virtue. This can quite easily be applied to meta questions of the morality of tax law, but this statement was made in the context of how variations could exacerbate the position whereby many children have already been ‘ruined by being given too much’. This highlights two key areas of policy arising where applications are made for trusts to be varied. One is that there are often successive interests to accommodate, and that a variation in one beneficiary’s interest may affect someone with a later entitlement. And underlying all of this is how variation will override a settlor’s original intentions, raising fundamental questions of distinguishing between trusts and gifts, and the legal framework seeking to ensure that a trust will only arise where one is intended, and which governs the commission of a breach of trust. In practice many trusts are drafted widely to allow for increasing a trustee’s powers and even variation of beneficial interests, but as a number of cases show, a settlor’s wishes are seldom paramount, and are frequently overridden.
(d) What are the key provisions that allow for the variation of trusts?

Here you must be aware of the courts’ inherent jurisdiction and also variation under the Variation of Trusts Act 1958.

There is longstanding consensus and supporting authority - centrally Chapman v Chapman (1954) - that inherent jurisdiction is narrow, and actually confined to what has been termed ‘emergency or salvage’ (for example releasing funds to carry out vital repairs of property). It has become extended to a range of unforeseen contingencies, but there has remained the need to show some element of emergency. This applies only to variation of beneficial interests (with wider inherent powers elsewhere for matters of trust administration, e.g. in authorising remuneration of a trustee). And although the courts’ capacity to approve compromises for disputed entitlements of infant or future beneficiaries this is not strictly a variation matter (because there is actually dispute as to the terms of the trust), in reality many such things don’t escalate as disputes and treated as variations, but with Chapman disapproving this wider angle on variation. The Variation of Trusts Act 1958 itself originated in contention about the scope of inherent jurisdiction, and now empowers the court with discretion to approve any arrangement varying or revoking all or any of the trusts, or enlarging the trustees’ powers of management and administration over the property subject to the trusts for a number of categories of person listed under s 1(1). But Re Ball is authority that the courts will not approve a proposal for a total resettlement that alters completely the substratum of the trust, with Lord Reid’s view in Re Holmden (1968) that this statutory variation must be regarded as one made by the beneficiaries themselves, rather than by the court, with the court acting merely on behalf of those beneficiaries who are unable to give their own consent and approval.
Revision Box Chapter 16

1. In joining these materials on breach of trust together with the study of trusteeship in Chapters 13 and 14, ensure that you can answer the following questions.

(a) What is meant by breach of trust and how is a breach of trust committed?

Generally any failure to comply with duties he falls subject to as a trustee will result in a trustee committing a breach of trust. This covers duties arising from the trust instrument itself or ones found in the general law relating to trusteeship applying in default of this, with a breach capable of subsisting as engaging in a prohibited action or failure to engage in what is required. These characteristics of breach are summarised very effectively in Armitage v Nurse (1998), and liability arises where such an act or omission has been committed giving rise to a loss for the trust estate.

(b) How does breach of trust differ from breach of a fiduciary duty?

Breach of fiduciary duty is different, because unlike breach of trust, breach of fiduciary duty instead of governing unlawful acts of trustees instead focuses on situations where a prima facie lawful act becomes a wrongful act only because of the fiduciary obligation of loyalty that is imposed by equity. Differences in the basis for liability are best understood through appreciating that for breach of trust this follows loss experienced by the trust, whilst for breach of fiduciary duty, wrongdoing has given rise to a personal profit for the fiduciary. For breach of trust liability arises because a wrongful act/omission committed has resulted in loss to the trust estate, and which must be compensated for. Breach of a fiduciary duty is said to arise where an otherwise lawful act has become unlawful because equity will not allow a fiduciary’s personal interests to conflict with duties owed to his principal.

(c) What are the remedial consequences of breach of trust compared with breach of duties at common law arising from breach of contract or commission of a tort?

There are no degrees of fault attached to a breach of trust, with liability catching equally the innocent mistake of an honest trustee and the dishonest trustee alike. Once causation between the breach committed and the loss to the trust estate the trustee becomes liable for all losses experienced through the mechanism of equitable compensation. Unlike common law damages awards, all losses are compensable: there are no remoteness rules and a beneficiary isn’t required to engage in loss mitigation.

