Question 1 (40 marks)

(a) The critical issue here is whether there was a valid charitable trust for the relief of poverty — the first category of charitable trust noted in Pemsel’s case. As to whether low income persons fall within the description of poor people, Re Coulthurst described people who have to ‘go short’ because of their financial circumstances as being within the category of poor persons. This aspect of the question was dealt with Community Housing Ltd v Clarence Valley Council, where it was held that low income persons readily connoted the idea of persons who have to ‘go short’.

Better answers will note that: (i) the first category in Pemsel’s case includes relief to the aged, sick and poor and that these words are read disjunctively; and (ii) the Compton test that requires a charitable gift to be for the benefit of the public or a section of the public does not apply in relation to the first category in Pemsel’s case: Dingle v Turner. (10 marks)

(b) This question raised a number of issues. The first was whether the gift for scholarships was for a charitable purpose. Many students did not mention this at all. If it was, and it likely was, then the next issue was whether the court would order a cy-pres scheme which would order the funds to be paid to the Australian College of Physicians. This is a case of initial impossibility because the Royal College of Physicians had ceased to exist at the time of Larry’s death. Prima facie the gift will lapse and courts are reluctant to order a cy-pres scheme in such cases because such gifts are more indicative of a particular charitable intention. However, in cases where a charitable institution has been wound up and its activities taken over by another institution the courts will regard the original charitable purpose as not having lapsed and still continuing, albeit by a different corporate shell: Public Trustee v Cerebral Palsy Association of Western Australia Ltd.

In relation to the proviso, in Re Lysaght a cy-pres scheme was ordered where there was a gift for scholarships that excluded Catholics and Jews and the named charitable institution refused to accept the give on such conditions. The gift in Re Lysaght was also subject to a condition that excluded women. Although, there was no objection taken to that condition in Re Lysaght and the cy-pres scheme was ordered with that condition still intact, it would be reasonable to argue that this aspect of the gift in Clause 4 would also be removed.

Better answers will note: (i) that the gift for scholarships would be a gift for the advancement of education — the second category in Pemsel’s case; (ii) that, when dealing with the issue of charitable intention, s 10(2) of the Charitable Trusts Act 1993 states that states that there is a presumption of general charitable. (10 marks)
(c) The issue here was whether Clause 5 created a trust or some other institution such as an equitable charge, equitable personal obligation. Given that Clause 5 stipulates that the property is given , as stressed in *Byrnes v Kendle*, that would clearly indicate that there is a trust.

If construed as a trust, Eric’s rights would be to bring an action in equity for performance of the trust and an order that the property be sold, so that he could get his money. Better answers would note that Donald would not be entitled to any surplus - it would go to on resulting trust to the residuary beneficiary, in this case, Clyde. Surprisingly, given the facts, few students argued that there was a trust, opting for one or other of equitable personal obligation, conditional gift or equitable charge. (10 marks)

(d) The issue here concerned whether or not the $750,000 that Larry paid to EDM gave rise to a *Quistclose* trust. If it did, Larry’s estate would be entitled to the sum of $750,000 held by the liquidator. If not, the estate would have rights of an unsecured creditor for that sum and would only be entitled a pro rata share of EDM assets, ie one third of the $1,000,000 of EDM’s assets, less the liquidator’s costs. Whether a *Quistclose* trust arose depends upon the money paid by Larry to EDM was to be used solely for the purpose of the wedding and for no other purpose. The facts of the problem have some similarity to that of *Shepard v Mladenis* where a *Quistclose* trust was found to exist. Whatever, the entitlement of the estate is, it will pass to Clyde as the residuary beneficiary of Larry’s will.

Better answers will note the competing understandings of *Quistclose* trusts as put forth by Lord Wilberforce in *Barclays Bank Ltd v Quistclose Investments* and Lord Millett in *Twincestra v Yardley*. (10 marks)

**Question 2 (20 marks)**

(a) The principal issue was whether the salary of a person who holds an office, such as a judge, was assignable. For reason set out in *Arbuthnot v Norton* it is not assignable. Many argued that the facts related to future property and this could not be assigned due to the absence of valuable consideration. However, what was involved here was the right to salary, rather than salary itself and therefore the rule in *Holroyd v Marshall* was irrelevant. (6 marks)

(b) This question raised the issue of whether future or present property in the shares was assigned. Relevant cases on this issue included *Shepherd v Commissioner of Taxation* and *Norman v Commissioner of Taxation*. Given the wording, it is very likely that what was being assigned was a presently existing right in relation to an equitable interest in the shares, the writing requirement in s 23C(1)(c) of the Conveyancing Act has been met. However, valuable consideration was not required for the validity of the assignment and the dividends that were received would be for the benefit of Charles. This question was very poorly done. (7 marks)

