Chapter 14: The office of trustee: commencement and termination

1) ‘The office of trustee is traditionally associated with burden and responsibility. In order to ensure the correct management and administration of the legal estate for the benefit of the beneficiaries, equity has imposed strict duties on trustees. This emphasis on strictness has to be correct, given that the case law establishes that it is a position of tremendous power, and is easily abused’.

Discuss.

2) “It is an inflexible rule of equity that a person in a fiduciary position… is not, unless otherwise expressly provided, entitled to make a profit … It does not appear to me that this rule is … founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he is bound to protect. It has, therefore, been deemed expedient to lay down this positive rule” (Per Lord Herscell in Bray v Ford [1896] AC 44).

Discuss the views being expressed in this statement, indicating their significance in leading case law.

3) ‘In many respects the apparently clear statement on profit-making by those who occupy fiduciary positions from the House of Lords in Boardman v Phipps [1967] overlooks the way in which this can discourage, on the part of trustees and others, activity which can be highly profitable for trust assets and which can accrue considerable benefits for beneficiaries’.

Discuss.

Brief guidance notes:

All three questions are focused on the principle of ‘fiduciary integrity’ generally and the very strict rules in place which prevent a trustee profiting from his trust, and otherwise abusing his position by allowing his duties and personal interests to conflict. An introduction to the nature of fiduciary office (and including brief reference to the position of remuneration of trustee activities) will set the scene for the discussion of the case law which illustrates the very strict position adopted in relation to trustees who make unauthorised profits from their fiduciary responsibilities. Then some consideration will need to be given to how appropriate the ‘hard line’
prohibition on all profit making might actually be, and an analysis made of the benefits and detriments to the trust for adopting a more flexible approach to profiting from position.