(d) What defences are available to a trustee acting in breach?

There are a variety of defences to be aware of here. The most important ones are: beneficiary consent to or participation in the breach; passage of time through limitation or through application of the doctrine of laches; wide power under s 61 Trustee Act 1925 to excuse honest and reasonable trustees from liability for breach of trust.
2. From reading the chapter materials and any Online Resource Centre materials, ensure that you understand the significance of trustee exemption clauses (TECs) by considering:
– what is meant by TECs;
– what issues arise in the use of TECs; and
– what the implications for trusts law might be in the growing use of these mechanisms for restricting/excluding liability for breach of trust.

TECs or trustee exemption clauses seek to exclude liability that may otherwise be incurred in the course of trusteeship in the event of a breach of trust being committed. The widespread use of TECs was identified in the Revision Box questions for chapter 14 as a factor which made it difficult to assess the net effect of changes in law to trusteeship, in terms of whether this on balance conferred greater freedom to trustees or imposed enhanced liability on those who undertake trust services provision by way of a profession or business. The use of TECs is widespread amongst professional trustees and at common law their extensive scope for validity was confirmed in Armitage v Nurse (1998). Alarmed by how TECs could validly exclude liability for everything short of a trustee’s ‘actual fraud’, a Law Commission Report in 2002 set in motion a far-reaching debate on the appropriate use of TECs. This movement identified the tensions embodied in the valid use of TECs: these are centrally balancing considerations of settlor autonomy and particularly beneficiary protection alongside and against the availability of a range of affordable trusts services. The Law Commission’s recommendation was for an industry-wide adoption of a rule of practice to limit scope in the use of TECs to negligence, and only where the existence of such a clause is drawn to the attention of the settlor. In making this recommendation the Law Commission was praised for listening to all sides and proposing a ‘proportionate risk-based approach to the issue’, and following wide adoption in the trust services industry occurring from 2010, this approach was approved in the Privy Council in Spread Trustee Ltd v Hutcheson (2011). But for many it leaves unanswered concerns about the whether the Law Commission should have concluded in favour of TEC use at all, particularly on account of the already structurally asymmetrical relationship between trustee and beneficiary.
Revision Box Chapter 17

1. Ensure that you understand and can answer the following:
   (a) Why, following a breach of trust, may pursuing an action for equitable compensation not be satisfactory for a beneficiary?

   This is a personal action against a trustee acting in breach, and its value to a beneficiary depends firstly on the solvency of the trustee who has acted in breach. The value of an action for equitable compensation for a beneficiary will also depend on what has happened to the property after it has been misappropriated/misapplied.

   (b) Why is it necessary to have a suite of actions that are both proprietary and personal, and which are also available against a range of defendants?

   Understanding this requires understanding of how property which is missing as a result of a breach of trust is likely to be passed other persons at some point, and that a number of things can happen to it: it can be substituted with other property, and in this situation as in ones where the property remains in its original form, it can become dissipated or proceeds from its sale can become reinvested profitably in other property.

   (c) Why is a proprietary action a claimant’s action of choice?

   A propriety action attaches to the property itself, and so is theoretically available to a rightful owner of property in respect of anyone who holds what can be identified as his property, and against whom he can make a claim for the return of the property. The limits of a proprietary remedy are such that it only ceases to be available where it can no longer be identified as that of an original owner, with the common law and equity having different parameters for this, and with a proprietary action providing scope for recovery of the property itself and increases in its value which have occurred since being lost from its rightful owner.

2. In relation to equity’s tracing action, ensure that you can explain the following:

   (a) Why do so many non-beneficiary claimants wish to use equity’s tracing rules and what is the jurisdictional basis of this?

