**SUGGESTED SOLUTIONS – NOVEMBER 2014**

**SECTION A (60 MARKS)**

**QUESTION 1**

Compare the following concepts:

1. Trust and Agency *(7 marks)*
2. Agents and trustees both have fiduciary position which imposes on the duty not to delegate responsibilities
3. Both have a duty to avoid a conflict of interest with their duties
4. Both have a duty not to make any unauthorised profits and to keep proper accounts.
5. The relationship of principal and agent is created by their agreement, but this is not so in the case of trustee and beneficiary.
6. During his agency the agent will act on behalf of the principal as a means whereby the principal and third parties are placed in contractual relations: a trustee cannot involve his beneficiaries in such relations but must act so as to be personally liable (though with a right of indemnity from the trust property for proper acts).
7. The trustee does not represent the beneficiaries, though he performs his duties for their benefit, as the agent represents his principal.
8. The concept of trust necessarily involves the concept of trust property over which the trustee has at least nominal control, but an agent need never have any control over any property belonging to his principal.
9. An agent is subject to the control of his principal, but a trustee is not subject to control by the beneficiaries except in the sense that the beneficiaries can take steps to compel him to carry out the terms of the trust.
10. The statutory provisions relating to trustees do not in general apply to agents.
11. Agency is normally terminated on death of either principal or agent. A trust will not terminate merely because the trustees have died; and a beneficiary’s death will only terminate his particular interest. The settlor’s death is immaterial after his gift has created the trust.
12. Once a trust has been created the settlor cannot intervene at all, even with the agreement of the trustees, unless the trust deed reserved a power for him to intervene for a specified purpose: the contract of agency can be modified at any time by agreement between the principal and agent.
13. If the beneficiaries are all ascertained adults of full capacity they can terminate the trust at will: a principal cannot terminate the agency at will unless he reserves such a specific right in the contract of agency.

***(any seven answers from the above)***

1. Trust and Contract *(4 marks)*
2. A contract represents a bargain between the contracting parties giving each some advantage, while the beneficiary under a trust is commonly a volunteer, and the trustee himself usually obtains no benefit from the trust at all.
3. It is of the essence of a contract that the agreement is supported by consideration but in the case of a trust there is no need for consideration to have been given for it to be enforceable.
4. A contract can only be enforced by the parties to it, but a completely constituted trust may be enforced by the beneficiaries, even though they may only learn of the existence of the trust long after it has been created.
5. In some cases, though, a person may enter into a contract to create a trust and the contract will be enforceable so ensuring that the property, the subject matter of the contract, ultimately becomes vested in trustees upon trust for the beneficiaries.
6. Trust and Bailment *(4 marks)*
7. Bailment is a delivery of personal chattels upon a condition, express or implied, that they shall be redelivered to the bailor, or according to his directions, when the purpose of the bailment (e.g. safe custody, cleaning, repairing, hire etc) has been carried out.
8. Bailment only applies to personal property, while the trust concept applies to all kinds of property.
9. The general property or general ownership remains in the bailor, whilst the bailee is said to have only a special property or special ownership in the chattels bailed: thus an unauthorised sale by a bailee normally does not pass title to the chattels. A trustee has full legal title (not merely possession); so an unauthorised sale by him will vest good title in a bona fide purchaser of a legal interest for value without notice of the trust.
10. It is the bailor who can enforce or vary the bailment, whilst the settlor cannot enforce or vary the trust (unless he specifically reserves such power).

