1. Is there any real justification for the difference in the communication rules for fully secret and half secret trusts?

**Suggested Answer**
See 6.2.5, 6.2.11, 6.2.12 and 6.2.13. Communication in a fully secret trust must be before the death of the testator, so letters found after death cannot communicate a secret trust. Presumably this is to guard against the forgery of letters by those trying to get their hands on the estate. It is also because the secret trustees cannot decide whether to accept the secret trust or not if they do not know about it: *Wallgrave v Tebbs* (1855) 25 L.J. Ch. 241.
Communication in a half secret trust must be before or at the time the will is made. This seems to be about respecting the doctrine of incorporation by reference (see 6.1.2). The will must not refer to documents that do not yet exist. The half secret trust appears in the will, unlike a fully secret trust, so there is perhaps some logic in the distinction. It dates back to the case of *Johnson v Ball* (1851) 5 De G & Sm 85, but has been confirmed by the House of Lords in *Blackwell v Blackwell* [1929] AC 318 and the Court of Appeal in *Re Keen* [1937] Ch. 236. The biggest objection to the theory is that secret trusts, of both kinds, are supposed to exist outside the will, so rules relating to wills should be irrelevant.
Communication to one trustee only is treated oddly. On the face of it only the trustee that knows about the secret trust should be bound, but that is not the rule: *Re Stead* [1900] 1 Ch. 237. If the trustees are joint tenants, then communication before the will is made will bind them both. Communication to only one of the trustees was accepted without any comment in *Re Keen* [1937] Ch. 236, which was a half secret trust case. For the half secret trust to be valid, communication would have to be made before the will and as the secret trustees are named as trustees in the will, they would probably be joint tenants anyway.

2. What sort of trusts are secret trusts?

**Suggested Answer**
See 6.2.14. The accepted theory is that secret trusts take effect outside the will and are therefore not affected by the rules in the Wills Act: *Blackwell v Blackwell* [1929] AC 318 and *Re Young* [1951] Ch 344. This might suggest that they are some kind of express trust (*Re Gardner No 2* [1923] 2 Ch 230), but some cases suggest that secret trusts are based on fraud, in that the secret trustee must not be allowed to break his/her promise: *Blackwell v Blackwell* [1929] AC 318. This would make secret trusts a kind of constructive trust. Cases such as *Ottaway v* Norman [1972] Ch 698 tend to assume this without discussion. If, on the other hand, constructive trusts are express trusts then most of them do not obey the formality requirements for an express trust of land i.e. the declaration of trust should be in writing: *Re Baillie* (1886) 2 TLR 660. If they are express trusts, it would suggest that the testator cannot change their mind, once they have declared the trust, which was what *Re Gardner No 2* [1923] 2 Ch 230 decided. Other cases suggest that the testator can change his mind: *Re Colin Cooper* [1939] Ch 811. Some authors argue that fully secret trusts are constructive trusts, as they are based on fraud, but that half secret trusts are express trusts, as they are based on intention.

FURTHER READING: [1980] Conv 341 D. Hodge “Secret Trusts: the Fraud Theory Revisited.”

3. How does the floating trust in mutual wills and in *Ottaway v Norman* actually work?

**Suggested Answer**
See 6.2.7,6.3.2 and 6.3.6. Once the first spouse dies in a mutual will the surviving spouse is bound by what they agreed. He or she cannot go back on who they promised to leave the property to in the original will. There is nothing to stop the survivor making new wills, so a constructive trust will be imposed on whoever ends up with the property to make sure that the original promises are kept: *Charles v Fraser* [2010] EWHC 2154 (Ch) (see 6.3.1). So, someone who did not make the original promise will be bound by the constructive trust. That is where the similarity to the secret trust in *Ottaway v Norman* [1972] Ch 698 comes in. This might seem unfair. Another problem is the constructive trust also affects what the survivor can do with the property in their lifetime. Quite what freedom they have is problematic. The main cases, *Re Cleaver* [1981] 1 WLR 939 and *Birmingham v Renfrew* (1937) 57 CLR 666 state that the survivor can use the mutual will property to live their life and pay normal expenses, but that they must not do anything to deliberately defeat the mutual will. An example of this can be seen in *Healey v Brown* [2002] WTLR 849 (see 6.3.4), where the survivor made a lifetime gift of the mutual will property to his son. The Court of Appeal case *Olins v Walters* [2009] Ch 212 declined to rule upon what property was caught in the mutual will constructive trust and what restrictions this placed on the surviving spouse. The Court said that the law had still to develop.

FURTHER READING: [2009] Conv 498 P Luxton ‘Walters v Olin: Uncertainty of Subject Matter – An Insoluble Problem in Mutual Wills?’

4. Why should not all types of property be capable of being the subject matter of a death bed gift?

**Suggested Answer**
See 6.4.5 and 6,4,6. It was thought for a long time that land could not be the subject matter of a death bed gift. The decision in *Duffield v Elwes* (1827) 1 Bli (NS) 497 was respected because it was a decision of Lord Eldon, the ‘founding father’ of equity, who laid down many of the basic principles of trust law. *Sen v Headley* [1991] Ch 425 decided that, as donatio is an exception to the normal rules of wills and death bed gifts, there was little point in making an exception to the exception and saying that some kinds of property could not be the subject matter of a death bed gift. Some would still argue that land is different, because there are more formalities required for its disposal and, unlike other kinds of property, other people could have rights over it, e.g.

easements, mortgages, the rights of spouses, civil partners and cohabitants. Recent cases confirm that a death bed gift of land is possible: *Vallee v Birchwood* [2014] Ch 271 and *King v Chiltern Dog Rescue* [2015] EWCA Civ 581. Both cases concerned unregistered land, where the deceased was able to deliver the title deeds to the donee. If the land had been registered, which is now an all-electronic system, it is difficult to see what the donor could hand over to the donee.

FURTHER READING: (1993) 109 LQR 19 P Baker, 'Land as a donatio mortis causa'. N.Roberts [2013] Conv. 113 'Donationes mortis causa in a dematerialised world.'

5. Why does equity allow exceptions to be made to the normal law of wills?

**Suggested Answer**
See the whole chapter! If we look at Questions 2 and 3 above what we can see is the imposition of a constructive trust to make someone keep their promise, which is typical of equity. Donatio mortis causa can be justified as an exception to the normal rules of wills and property transfer, because the person is about to die and has no time to summon their lawyer, complete documents etc. This is explained in *King v Chiltern Dog Rescue* [2015] EWCA Civ 581 (see 6.4.5)

The same logic can also be seen in some secret trust cases, e.g. *Re Fleetwood* (1880) 15 Ch D 594 (see 6.2.10). The rule in *Strong v Bird* (see 6.5) seems to work on the basis of respecting the intention of the donor, another repeated theme in equity. The continued existence of this rule can be seen in *Day v Harris, Royal College of Music v Harris [2013] EWCA Civ 191.*The problem with departing from the normal formality rules is that it may be uncertain who has a claim to the property and others may be affected. Members of the deceased's family may be disappointed to learn of gifts taking effect outside the terms of the will. The mutual will case of *Charles v Fraser* [2010] EWHC 2154 (Ch) (see 6.3.1.) is a good example of a beneficiary under a will being surprised to find that they could not keep the property, because of a much earlier mutual will.