   Tracing in equity is the only proprietary action available to a beneficiary under a trust, because although the common law has its own tracing regime, a beneficiary has no property rights which law recognises and will enforce. However, equity’s tracing regime is attractive to a number of potential claimants, including those who can access law’s tracing action. This is centrally because the common law will not allow tracing into mixtures of property: that is once the claimant’s property has become mixed with property which does not belong to him the common law no longer recognises this as the claimant’s property: equity will permit tracing into mixtures of funds on account of continuing to recognise property as that belonging to a claimant even where it becomes mixed with that belonging to others.
The jurisdictional basis for equity's tracing action is equity's regime of fiduciary governance, and particularly the commission of a breach of trust or breach of fiduciary duty regarded as being equivalent with commission of a breach of trust. This occurs in established fiduciary relationships where the requirement of a fiduciary relationship for establishing the right to trace in equity will be met automatically. Equity is also prepared to recognise a fiduciary relationship has arisen in a wide variety of circumstances beyond this, including for example where the claimant has been the victim of theft. The second requirement is the claimant must have an equitable proprietary interest in the missing property, which apart from being a beneficiary under a trust can arise in circumstances as far-ranging as being an unpaid seller, or victim of fraud or theft. Thirdly, the right to trace must not have been lost, where the property ceases to exist because it is actually destroyed or loses its original identity through manufacturing processes; where property comes into the hands of a bona fide purchaser; or where allowing tracing would be inequitable because an innocent recipient has used the property in ways which cannot be reversed or are not easily reversed. There is also some authority that the right to trace can be lost where a potential defendant has acted in good faith in his use of the property, but this is a very contentious position and has little authority supporting it.

(c) What is meant by a ‘unitary system of tracing’ and to what degree does English law currently embody this?

A unitary system of tracing is one discussed in the book as a hypothetical universal set of rules which we might consider in the light of observation in the House of Lords in Foskett v McKeown (2000) that there was no sense in having different rules for tracing at law and in equity when one set would be sufficient. From this you are encouraged to think about what such a unitary system of tracing might look like in the light of what you have learned about ones currently subsisting at law and in equity, and which will gravitate strongly around incorporating the flexibility of equity and also the simplicity of the common law. The former can be seen in equity’s very accommodating approach to ‘mixed substitutions’, its approaches to competing innocent claims, and also its facility for allowing recovery for increases in value. In terms of joining this with the simplicity of the common law, we would focus on the much more elementary requirements of using tracing at common law, which means that all that is required is that the claimant owns the property. A universal approach would emphasise a requirement of a proprietary interest in property—at law or in equity—and would enable the current fiduciary relationship requirement for equitable rules dispensed with, which would satisfy criticism that it is unprincipled. Overall this would encourage focus on the issue at heart—namely the recovery of wrongfully taken property—rather than concentrating on the status of the victim.

3. In relation to equity’s personal actions, consider the following:

(a) What is meant by ‘strangers’ to a trust and why it is said that there are two types of stranger?

(b) How does the type of stranger appear to influence the nature of liability?

The term stranger here applies to those who, prior to the breach were not in any way connected with the trust and its administration. There are said to be two types of stranger on account that those who are innocent can also become embroiled in a breach of trust if
they receive wrongly applied trust property without knowing of its provenance. A knowing stranger is one who is aware that property received is not bona fide, or someone who has actually assisted in the breach of trust which has occurred. The type of stranger is central to liability arising in this sphere: traditionally the liability of knowing strangers has arisen by way of constructive trusteeship, reflecting that this is wrongdoing of the type associated with imposition of a constructive trust. This remains so for those who knowingly receive trust property, but it was always the case that those who assist a breach of trust – known as accessories – never actually receive property. The wrongdoing of the latter type was nevertheless treated as a form of constructive trusteeship and this remains so but this view is under scrutiny following the Supreme Court decision in Williams v Central Bank of Nigeria (2014). Innocent strangers do not incur liability as constructive trustees on account of absence of wrongdoing, and the liability associated with them is of a personal nature, and one which appears to be very restricted in application.

(c) Summarize the current law relating to dishonest assistance.