**(Total 15 marks)**

**QUESTION 2**

1. The Certainty of Words (8 Marks)
2. In order for a trust to be created, there must be certainty that he intend to create such a trust from the wording of the document creating the trust. Since “equity looks to the intent rather than the form” there is no need for any technical expression to be used in order to constitute a trust. It is a question, in every case, of construction of the words to ascertain whether they (together with any admissible extrinsic evidence) establish an intention to set up a trust. When the intent to create a trust is clear and obvius, it will be carried into effect, however crudely or elliptically it may have been expressed. Whether an intention to create a trust is sufficiently evidenced is in each case a question of interpretation, and may even be inferred from the context.
3. Use of the words “in trust for” or “upon trust to” are the most proper for expressing a fiduciary purpose; but wherever a person vests property in another and shows an intention that it is to be applied for the benefit of third parties who are sufficiently pointed out, an express trust will be created, whatever form of words may have been used.
4. Where there is a gift by will to a person, followed by precatory words expressive of the testator’s request, recommendation, desire, hope or confidence, that the property will be applied in favour of others, may create a trust if, on the will as a whole, it appears that the testator intended the words to be imperative, but the court will not presume the imposition of a precatory trust merely from the presence of particular precatory words.
5. In **Re Adams and the Kensington** Vestry it was held that there was no trust created by a testator who gave all his property to his wife “in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime or by will after her decease”.
6. In **Lambe v Eamesa** testator gave all his property to his widow to be at her disposal “in any way she may think best for the benefit of herself and family”. It was held that the latter words imposed no trust on the widow in favour of the family.
7. The certainty of subject (7 Marks)
8. For a trust to be created, there must be certainty of subject i.e. either the property, or the person to be benefited, or the way in which they are to benefit, have to be indicated with reasonable certainty. This is the case even where the most direct and imperative words are used.
9. Thus, where a testator gives property to, or in trust for, his wife, and directs that such part of it as may not be required by her shall, after her death, be held in trust for his children, the latter trust’ is void for uncertainty, for no one can say how much the wife may or may not require. (**any other example will suffice)**
10. If there is certainty of words, and the property subject to the trust is clearly identified, the trust will be valid. If however, the beneficial interests to be taken are not certain, those interests will fail for uncertainty, and the trustees will hold on a resulting trust for the settlor, as in ***Boyce v Boyce[[1]](#footnote-2)***, where

*a testator devised two houses to trustees on trust to convey one to Maria “whichever she may think proper to choose or select” and the other to Charlotte. Maria predeceased the testator and it was accordingly held that Charlotte had no claim.*

**(Total 15 marks)**

**QUESTION 3**

**ANSWER:** *These are: (i) to dispose of the testator’s property after his death by gifts, directly to a person either beneficially or to trustees upon trust*

*(ii) to appoint one or more executors to administer the testator’s estate after his death.*

(b)

**ANSWER:** *Candidates should discuss any of these duties: (i) Duty to act unanimously (ii) Duty to exercise discretions properly (iii) Duty to keep accounts and records (iv) Duty to allow inspection of trust documents (v) Duty to obey the directions of the settlement (vi) Duty to act impartially between beneficiaries (vii) Duty to pay trust moneys to the right persons*

**QUESTION 4**

**ANSWER:** *It is a discretionary trust*

(ii) Advise parents from Phela District on the legal position. (**6 marks)**

**ANSWER:** *The parents of Phela District have no any legal right to compel the trustees to consider their children, as this is a discretionary trust. A discretionary trust is a trust in which the beneficiaries have no such current fixed entitlement but only a hope that the trustees, in carrying out their duty to consider how much income might be paid to which beneficiaries, will in their discretion pay income to a particular beneficiary or beneficiaries. In this kind of trust, no interest subsists. Therefore, the parents of Phela District cannot compel the trustees to use their discretion in their favour.*

(b) What is a trust corporation as defined in the Trustees Act? (**6 marks)**

**ANSWER:** *A trust corporation is defined as follows:*

*(i) a company carrying on business in Malawi as a commercial bank registered as such under the Banking Act.*

*(ii) a company approved for the time being by the Minister of Finance as a trust corporation*

*(iii) the administrator general*

**SECTION B**

**QUESTION 5**

**ANSWER:** *These are:*

*(i) probate which is granted when an executor proves a will*

*(ii) Administration with the will annexed which is granted when a person other than an executor proves a will.*

*(iii) Administration or simple administration that is granted when the deceased died wholly intestate.*

(b) Tisunge is a son to Zeze from his first marriage. Upon the dissolution of the marriage, Tisunge was staying with his mother. Zeze re-married after the dissolution of the marriage. Zeze died two months’ ago. Tisunge has heard a rumour that his stepmother wants to obtain a grant from the Court to administer the deceased estate. Tisunge is of the considered view that this should not happen without his knowledge. He has approached you for advice. Please advise him on what he must do in these circumstances. (**8 marks**)