(c) This question raised the issue of whether there had been an effective assignment of the debt. The provisions of s 12 of the Conveyancing Act needed to be discussed and applied. There was no legal assignment because notice had not been given to Goldie. Whether there was an assignment in equity required an application of the rules in *Milroy v Lord*. Many students failed to mention the rules and of those that did, many simply noted *Milroy v Lord* but did not set out the actual rules and explain why, in all likelihood, there was an effective equitable assignment. A number of students incorrectly argued that because the requirements of s 12 had not been met,
there was no assignment. However, that ignored the fact that although there was no assignment in law, it was, pursuant to the rules in Milroy v Lord, assigned in equity. (7 marks)

Question 3 (20 marks)

(i) Goldie would be able to assert beneficial ownership of the Abbot’s half share in the townhouse. Beneficiaries can trace into purchase of a valuable asset: Re Oatway. Goldie is entitled to either, ownership of the new property or an equitable lien or charge for the value of funds that were taken: Foskett v McKeown. Goldie should take the ownership of the half share as the newly acquired property has appreciated, and she is entitled to keep the gain for herself: Foskett v McKeown etc.

Chong is a volunteer and on that basis is subject to the rule in Re Diplock for the half share in the house. Under that rule the purchase by a volunteer of a new asset using trust funds means that the new piece of property is held on trust by the volunteer. Because Chong has not contributed any funds to the property Goldie is entitled to the appreciation.

In relation to the shares in GBC, Goldie could elect between claiming beneficial ownership or asserting a charge or lien for the amount owing to her: Foskett v McKeown. (14 marks)

(ii) In relation to the trust of shares in BHMC, Goldie can require Cheech to transfer the legal title in the shares to her pursuant to the rule in Saunders v Vautier. (6 marks)

Question 4 (20 marks)

PART A

The issue here relates to half secret trusts. The requirements for such trusts are set out in Ledgerwood v Perpetual Trustees and needed to be stated and applied. Critical points here were whether there had been communication and acceptance of the terms of the trust.

If the elements of a secret trust are present a further issue relates to the fact that Edward (the beneficiary of the secret trust), died before Andrew. If a secret trust is a testamentary trust then the gift to Edward lapses, in which case it would go to George as the residuary beneficiary under the will - it cannot pass to Frank as it is clear that he is a trustee only.

But, if the secret trust is non-testamentary then the trust in favour of Edward arose prior to Edward’s death, in which cases the interest under the trust would go to Edward’s residuary beneficiary or next-of-kin, as the case may be.

Quite a few students did not deal adequately, or at all, with the issue raised by the fact that Edward died before Andrew. (10 marks)

PART B

Part (i) raises the issue of an injunction to restrain a negative contractual stipulation pursuant to the line of cases starting with Lumley v Wagner. (5 marks)
Part (ii) raised the issue of whether a or freezing order is available to Russell in relation to his proceedings for breach of contract. (5 marks)

Question 5 (20 marks)

Part A

The essential issue raised in this question is of constructive trusts that arise pursuant to a mutual wills agreement following the death of the first party to the mutual wills agreement. For mutual wills to arise the critical agreement is that the parties have agreed not to revoke their wills after the death of the first party to the mutual wills agreement. The agreement can be oral, but the evidence must be clear and satisfactory: *Birmingham v Renfrew.* The survivor can make a new will, but probate of that will be granted on the basis that the executor of that will hold on constructive trust for the survivor.

The survivor is able to freely use the property that is the subject of the mutual wills agreement, subject to the qualification that transactions that are ‘calculated to defeat the intention of the compact’ will attract equitable intervention. To this extent the survivor’s rights are qualified: *Birmingham v Renfrew.* Gifts of property are problematic in this context: *Palmer v Bank of New South Wales, Healey v Brown.*

On the facts there would appear to be a mutual wills agreement. The major issue is whether the transfer of the house was calculated to defeat the intention of the compact. (10 marks)

Part B

This question raised the issue of the circumstances in which equitable damages pursuant to s 68 of the Supreme Court Act can be awarded in lieu of an injunction. The guidelines listed in *Sheffer v City of London Electrical Lighting Co* have been generally cited in the case law. Better answers noted the dicta in *Lawrence v Fen Tigers Ltd* suggesting that courts should now be more willing to award damages in lieu of the injunction. (10 marks)