From its origins in ‘knowing assistance’ what is now known as ‘accessory liability’ or ‘dishonest assistance’ (following the decision of Royal Brunei Airlines v Tan (1995)) is governed by what is required for the defendant to have acted dishonestly. There have been a number of key cases including Twinsectra v Yardley (2002), and Barlow Clowes v Eurotrust (2006) and Abou Rahmah (2006) and Starglade Properties v Nash (2009) as the courts have tried to clarify whether this is appropriately determined on an objective or subjective approach. In the Court of Appeal decision in Starglade Properties v Nash (2010) and Aerostar Maintenance v Wilson (2010) the approach appears that a defendant acts dishonestly where he does ‘not acting as an honest person would in the circumstances’, with the latter case expressing this as amounting to ‘conscious impropriety’ on the part of the defendant.

(d) Summarize the current law relating to knowing receipt.

In terms of establishing the meaning of ‘knowledge’ for the purposes of knowing receipt, the key case here is BCCI v Akindele (2000), which focused on the ‘want of probity’ approach adopted in Re Montagu’s ST (1987). From this, Akindele is authority that there is no requirement for a defendant to be dishonest for liability to arise, and instead it would do so where the ‘recipient’s state of knowledge’ was such as ‘to make it unconscionable for him to retain the benefit of the receipt’. This was thought to avoid difficulties which can be seen in earlier case law, but Akindele did not actually clarify what the differences between dishonesty and unconscionability might actually amount to. Some clarification came in Criterion Properties v Stratford UK Properties (2003), suggesting the question of unconscionability could not simply be answered by reference to whether or not there was actual knowledge of the circumstances giving rise to the breach of duty, but in the House of Lords it was submitted that neither it, nor Akindele, were truly concerned with knowing receipt. Amidst continuing uncertainty the Court of Appeal stated in City Index Ltd v Gawler (2007) that Akindele ‘represents the present law’- albeit that uncertainties generated by it appear not to have been resolved, and Starglade Properties v Nash (2010) supports this view. Moreover, Williams v Bank of Nigeria has reignited debate evident in Twinsectra v Yardley on the relative merits and attractions of approaches to recipient liability requiring fault or where liability is strict through references in Williams to non-innocent recipients as ‘merely wrongdoers’.
(e) Summarize the key features of the personal Diplock action.

This action stems from how it is sometimes deemed inequitable to bring a proprietary tracing claim in equity (where this is theoretically possible) because property has been applied to purposes which are not reversible or easily reversed. Such persons aren’t entitled to the property because they are volunteers and not bona fide purchasers, but their innocent position renders them subject to a personal action in equity. This action is restrictive in scope compared with other beneficiary actions, appearing to limit recovery to the principal sum misapplied (without interest) and may only be available in the administration of estates (as considered in Re Montagu), and even then only once remedies against ‘wrongdoers’ have been exhausted. It is seeking to balance the competing interests of innocent victims of a trustee’s breach of trust, recognising that volunteers should not take free of a beneficiary’s interests, but that the position of an innocent recipient who has applied property in ways which cannot easily be undone also requires equity’s careful application of justice and fairness.
Revision Box Chapter 18

1. In relation to Quistclose trusts, ensure that you can explain:
   – what the essence of a Quistclose arrangement appears to be; and
   – what the key requirements of a Quistclose trust appear to be, drawing on Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567 itself and subsequent cases.

   This is a special type of trust arising from a loan which is made, to ensure that where money advanced for a particular purpose cannot be used for this that it will be returned to the creditor. Here where an identifiable sum of money is advanced by its owner to another for a particular purpose, the obligations of trusteeship are imposed upon the latter. From Barclays Bank v Quistclose (1970) it is clear that this works by way of a primary trust attaching to the purpose underpinning the loan and a secondary trust arising for the original lender because this primary purpose could not be carried out.

   A central pre-condition seems to be that money is advanced for a specific purpose and for that purpose alone, and that this (purpose) is known to the recipient (focus is what is understood by the recipient rather than what is intended by the lender). It isn’t clear whether payment of money into a special account is necessary but there are many advantages associated with this gravitating around the claimant’s ability to identify the money as his. It does not appear to matter whether the money originates in a voluntary loan or payment under a contractual obligation.