**ANSWER:** *Tisunge is supposed to obtain a caveat. A Caveat is a notice in writing to the High Court that no grant is to be sealed in the deceased’s estate without notice of the caveator, the person who enters the caveat. The caveat will be entered in a registry is kept. This entry stops the issue of any grant in the deceased’s estate until the caveat ceases to be effective. It gives the caveator time to take legal advice, or collect evidence, so that he may decide whether to oppose an application by another person for a grant.*

*Reverting to the present case, one Tisunge has entered the caveat, no any grant will be made without his knowledge. Therefore, he has to enter the caveat if he is to be involved in the administration of his father’s estate.*

(c) Under what **two** circumstances will a grant be revoked? (**6 marks**)

**ANSWER:** *These are:*

*(i) If a grant is wrongly made as a result of a false statement by the grantee, whether made fraudulently or in ignorance of the truth.*

*(ii) Subsequent events by reason of the occurrence of subsequent events, for example where the grantee becomes incapable; a grantee wishes to be relieved of his duties for some good reason, such as advanced age.*

**QUESTION 7**

(a) Under what **four** circumstances will a court possess inherent jurisdiction to authorise a variation of terms in a trust? (**8 marks**)

**ANSWER:** *Under the following:*

*(i) Conversion jurisdiction*

*(ii) Emergency jurisdiction*

*(iii) Maintenance jurisdiction*

*(iv) Compromise jurisdiction*

(b) Tasaukadala, a public servant, has embezzled public funds to the tune of MK2, 000, 000. Using the funds, she has purchased a house in one of the townships. The embezzlement has been discovered. Advise the Government on its remedies against Tasaukadala. (**6 marks**)

**ANSWER:** *In this case Tasaukadala was holding the public funds in trust for the benefit of the people of Malawi. He was to be treated as a trustee. By embezzling the funds, he has breached the trust that was placed in him. As a result, the government has amongst several remedies, the remedy of tracing. Tracing is a process which equity makes available to the beneficial owner who seeks to recover his property from those into whose hands it has come. Since Tasaukadala has bought a house, using the embezzled funds, the Government is at liberty to trace the money from the seller since this is public money. Again, the Government can confiscate the house and sell the same to recover the embezzled funds.*

*Apart from tracing, the Government is at liberty to commence criminal proceedings against Tasaukadala for theft of a public servant. If convicted, then he will be penalised in any manner the court deems fit as per the penal provisions.*

(c) Describe **two** characteristics of equity jurisdiction? (**6 marks)**

**ANSWER:** *These are:*

*(i) A court of conscience. The chancery courts initially functioned as courts of conscience. The chancellor decided cases on the basis of his own sense of justice. Inevitably, different chancellors had different conceptions of justice so that it was said equity varied with the length of the chancellor’s foot.*

*(ii) Court of equity: It is said that with passing of time, the chancellor became a lawyer and acted not as a churchman. Decisions were reported, leading to a system of precedent and the development of a settled body of law, with distinct rights and remedies that were almost as rigid as the common law. The court of Chancery was no longer a simple court of conscience, but a court of equity in the technical sense.*

Donald Trump who died in June 2013 was a real estate mogul who was living in the exclusive suburb of Mount Pleasant in Blantyre. Before his death he created a trust in which he left one of his plots to his last born daughter Ireen, for life and their after to Ireen’s 24 year old son Welbeck. The plot has a 5 storey block of flats on it. Ireen is a creative person and wants to add to the plot a swimming pool and playground with swings and other amenities for children and adults to use at their leisure. She believes she can claim more rent from the tenants. Knight Frank have created a report in which they value the plot at K100 million and after the improvements that Ireen is planning the value of the plot will be K150 million. Ireen contracts X Building Contractors to start the building of the swimming pool and playground. However right before the construction is about to finish, Welbeck gets an injunction restraining further construction of the swimming pool and playground claiming this is waste and Ireen should stop the construction. The High Court also orders Ireen to pay Welbeck damages to the tune of K20 Million. Ireen is not happy with this decision and has asked you to appeal the decision. What is your advice to Ireen and will she succeed? **(Total 15 marks)**

