Chapters 1 & 2: Law and equity and an introduction to the trust; The nature of the trust: its operation and applications in society and economy

1) ‘Notwithstanding that the formalised equitable jurisdiction characteristic of today is in stark contrast to its medieval origins, this much more recent state of affairs has not stifled equity’s creativity and its underlying rationale’.

Discuss.

2) ‘Equity’s development of the modern trust, and the rights and obligations pertaining to it can be seen as a mechanism to support property rights subsisting at law as much as a means of responding to injustices which can arise from legal rights’.

Discuss.

Brief guidance notes:

Both these questions are rooted in understandings of the nature of modern equity and the reasons underlying its origins as a distinct jurisdiction in English law alongside ‘law’. It requires reflection on the origins of equity in feudalism, premised on the common law’s recognition of only rights subsisting at law, and acceptance by the King’s chancellor that this could cause injustice. There must be some reference to this concern with preventing injustice leading initially to the Chancellor exercising his discretion in an ad hoc manner, and the origins of the modern court of Chancery being traceable from this. There must also be some explanation of the way in which the court of Chancery became more formalised the maxims and principles of equity appeared, with some reference to what these are. Importantly there needs to be reference to the way in which this ensured that jurisdiction would become less ad hoc. Notwithstanding this the quotation is inviting reflection on there being a number of testaments to the way in which modern equity remains faithful to its origins - to support law and legal rights as well as to prevent injustice - and that it’s creativity has not been stifled notwithstanding its operation within a more rigid framework of operation (such as the evolution of the doctrines of undue influence and estoppel, and the innovation of the “mere equity”).
3) ‘The trust instrument is one of the most flexible and useful legal devices ever. While it has gown up around family arrangements, there is much evidence which points to the trust as an essential tool in commercial relationships which are far removed from this original context’.

Discuss, assessing the principal strengths and weaknesses of this statement.

4) ‘The modern trust can be found present across a number of social and economic spheres and being applied to a variety of apparently different situations, with modern trusts law being reflective of this. However, at the heart of modern trusts law there is one single overriding tension- that subsisting between neo-liberal notions of property and a wider objective of “social justice”’.

Discuss this statement, indicating whether you agree, and providing support for your views.

Brief guidance notes:

These questions are an exploration of the trust as a very flexible and useful instrument and a number of illustrations of this can be found within chapters 1 and particularly 2. Some introduction to what a trust is and what its key features and characteristics are is necessary to set the scene, and will provide a solid foundation for explaining why and how the trust is able to do what it does. There are many illustrations in these chapters of the way in which the trust might be worthy of such adulation, and a critical assessment of some of the following can assist with an analysis of whether this claim is worthy of merit, or whether in comparison with other similar common law concepts, this view of the trust over-plays its importance. Such matters include the way in which the trust is capable of fulfilling a variety of useful functions relating to property (notably the facility of ‘dual ownership’; the way in which it might be considered an instrument which is highly adaptable, and has developed in a number of different directions from its ‘family trust’ origins) and one which has become applied to a variety of contexts, across social and domestic and commercial spheres.

5) ‘The trust is an instrument whose flexibility and ingenuity is worthy of much celebration. Its traditional relationship with the contract illustrates that it has always been able to ‘reach’ the parts which the common law cannot, and the Contracts (Rights of Third Parties) Act 1999 underscores the trust’s superior nature still further’.

Discuss.
Brief guidance notes:

Like the question above, this one has its origins in the broad idea which presents a particular view of the trust, but here it is focused directly in comparison with the contract, and requires a close examination of the nature of the traditional relationship between the two. This of course hovers around the contractual doctrine of privity and the capability of both instruments to create enforceable rights for third parties.

6) ‘Despite any suggestion to the contrary, the trust and its functions are not difficult to pin down; and instead what it is, and what it is capable of doing, are plain and obvious. Any approach which seeks to explain what is special about a trust by comparison with similar common law devices is simply unnecessary’.

Discuss the views expressed in this statement, indicating whether or not you agree with them, and why.

Brief guidance notes:

This is a slightly different take on the ‘virtues of the trust’ and which invites reflections on whether the trust is worthy of adulation which it receives, based upon its key features and characteristics and capabilities and whether it actually has any kind of ‘superior nature’. Here, it incorporates elements of both the above questions, and requires an approach which is substantively very similar in terms of subject matter and content, but of course one which is focused on what this particular question appears actually to be proposing.

7) ‘The function of modern trusts law can be seen in equal measure as manifesting entitlements relating to property and also as ensuring the allocation of responsibilities subsisting in respect of it.’

Discuss.
Brief guidance notes:

This is a slightly different take on the themes of chapters 1 and 2, and the questions which have been asked up to now, but in addition it also seeks to draw everything together to encourage focus on what the law of trusts might actually be about. This follows on from the introduction to the trust given in chapters 1 and 2, and comes ahead of chapter 3 which provides the first chapter on the substantive law relating to private trusts. So this is a question seeking reflection on the introduction to the trust and a forward looking focus on what the law of trusts actually amounts to, by asking what trusts law might actually be seeking to achieve and how it might do this.