QUESTION 1

(a) This part of the question is based upon the facts of Re Gardiner (dec’d). The court in that case held that this was a conditional gift and because the condition had not been complied with the gift failed, in which case, the property passed to the residuary beneficiary. In Re Gardiner it was held that since the will required, in our case, Jim to pay a sum of money to the Amos within a period after John’s death, as a prerequisite to taking the personal estate, the gift of the personal estate was subject to a condition liable to operate against Jim, and could not be construed as a trust in favour of Jim, or as imposing a charge on the estate, or a personal obligation Jim. Whether the condition was a condition precedent or subsequent did not make any difference because the effect was the same – Jim does not get the painting unless he pays Amos the money. Better answers noted the difficulties the courts have with provisions such as this and their general reluctance to find such provisions as conditions precedent or subsequent, preferring, if at all possible to classify them as equitable personal obligations or charges.

(b) The question here is based upon the case of Liberty Trust v Charities Commission. The issue is whether it is a valid charitable trust for the advancement of religion. In the Liberty Trust case the provision was upheld as charitable. On the issue of profits, this does not prevent the charitable trust being valid, if the profits are applied towards the charitable purpose: Commissioner of Taxation v Word Investment. A number of students failed to address this point.

(c) This question raised the issue of the requirements for the disposition of a subsisting equitable interest by means of an agreement to assign. To be enforceable, such dispositions must be (i) in writing, pursuant to s23C(1)(c) of the Conveyancing Act, and (ii) be for valuable consideration. Because it is a voluntary deed it is ineffectual and David, as residuary beneficiary will inherit the equitable interest in the shares. Many students treated this as an assignment, where different principles apply, rather than as an agreement to assign.

(d) This question raised the issue of resulting trusts and the operation of the presumptions of resulting trust and advancement. The latter presumption does apply in favour of a child (Marcus) but not a de facto (Susan). Most students raised these principles. Better answers noted that both presumptions can also be rebutted by evidence of actual intention on the part of, in this case, James, who provided all the funds.

QUESTION 2

Daisy’s bank account is one that his mixed funds from a number of trust accounts. If the rule in Clayton’s case applies to mixed funds held in the bank accounts, it displaces the pari passu rule and means that all beneficial interests in a mixed bank account are subject to a ‘first in, first out’ rule.
Thus, the $6,000 first taken out represents Edith’s trust funds and as they have been dissipated, Edith only has a personal claim against Daisy for recovery of that amount.

The $12,000 withdrawn to pay for the painting would represent $6,000 of Edith’s trust funds and $6,000 of Mary’s trust funds. As beneficiaries they could trace those funds into the painting, provided (i) the property is traceable, (ii) there must be an equity to trace, and (iii) tracing must not produce and inequitable result and cannot be used to defeat the interests of a bona fide purchaser taking the property for value and without notice, nor when a beneficiary has acquiesced in the breach of trust. These three requirements appear to be met on the facts, thereby allowing the beneficiaries to trace the trust funds into the painting and share ratably in the increase in value: *Scott v Scott*. Edith and Mary would be entitled to take a charge over the property or to seek a transfer of the property to themselves – in either case they would be entitled to a 50% share of the value, ie $7,500 each. This would represent recovery of the trust funds plus a ratable share of the increase in value.

The money that is left in Daisy’s account ($54,000) would be traced to Mary as to $18,000 and Sybil as to $36,000, based upon the first in - first out principle in *Clayton’s case*.

Thus, taking into account the balance left in Daisy’s account and the equity in the painting (ie $69,000), Edith would end up with $7,500, Mary with $25,500 and Sybil with $36,000. Edith would also have a personal claim against Daisy for $6,000.

It should be noted that the application of *Clayton’s case* in such situations has not escaped criticism. An alternate view favours the *pari passu* approach: *Re French Caledonia Travel*.

On the *pari passu* approach, the $6,000 first taken out and dissipated would mean a depletion in Edith’s trust funds of $1,000, in Mary’s trust funds of $2,000 and in Sybil’s trust funds of $3,000.