1. Where one person has a life interest and the other a remainder, the life tenant is allowed to put the property to work to give himself an income but he may not destroy it so that it is value is diminished or it is totally destroyed and thereby disadvantaging the remainder. *He is therefore entitled to fruits of all kinds, but must leave unimpaired the source of the fruits.*”
2. At common law, any act which affects the capital nature of land is described as ‘waste’. Simply put, acts or omissions which result in a change in land are in law termed waste.
3. There are four types of waste:
   1. Permissive waste: This consists of allowing land (including the buildings on it) to deteriorate for want of attention; for example allowing a house to fall into disrepair or failure to repair walls.
   2. Voluntary waste : This consists of acts which alter land to its detriment, for example felling trees, but which fall short of mere wanton destruction. To open a mine or quarry on land is an act of voluntary waste.
   3. Equitable waste: This consists of acts of wanton destruction; for example stripping lead off the roof, chopping down trees planted for ornament, pulling down a house and felling trees planted to provide shelter.
   4. Ameliorating waste: Waste consists of any act or omission which results in a change in the land that improves the value of land. The law presumes that it is unlikely that anyone can or would wish to raise any objection to improving the value of the land. Since the value of the land will have increased, one is not liable for ameliorating waste and no damages are recoverable. Further, if Welbeck seeks an injunction to restrain Ireen from making the change, the courts will be unlikely to grant the remedy sought as the improvement will not change the whole nature of the land. Welbeck will therefore not succeed.

**QUESTION 4**

Describe defences available to a trustee where legal proceedings are brought against him for breach of Trust? ***(*Total 15 marks)**

1. A trustee commits a breach of trust if he violates any duty which he owes as trustee to the beneficiaries. The essence of a breach of trust is the failure of the trustees properly to carry out the duties expected of them. Trustees are liable for breach of trust both for their actions and omissions. However certain defences are available to a Trustee who is accused of breach of trust. These are listed below.
2. The first defence that is available to a trustee is that of an exemption clause. The liability of a trustee may be expressly excluded by the trust instrument. In **Armitage v Nurse** where a clause in a settlement provided that no trustees should be liable for any loss or damage to the fund or its income “unless such loss or damage shall be caused by his own actual fraud,” it was held that the clause was effective no matter how indolent, imprudent, lacking in diligence, negligent or wilful he might have been, so long as he had not acted dishonestly.
3. A trustee will also have a defence where the beneficiary has assented to, or concurred in, a breach of trust, or has subsequently released, confirmed or acquiesced in it provided:

*(a)* that, the beneficiary was *sui juris* at the date of such assent or release;

*(b)* that he had full knowledge of the facts, and knew what he was doing and the legal effect thereof; and

*(c)* that no undue influence was brought to bear upon him to extort the assent or release.

1. Under s.70 of the Trustee Act, a beneficiary who instigated or requested a trustee to commit a breach of trust could be called upon to indemnify the trustee, in respect of his liability to make good the loss to the trust estate, out of his beneficial interest
2. The Trustee can state that the action is subject to limitation as the action was not brought within six years from the date the breach occured. Section19 of the Limitation Act provides that, except for an action for fraud or fraudulent breach of trust to which a trustee was party or privy, and an action to recover from a trustee trust property or the proceeds thereof in the trustee’s possession or previously received by him and converted to his own use, no action to recover trust property or in respect of any breach of trust may be brought by a beneficiary after the expiration of six years from the date on which the right of action accrued.
3. The Trustee can state that he acted reasonably though in breach. He has to show that he acted honestly, reasonably and ought fairly to be excused for the breach and for omitting to obtain the directions of the court in the matter in which he committed such breach. s.69 of the Trustee Act empowers the court to relieve him, either wholly or partly, from personal liability for breach. The onus of proving honesty and reasonableness is cast upon the trustee; and whether a trustee has acted reasonably and honestly is a question of fact depending on the circumstances of each case.
4. Finally if a plaintiff delays bringing his action, the court may consider it inequitable for him to succeed, and the defendant trustee will be protected from liability.

