How to Use this Script:
These sample exam answers are based on problems done in past years. Since these answers were written, the law has changed and the subject may have changed. Additionally, the student may have made some mistakes in their answer, despite their good mark.

Therefore DO NOT use this script by copying or simplifying part of it directly for use in your exam or to supplement your summary. If you do so YOUR MARK WILL PROBABLY END UP BEING WORSE! The LSS is providing this script to give you an idea as to the depth of analysis required in exams and examples of possible structures and hence to provide direction for your own learning.

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LAWS2205 Equity - Semester 2, 2010  
Q2A & 2B: Mark: 23/30 (76.7)

As T had died and his estate in bankrupt, D’s personal remedies against T for the debt and any breaches are likely to be worthless, thus D must seek to establish proprietary rights against T’s estate, based on retaining equitable ownership to the $50,000 loaned and being able to trace this ownership into the funds in T’s bank account.

1) Quistclose Trust

T&D’s debtor/creditor relationship gives rise to legal personal obligations, but where money is lent for a specific purpose a trust may exist: Quistclose. Whether a Quistclose trust arose depends on the mutual intention of the parties: Quistclose, ascertained from the language, nature of transaction and relevant circumstances: AETT.

What was the purpose?
The relevant purpose appears to be to use money to develop energy saving inventions. The fact that money was in a separate bank account points towards intention to create a trust: Henry v Hammond, particularly in light of the strict controls on access to the money. A trust is likely to be found. [✓]

Operation
Uncertainty surrounds the nature of the trust. On Lord Wilberforce’s view, a primary trust is created in favour of the intended beneficiaries of the purpose (here – arguably Gadgets Co but maybe T, as the purpose is broad – not just about paying invoices or equipment) and if purpose fulfilled, only remedy in debt. However purpose of T building energy saving inventions is arguably frustrated since T has died, on a broad view of the “purpose”, even though G remains unpaid. On such a failure of purpose, a secondary trust arises if there is on by implication – here, the return of money to D. [✓]

The issue with this interpretation is that the trust may be in favour of Gadgets, if the purpose is described as acquiring inventions.

Millet in Twinsectra considered a resulting trust to arise in favour of the lender from the outset, subject to a power to use for purpose – thus the trust would still be in D’s favour, possibly subject to power to pay G for invoice. [✓] Similar analysis by Gummow in AETT, with one express trust in D’s favour subject to mandate by T to use for purpose. Thus, D would remain beneficial owner of the $50,000 on Millett and Gummow (Prof Finn)’s view, subject to potentially revocable mandate to pay Gadgets. [What does the revocation of mandate depend on?]

2) Tracing to bank account

Prerequisites
Must be a fiduciary breach: Re Diplock. [✓] As trustees are fiduciaries and the money misapplied from the Quistclose trust, this is established. There is identifiable property in the form of T’s bank account.
D can trace into the mixing of $50,000 into t’s personal account: Re Halletts, creating a charge over the account. It is presumed that T used his own funds first: Re Halletts thus $5000 of the dissipation to pay T’s creditors was T’s own funds, thus D remains entitled to the $15,000 remaining after T paid creditor. The $5,000 lost is dissipated (cannot trace) but D can trace into the winnings as a substitute of D’s funds: Re Halletts [Foskett?] leaving T entitled to $10,000 in account. The $50 lottery ticket is a substitution for a chose in action which D is entitled to: Foskett ✓ and D would claim it was held on constructive trust: Foskett, thus D is entitled to the increase in value to $10,000 and obtain profit for himself.

∴ D entitled to trace into the $9950 in T’s bank account and $10,000 of lottery winnings. Obviously not enough to satisfy all loss thus should seek more from Eldon (E).

3) E’s liability
E may be held personally liable under the “knowing assistance” limb of the Barnes v Addy rule (applicable in Australia: Farah) which would make E a “constructive trustee” as a 3rd party to T’s breach.

