Chapter 4: Formality and the creation of valid trusts

1) ‘The general policy behind requiring formality is to protect the parties involved when property is settled on trust. Formalities requirements seek to achieve this by providing documentary evidence of transactions, by providing certainty as to the property and nature of the transaction and by preventing ‘secret’ transactions involving trust property. This helps to ensure that all dealings with trust property are visible and ascertainable. Thus, these requirements are clearly at the heart of trusts law’.

Discuss the views in this statement, making an assessment of the representations being made.

2) ‘It is commonly claimed that the formality requirements which surround declarations of trust like all formality requirements pertaining to dealings with property can be understood by reference to one key overarching rationale - this is the protection of property through the prevention of secret dealings. However this claim can also be used to obscure other considerations of policy’.

Brief guidance notes:

Both these questions are geared towards explaining formality requirements pertaining to trusts and their nature and source, and the reasons often advanced for their existence concerning the protection of property (and thus the protection of the owners and recipients of property, including those who are responsible for dealings with trust property) through preventing secret property transactions. However, in being focused on formalities which are associated with declarations of trust and also dispositions of equitable interests, both questions (and particularly question 2) require some thought to be given to a variety of reasons why it is deemed to be good policy to prevent secret transactions. This is in close consideration with the reasons why people choose to divest themselves of their property (and particularly equitable ownership of it), and why the State might have an interest in regulating such dealings and which relate to the prominence of trusts in tax planning (and also tax avoidance).