**SECTION B** **(40 MARKS)**

Answer **ANY TWO** questions from this section

**QUESTION 5**

Ferguson and Rooney are beneficiaries of a trust in which the settlor provided that all income of the trust should be given to Ferguson, Rooney and Open Arms Charity Home in the following proportions: Ferguson and Rooney 40% each and open arms 20%. Ferguson and Rooney want the trustees to give them the 20% that is paid to Open Arms Charity and they apply to the High Court for a variation of the trust to this effect. Can the court vary the terms of this Trust? **(Total 20 marks)**

1. The fundamental principle is that a trustee must faithfully observe the directions contained in the trust instrument and, “*as a rule, the court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not, on the face of the instrument creating the trust, authorised by its terms.*”
2. However, it might be in the interests of the beneficiaries that the trust be carried out in a way which is different from that specified by the settlor. For example, circumstances may have changed since the trust was created so that what was once a tax- advantageous settlement now has disastrous tax consequences. Out of necessity, therefore, there are limited exceptions to the general rule.
   1. Under the principle of ***Saunders v Vautier*** the beneficiaries, provided they are absolutely entitled, *sui juris* and of age, may call for the legal title to the trust property. The primacy of the beneficiaries’ wishes established by ***Saunders v Vautier*** enables them to vary the beneficial entitlements under a trust. However, their right to do so is subject to severe restrictions. A consensual variation of trust can only take place with the unanimous consent of all the actual and potential beneficiaries of the trust, since if any beneficiary fails to give consent the trustees will remain open to liability for breach of trust to any who have not consented. Therefore, consensual variation will not be possible if some of the beneficiaries are minors and unable to give consent, or, alternatively, unidentifiable or not yet in existence, for example if the class of beneficiaries includes children as yet unborn or the future spouses of present beneficiaries. This will often be the case if the trust creates successive interests.
3. However the courts have powers to vary the trust. In **Chapman v Chapman** it was held that the court may vary the trust in four situations:
   1. Under Conversion Jurisdiction: The court has the power to authorise the conversion of property in which an infant has an equitable interest from personalty to realty.
   2. Under Emergency Jurisdiction: The court has jurisdiction to authorise transactions involving the trust property which are not authorised by the trusts if a peculiar set of circumstances arises for which no provision was made in the trust instrument - the court may allow the trustee to enter into some business transaction which was not authorised by the settlement.
   3. Under Maintenance Jurisdiction: Where the settlor directed that income from the trust fund should be accumulated for the beneficiaries the court has the jurisdiction to authorise the advancement of the income to provide for their maintenance. Usually, this is in the case of infant beneficiaries. The maintenance jurisdiction does not, of course, give the court the power to alter the beneficial interests of the beneficiaries.
   4. Under Compromise Jurisdiction: The court has inherent jurisdiction to approve on behalf of those who cannot consent for themselves (minors and possible after-born beneficiaries) a compromise agreement between the beneficiaries where there is a genuine dispute.

**QUESTION 6**

John is a successful businessman with business interests in the three regions of the country. His mother appointed him trustee of her Trust whose beneficiaries are homeless kids. However due to his expanding business, John is not able to perform his duties and would like to appoint his friend Mike who is a parttime teacher, to act as Trustee on John’s behalf. Is this possible and are there any restrictions to the appointment?

**(Total 20 marks)**

1. It is clear that John ants to delegate his powers as a trustee. Traditionally, equity took the view that a trustee had no power to delegate his powers to an agent - as the Latin maxim expresses it: *delegatus* *non* *potest* *delegare*. The principle was that “trustees who take on themselves the management of property for the benefit of others have no right to shift their duty on other persons.” The rationale for this restriction was that the settlor had placed his confidence in the trustees he had chosen to perform the trust obligations, and not any other persons.
2. It was recognised, however, that administration of a trust would often be impracticable unless exceptions were permitted, and thus the general principal has now been replaced by a more moderate formulation, and now “the law is not that trustees cannot delegate: it is that trustees cannot delegate unless they have authority to do so.” Trustees can “act by other hands” on the grounds of legal or moral necessity or commercial practicality.
3. S.32(1) of the Trustee Act revolutionized the position as to the employment of an agent, in that a trustee is no longer required to do any actual work himself, but he may employ a legal practitioner or other agent to do it, whether there is any real necessity for the employment or not. S32 states:

‘Trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a legal practitioner, bank, stock broker or other person, to transact any business or do any act required to be transacted or done in the execution of the trust, or the administration of the testator’s or intestate’s estate, including the receipt and payment of money, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith.’