Elements of Knowing Assistance
i) Trust or Fiduciary Duty
As established above, a Quistclose trust arose, which was between T (trustee) and D (beneficiary) under the Millet/Gummow analysis ✓ and possibly the Wilberforce analysis (if the purpose was T developing energy saving inventions).

ii) Dishonest and fraudulent design by T?
This is affirmed as a requirement in Australia: Farah, with an objective test applied to consider whether behaviour is dishonest judged by the standard of ordinary decent people: Farah. “Fraud” is lower than the criminal law context or actual fraud at common law: Owen J in Bell Group. ✓ T’s behaviour is clearly dishonest, proved by T lying to E about the use of the cheque, a conscious impropriety: Royal Brunei, even though he intended to pay the loan funds back, T knew he had to hide this from E.

iii) Assistance by E
There is a clear causal link between E’s action and the breach: Consul Developments as but for E’s signature, the money could not be withdrawn. ✓

iv) Knowledge
E must have had knowledge of T’s breach (content) – this is the key issue on which liability turns.

IT appears that level (iv) Baden knowledge – knowledge of circumstances indicating facts of breach to an honest and reasonable man would be sufficient for knowing assistance, but level (v) knowledge of circumstances that put a reasonable man on inquiry is insufficient: Consul Developments (majority) as affirmed as the current state of law in Farah.

E clearly has level (v) knowledge due to his possession of the duplicate invoice stating the money was not yet due and the dodgy circumstances of payment into T’s account, however level (v) does not suffice.
However it appears T believed that the cheque was going to Gadgets, not T, as he chided T for making an extra buck by paying G in “cash”. It is doubtful E was “wilfully blind” since he was hurriedly signing the cheque as he was busy, and honestly seemed to believe T’s story. E did know that ‘technically’ the cheque should have been to the Co, indicating he may have knowledge that payment to T was in breach (technically) of the trust terms. Accordingly, he did have knowledge of the ‘facts’ of the breach of trust: level (iv), even if he didn’t know of the dishonesty behind T’s cheque?. Unclear whether knowledge of the dishonesty is required. Further argument that if E had read the invoice he would know the money not due and no cash discount, this may have at least become level (iv) knowledge of facts but maybe again putting him on inquiry. More facts needed.

Liability depends on establishing at least (iv). Liable for equitable compensation to restore D to position but for the breach: Re Dawson.

[Mark: 15.5/20]

Q2B
A, M, J are potential objects under a discretionary trust. They don’t have proprietary interests but an equitable chose in action to ensure discretion is properly exercised: Gartside, and can call for Marcus to exercise discretion: Karger v Paul but Court can only examine whether discretion was exercised, not how, unless A/M/J can establish M did not act in good faith or if M gives reason for exercise (possible here as M has stated he thinks their life has been too easy – uncertain whether this is a public statement) Karger v Paul

M has also breached obligation to account and provide info by not giving financial reports: Re Simersall. ✓

1) Removal of Trustee
This can occur pursuant to he Court’s inherent jurisdiction or statutory jurisdiction to remove trustee. ✓The Supreme Court must make orders if satisfied that it is appropriate in the beneficiaries’ interest or to advance a purpose of the trust: s 70 Trustee Act.

A/M/J’s situation is analogous to that in Titterton v Oakes where a sole trustee was removed. Although mere past breaches is not enough: T v O, ✓ A/M/J would argue that M’s psychological problems were a chance in circumstances not envisaged: T v O. Other analogies are that M appears not to appreciate how to promote A/M/J’s “welfare and happiness” by not helping J pay university expenses,[✓] and that communication barriers existed exemplified by M not sending financial reports such that removal is appropriate in A/M/J/s interest as well as to advance purposes of the trust, being for the education health and wellbeing of A/M/J, clearly not advanced if no distributions made because of M’s attitude to their financial support. [✓]

Termination only possible when A/M/J are of full age: Saunders v Vautier [✓].

[Marks: 7.5/10]