2. In relation to the decision in Twinsectra v Yardley [2002] 2 WLR 802, ensure that you understand:
   – the spectrum of possible views advanced and the extensive analysis of why ultimately a resulting trust in favour of the lender was the one ultimately to be preferred;
   – how the resulting trust in favour of the lender operated subject to the mandate of the borrower to apply the sums advanced to the specified purposes and how this ultimately ensured that Sims did hold the money on (resulting) trust for Twinsectra; and
   – why, at that point, it did not matter that the money was advanced to be applied to a purpose rather than to benefit an identifiable individual.

   This requires you to understand that Twinsectra is a very important case and how although conventional analysis has gravitated around the secondary trust as one which is resulting (and included in Lord Browne-Wilkinson’s Westdeutsche Type B categorisation) and an alternative theory that an express rather than an implied trust arises. Here you will need to read carefully Lord Millett’s (1985) LQR article and also Jamie Glister’s one from 2004. In Twinsectra the House of Lords held that intention to create a trust (of the property held by Sims) could be found on the construction of the undertaking that the money was to be used for the acquisition of property and for no other purpose. In turn, this gave rise to a beneficial interest in the money to be held on resulting trust for the lender. This countermanded the argument made that there was no intention to create a trust and that there was no obvious ‘specific purpose’, and so there was no bar on the money being applied to unspecified purchases of property.

3. In the light of questions 1 and 2, answer the following questions:
(a) By way of a summary, what is the likely significance of key cases post Twinsectra?
(b) What issues of law appear to arise from judicial recognition of Quistclose arrangements?
(c) What issues of policy are associated with judicial recognition of Quistclose arrangements?

A number of cases post-Twinsectra have continued the quest to try to clarify the operation of Quistclose arrangements. Cooper v PRG Powerhouse Ltd (2008) appears to support its views on when a trust will arise, with Mundy v Brown (2011) continuing the interest taken in the importance of alongside purported need for segregation of a creditor’s assets, with this also evident in Bieber v Teathers (2012) which also considers the consequences of finding that no trust has arisen; this is that as stressed in Anglo Corporation v Peacock (1997) as being what was understood by the recipient rather than what was intended by the creditor. However it is also the case that Quistclose itself raises an interesting issue of law, inasmuch as it was not clear that the primary trust had actually failed when the secondary one was applied, with this seeming to reflect policy considerations highlighting the benefits of enforcing Quistclose arrangements associated with willingness of lenders to provide vital cash lifelines to struggling businesses. Alongside that, Quistclose arrangements are criticised for conferring preferences for some creditors at the expense of others, particularly where there is an insolvency and the purpose of insolvency law is to provide fairness between creditors as far as it is possible to do so.

4. Ensure that you are able to explain where trusts and equitable obligations are to be found in ‘commercial dealings’ and that you are able to identify the apparent attractions of these mechanisms for contracting parties.

This requires understanding that commercial dealings are not an obvious operating context for equity’s core ideas, given that the former are characteristically dealings ‘at arm’s length’ governed by contract, involving an exchange between parties for profit, and in which considerable freedom is given to the parties by ‘commercial law’ to determine relations between them. But also that there are some strong similarities subsisting between equity and commerce which help to highlight the attraction of equitable principles for commercial activity. Trust and confidence at the heart of equity’s jurisdiction are essential elements for contracting, because, notwithstanding all that has been said about commerce and its raison d’être, commercial parties will deal with only those whom they trust, even if this is at a ‘threshold’ level, and will equally want to be perceived as trustworthy, even if this is directed at profit maximization. This suggests that even very naked self-interest requires some fairness in contractual exchanges. The key difference between them is the binding character of fiduciary relationships, which are quite different from those arising from the ordinary governance of commercial relations by commercial law. Here much of the interesting development is occurring around how some contracting parties will be keen to import fiduciary obligations into their dealings with others, and reactions this generates amongst others who are profit-driven and contractually oriented. We know that some parties are very keen to show their relations with others are vested with fiduciary duties, and also that others are often very keen to establish that they are not.