Summative assessment exercise - outline answer

The way to approach this question is to identify possible breaches of trust and then to advise the trustees as to whether or not a breach has actually occurred. Although the question raises technical issues relating to trustee investments you will not be expected to discuss those at this stage.

The first potential breach is the purchase by the trustees of the freehold titles to the properties of which they were tenants. The freeholds were trust property and the normal rule would be that the purchase must be set aside for breach of the rule against self-dealing. At the very least one might expect the trustees to be in breach of trust for putting themselves in a position where their self-interest might conflict with their duty to the trust. As for the rule against self-dealing, guidance is given by Wynn-Parry J in *Re Mulholland WT*, where he stated that 'the existence of the fiduciary relationship creates an inability in the trustee to contract in regard to the trust property [but] does not touch the position arising where the contract in question has been brought into existence before the fiduciary relationship'. This dictum clearly applies to the present case. The trustees have exercised an option which was a contractual right they had held before they became trustees—accordingly there will be no breach of trust if the option was exercised according to its terms. If however, the trustees contrived to use their position to gain an extra advantage (perhaps by varying the terms of the option or by reducing the purchase price) this would be in breach of their trust. As for the possibility that the trustees have breached their trust by putting themselves in a position where their self-interest might conflict with their duty to the trust, guidance is given by the Court of Appeal in *Sargeant* v *National Westminster Bank Plc*. The facts of that case are similar to those of the present. A testator let certain farms to his children, and when he died appointed them as trustees of the freeholds of those farms. The children were now both landlord and tenant, a clear position of conflict. The court held that they had not breached their trust because they had not *put themselves* in the position of conflict, the testator had done so. Therefore, it would not be a breach of trust for the children to sell the freeholds to themselves, which is what they did. Similarly, in our case, Beryl and Charlie will not have breached their trust, because Albert was responsible for putting them in the position of conflict. However, there will be a breach if Beryl and Charlie do not pay a fair price for the freehold.

The second potential breach is the purchase, from the trust, of the shares in Y Co. This is a clear case of self-dealing and the purchase must be set aside if any of the beneficiaries so requests. The fact that the trustees paid a generous price for the shares is no defence. Justice, it is said, demands that the purchase be set aside (*Re Thompson's Settlement*).

The third potential breach is the investment in Z Co. Here things look ominous for the trustees. The trust instrument grants them unlimited discretion to invest as they think fit. However, this does not mean that they can invest with a careless disregard for the well-being of the fund. Their administrative discretion to invest is subject to the proviso that they must invest within the limits of the duty, imposed upon them by the general law, to act prudently (*Bishop* v *Bonham*). The duty to act with prudence was described in *Speight* v *Gaunt* in terms that 'a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own'. In *Re Whiteley* Lindley LJ added that 'the duty rather is to take such care as a prudent man would take if he were minded to make an investment for other people for whom he felt morally bound to provide'. Beryl and Charlie have clearly breached this duty by investing in a company without first checking its viability.

The fact that the trustees have been handsomely paid for their services is unlikely, in itself, to subject them to an even higher standard of care, but it is probable that the court will be more reluctant to relieve the trustees from the consequences of liability for their breach (Brightman J in *Bartlett* v *Barclays Bank Trust Co. Ltd*).