EXAMINER’S COMMENTS

Question 1

The first issue raised by this question is the entitlement to the $100,000 in the special bank account. This raises the issue of whether there is Quisclose trust. The requirements for a Quisclose trust are the receipt of money is for a purpose and only for that purpose, in this case for payment of the vacuum cleaners once dispatched to Industrial Chickens. For Quisclose trusts the joint intention of the person paying the money and the recipient that is normally required. However, it has been held that in some cases, such as the present, the intention of the recipient alone is enough: Re Kayford. If Re Kayford is followed the purpose of the payment failed when Rainbow went into liquidation. Thereafter the money would be held on resulting trust for Industrial Chickens and would, therefore, not be available to the liquidator. (10 marks)

The second issue is whether Rainbow has rights over the Newcastle property, in which case the property is available to the liquidator. Such a claim depends upon whether Wayne is in breach of fiduciary duties to Rainbow. Wayne is a director of Rainbow and thus owes fiduciary duties to it: Regal (Hastings) Ltd v Gulliver. The factual scenario here is somewhat similar to Regal Hastings and other such cases. This involves a breach of the so-called misuse of position rule discussed in Chan v Zacharia. Wayne could only go ahead with his action if he had the consent of the company. That has to be given by a meeting of shareholders – consent of the board of directors is not enough. (10 marks)

If there has been a breach as seems likely, the profits would, in these circumstances, likely be held by Classic Cleaners on constructive trust for Rainbow under the knowing receipt principles of Barnes v Addy. The knowing receipt principles involve the third party receiving trust property of property flowing from breach of fiduciary duty with knowledge that such receipt was in breach of trust or fiduciary duty. The critical and often contentious issue is what is meant by knowledge. In Baden v Societe Generale pour Favoriser le Developpment du Commerce et de L’Industrie en Franc SA, Peter Gibson J stated that there were five categories of knowledge in a recipient that were relevant to the decision to impose a constructive trust.

The High Court has made clear that the first 4 categories are knowledge for the purpose of the knowing receipt rule, but not the fifth: Farah Constructions Pty Ltd v Say-Dee Pty Ltd. There would seem to be little doubt that Classic Cleaners through Wayne had knowledge so it would hold the funds on constructive trust. (10 marks)
As Classic Cleaners used the money to purchase property in Newcastle, that is a clear breach of trust. Rainbow has a personal claim against Classic Cleaners, but also and more likely to pursue, a tracing remedy to assert a property right in the Newcastle property: *Lake v Bayliss* is an example. (10 marks)

Thus, the liquidator would have access to the $5,000 in the general operating account and the Newcastle property, but not the $100,000 in the special account.

**Question 2**

**Part (a)** In relation to the shares in Allied, Jerry’s breach of trust allows Kramer to trace the money spent on purchasing the shares. Jerry would be able to assert beneficial ownership of the shares, which he presumably would do because the shares have appreciated in value: *Foskett v McKeown* etc. (10 marks)

**Part (b)** In relation to the painting, Kramer can trace property into the hands of a third party, such as Newman, unless the third party is a bona fide purchaser taking for value and without notice: *Boscawen v Bajwa*. The critical issue is whether Newman has given *valuable* consideration. Students needed to discuss what is meant by valuable consideration and then discuss whether it exists on the facts. (10 marks)

**Question 3**

**Part (a)** This raised the issue of whether the gift in her will was for a valid charitable purpose within the fourth category of *Pemsel’s* case. The key authorities here are *National Anti-Vivisection Society v IRC* and *Aid/Watch Inc v Comm of Taxation*. In *National Anti-Vivisection Society v IRC* it was held that such a purpose was not charitable for two reasons: (i) it was for a political purpose and (ii) it was not for the public benefit because any benefit from promoting vivisection was outweighed by the cost to the public if vivisection was prohibited. Good answers questioned whether the first reason can now be maintained in light of the *Aid/Watch* case. (12 marks)

**Part (b)** In *Gill v Gill* the court held that an identical provision to this was not a condition. Nor was it a trust in favour of the sisters. It was found to create an equitable personal obligation enforceable by the sisters in equity. The enforcement of the equitable personal obligation would be against Manuel the son personally for compensation. The sisters have no proprietary interest in the house. (8 marks)

**Question 4**

a) This part raises the issue of whether specific performance would be refused on the discretionary ground that it would require constant court supervision: *Tito v Waddell (No 2)*, *Co-operative Insurance Society v Argyll Stores*, or on the grounds that it is a contract for personal services. (5 marks)
b) Nominal damages, because Quintus suffered no loss himself. Would Quintus be able to recover damages suffered by Romulus? English cases that suggest that in certain circumstances a plaintiff may recover damages for a third party’s loss would not apply here because Romulus, being a party to the deed, has a claim for those damages himself. *(5 marks)*

c) This part raises the issue of whether damages would be an adequate remedy and thus specific performance would be refused on jurisdictional grounds: *Beswick v Beswick*. *(5 marks)*

d) This part raises the principle that specific performance will be refused on jurisdictional grounds if a plaintiff has not provided valuable consideration. This is an application of the equitable maxim that ‘equity does not assist a volunteer’. *(5 marks)*

**Question 5**

As to the land, *(7 marks)* Janine’s oral declaration of trust is ineffective. Writing is required by s. 23C(1)(b) of the *Conveyancing Act 1919*. Thus, Eva has nothing to give to Margot. At the date of Eva’s death, Janine remains the absolute owner of Greenacre.

As to the shares, *(13 marks)* Janine’s oral declaration of trust in favour of Eva is effective. Section 23C(1)(b) does not apply because that section is confined to land. Nor does s 23C(1)(c) apply because there is no disposition of a subsisting equitable interest. Thus, Eva gained an equitable interest in the shares upon the making of the declaration by Janine, with Janine becoming the trustee.

In relation to Eva’s direction to Janine in relation to the shares, the question arises as to whether it is caught by the writing requirement in 23C(1)(c), given that Eva’s interest is a subsisting equitable interest in property (the section applies to both real and personal property). According to *Vandervell v IRC*, Eva’s direction is not caught by s 23C(1)(c). The reasoning of the House of Lords in that case was that s 23C(1)(c) does not apply to a disposition where a person who has an equitable interest in property and is also in a position to give directions to a trustee about transferring the legal interest in the property gives directions to the trustee that both the legal and equitable estates are to be transferring to another person. This distinguished the facts of *Vandervell* from those in *Grey v IRC*, where the owner of the equitable interests gave directions only in relation to the equitable interest.

Thus, on the basis of the decision in *Vandervell*, Eva’s oral direction is effective to pass the equitable interest to Margot, with the result that, at her death, Eva has no interest in the shares and therefore Frank does not inherit any interest in them upon her death.

However, *Parker & Parker v Ledsham*, suggests that, as nothing had been done by Janine in relation to the shares at the time of Eva’s death, her death would revoke
the direction and thus there would be no disposition to Margot, with the result that
the equitable interest Eva gained pursuant to Janine’s declaration of trust would
pass to Frank as the sole beneficiary under Eva’s will.

General Comments

Question 1 was generally poorly done. The great majority of students did not
address all the issues raised by the problem, in particular, the *Barnes v Addy* matter.
In Question 2 many students raised issues relating to whether there had been an
effective assignment of either the shares or land. This represented a failure to
understand that a declaration of trust is different to an assignment and that the
principles applying to one of these forms of disposition cannot be applied in relation
to the other form of disposition. This stems from the fact that the intentions for
these forms of disposition are different. The other questions were in general
reasonably done.