The $12,000 withdrawn to pay for the painting, would have come from Edith’s trust funds for $2,000, from Mary’s trust funds for $4,000 and from Sybil’s trust funds for $6,000, and the increase of $3,000 would result in Edith claiming $500, Mary claiming $1,000 and Sybil claiming $1,500. Thus from the $18,000 that the painting is now worth, Edith would get $2,500, Mary would get $5,000 and Sybil would get $7,500.

The money left in Daisy’s account ($54,000) would be ratably distributed, with Edith receiving $9,000, Mary receiving $18,000 and Sybil receiving $27,000.

Thus, taking into account the balance left in Daisy’s account and the equity in the painting (ie $69,000), Edith would end up with $11,500, Mary with $23,000 and Sybil with $34,500. They would also all have personal claims against Daisy in relation to the money that was withdrawn from the mixed account and then lost at the casino.

A variation of the *pari passu* approach is the ‘rolling charge’ method. It would not apply in this case as there has been no dissipation of funds in between the withdrawals of funds from the accounts of Edith, Mary and Sybil.

Better answers also proved the requirements that need to be satisfied before the right to trace arises.
QUESTION 3

Part A

The first issue here is whether the court in its discretion would refuse specific performance on the grounds that such a contract would involve it in the constant supervision of the contract. *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*, a decision of the House of Lords, would suggest that relief would be refused on this ground. However, subsequent Australian cases take a more flexible approach on this principle: *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*. In *Diagnostic X-Ray Services Pty Ltd v Jewel Food Stores Pty Ltd* the court did order specific performance of a lease to operate a business. A second issue was whether specific performance would be refused on the grounds of hardship to the defendant, which was not raised by many students.

Part B

In *Lumley v Wagner* and *Warner Bros v Nelson*, the judges were prepared to contemplate that work as a typist or maid would be reasonable alternative work and that therefore an injunction could be granted. Assuming that an unskilled worker's wage was enough to sustain a living, the argument can be made that *Page One Records* should have had an injunction awarded. A number of students answering this question did not address the question as asked, and only generally what happened in these cases.

QUESTION 4

Part A

The question was based upon the facts of *Johnson v Agnew*. In that case, the equivalent of Hansel sought recovery of equitable damages which the court can award pursuant to s 68 of the Supreme Court Act. Although most students raised this point, they failed to note the formal requirement that the plaintiff must first have the order for specific performance vacated before equitable damages can be awarded.

Part B

The major differences between beneficiaries under a fixed and discretionary trusts are that with fixed trusts it is the settlor who determines the extent of the beneficiaries' interests, that their interests are equitable proprietary interests, and that lists certainty is required for a valid fixed trust, whereas with discretionary trusts, it is the donee of the power of appointment that determines whether, and to what extent, a beneficiary is entitled to anything, that the beneficiaries have no proprietary interest - only a right to require the donee to exercise the power, and that criterion certainty only needs to be establish to validate the discretionary trust.
QUESTION 5

Part A

This question raised the issue of whether there was a fiduciary relationship between Bob and John. This could well arise based upon the facts of the relationship, because their relationship is not a presumed fiduciary relationship. Although this was raised as an issue, many students did not note that, if there was a fiduciary relationship, the only way in which Bob could escape liability was by getting John’s informed consent to the transaction. Overall, this question was poorly done as many students did not raise the issue of fiduciary obligations at all.

Part B

(i) Equity enforces the assignment because valuable consideration has been given. The assignee’s consideration must be executed and it is that fact that binds the conscience of the assignor and explains equity’s intervention here.

(ii) The assignee’s right is proprietary, nor merely personal. The explanation is given in Re Lind and it rests upon the fact that, once the property comes into existence, the assignor automatically becomes bare trustee of the property for the assignee. There is no need for the assignee to undertake any action for the trust to arise. If the assignee had to take some action at this point then the right would be personal and not proprietary: Re Lind.