Therefore S32 allows for the delegation to any person. Though Mike is a part time teacher, this does not stop John from delegating to Mike because S32 specifically states that a trustee can amploy an agent whether a legal practitioner, bank, stock broker or other person. Hence John can delegate to any one regardless of their profession. I therefore would advise John to go ahead. Furthermore he is protected from any default of Mike where he is employed in good faith.

**QUESTION 7**

A trusteeship can be terminated by Death. Write notes on the consequences of the Death of a Trustee **(Total 20 marks)**

1. In terms of S27(1) of the Trustee Act, Trustees are invariably joint tenants and accordingly upon the death of one or two or more trustees the office, as well as the estate, survives to the surviving trustees or trustee who can carry out the trust and exercise all such powers as were given to the original trustees as such.
2. In terms of section 27(2) Upon the death of a sole or last surviving trustee, property devolves on his legal personal representative
3. Until the appointment of new trustees, the personal representatives or representative for the time being of a sole trustee, or, where there were two or more trustees, of the last surviving or continuing trustee, can exercise or perform any power or trust which was given to, or capable of being exercised by, the sole or last surviving or continuing trustee, or the other trustees or trustee for the time being of the trust.
4. The person upon whom the estate devolves cannot, of course, be compelled to act in the trusts; nor, on the other hand, can he insist upon doing so against the wishes of a donee of a power of appointing new trustees in substitution for deceased ones.

**QUESTION 8**

X is a judge who has been given a case in which he has to interpret a will. Describe the four rules which he has to apply in order to interpret the will, where necessary make reference to cases.  **(Total 20 marks)**

1. The first rule is that the object is to ascertain the testator’s expressed intention. In construing a will, the object of the court is to ascertain the intention of the testator as expressed in his will when it is read as a whole. Sometimes extrinsic evidence, i.e evidence not contained in the will, is admissible to assist in the will’s interpretation, but the language of the will is central to its construction because the object is to discover the meaning of the words as intended by the testator. Apart from its power to provide for dependants not adequately provided for in a will under s.14 of the Wills and Inheritance Act, the court has no power to rewrite a will for a testator after his death. The function of a court of construction is to construe the testator’s will, not to make a new will for him.
2. Words must be given their ordinary meaning. Prima facie the words and phrases used in a will are to be given their ordinary meaning - the strict, plain, common meaning of the words themselves. If the presumption in favour of the ordinary meaning is not rebutted the meaning of a word or phrase prevails even though it may produce results which appear capricious, because a testator is entitled to be capricious or eccentric in his testamentary dispositions if he chooses.
3. Some words change their meaning with the passage of time and some words have more than one ordinary meaning. For such words, the court determines the meaning intended by the testator by considering all the provisions of the will, construed with the aid of any admissible extrinsic evidence.
4. The will must be read as a whole. The testator’s intention has to be ascertained from an examination of the whole of his will. The testator’s “general” intention, when ascertained with reasonable certainty in this way, “is competent not only to fix the sense of ambiguous words, but to control the sense even of clear words, and to supply the place of express words, in cases of difficulty or ambiguity.”
5. Technical words are to be given their technical meaning. Prima facie, technical legal words and expressions used in a will are to be given their meaning. In **Re Cook**

*T* made her will on a printed will form and gave “*all my personal estate whatsoever”* to her named nephew and nieces. *T*’s estate consisted mainly of realty.

Harman J. held that *T*’s realty was not disposed of by her will and devolved as on her intestacy. The presumption that technical legal words and expressions are to be given their technical meaning may be rebutted in the same way as the presumption in favour of the ordinary meaning. A testator is free to use technical legal words and expressions to mean whatever he wants, provided he makes the sense in which he is using them clear in his will.

1. An intention to revoke must be as clear as the original gift. If a will or codicil contains a gift in clear terms, a later codicil is not construed as revoking the gift unless the intention to revoke is as clear as the original intention to give. These are the rules that apply.

**END OF THE EXAMINATION PAPER**

1. (1849) 16 Sim 476 [↑](#footnote-ref-2)