Success Without Tears

Third Edition

EQUITY AND TRUSTS

Paul Todd

EQUITY AND TRUSTS

THIRD EDITION

PAUL TODD, MA, BCL
Cardiff Law School, University of Wales

Series Editor C.J. CARR, MA, BCL

BLACKSTONE PRESS LIMITED

This edition published in Great Britain 1991 by Blackstone Press Limited,
9–15 Aldine Street, London W12 8AW

Previously published by Financial Training Publications Limited

First edition, 1986
Second edition, 1989
Third edition, 1991

ISBN: 1 85431 151 4

British Cataloguing in Publication Data
A CIP catalogue record for this book is available from the British Library

Typeset by Kerrypress Ltd, Luton
Printed by Loader Jackson Printers, Arlesey, Beds

Cartoons drawn by Anne Lee

PREFACE

This is not intended to be another introductory trusts textbook. If you want a conventional textbook on the subject there are plenty to choose from, in varying degrees of clarity and detail (and price). In common with other books in the series its purpose rather is to help students who have already embarked on a study of the law of trusts (or equity and trusts) to succeed as well as possible in examinations in the subject, at degree or equivalent level.

Unlike normal textbooks, therefore, this book concentrates primarily on the exam process itself, and though the substance of the subject is by no means relegated to second place, you will not find here an overview of equity and trusts in the didactic style that textbooks usually adopt.

It does not follow that this book is aimed at the weak student. Far from it. Under-performance in exams is just as likely to pull a student down from an upper to a lower second as it is to pull a weaker student down from a pass to a fail.

Concentration on assessment is easier with trusts than with most other subjects, first because it is nearly always assessed entirely by three-hour unseen examination, with no element of course work assessment, and secondly because there is relatively little variation in trusts courses taken in universities, polytechnics and colleges throughout the country.

Whether or not you approve of this is neither here nor there. Success at exams depends on understanding and beating a system, and whether or not it is a good system is of no consequence whatever. Nevertheless, it must be understood that the exam process is the way it is for a reason, and you have to understand that reason before you can succeed to the best of your ability.

Nobody would suggest that you can succeed at exams without a sound grasp of the subject. But every university teacher is familiar with students who apparently under-perform disastrously in exams. Such students work hard and attend classes diligently, only to produce an examination performance which fails to do justice to their effort or ability. Indeed, I believe that the *majority* of students under-perform, at least to some extent.

This may seem surprising given that trusts is rarely if ever a first-year subject, and is probably most frequently studied in the third year. Students of trusts therefore already have considerable experience of university or polytechnic exams, in addition to O and A levels for home students, and whatever the equivalent is for overseas students. Yet it is by no means uncommon for people who have succeeded admirably in all exams up to their third year at university or polytechnic, for some reason to get their

final exams hugely out of proportion, and forget all the exam techniques earlier learned.

The reason for poor achievement is usually rooted in failure to appreciate the purpose of exams, without which appreciation it is impossible to acquire the skills necessary for a creditable performance. This book seeks to remedy that, and the first chapter is directed to an examination of the exam process itself. Only once you have understood the system can you hope to beat it, and chapter 2 is about working during the course to achieve that aim. The rest of the book deals with the substance of the subject, the emphasis again being directed towards success at exams.

How then in detail does this book differ from a conventional textbook? There are three main ways. First, it is assumed that you are already a student of trusts (or equity and trusts), and so there is no need for material which is purely introductory, or setting the scene. Secondly, not all subjects are covered, but rather the material is selective. Thirdly, each substantive chapter is directed primarily towards the type of question you might get in an exam (including some real exam questions). There is no attempt at model answers as such, because individual styles can legitimately differ widely, but instead each section considers what an examiner might be looking for. Exam questions (if well set) are drafted with a specific purpose in mind, and if you are to succeed you must appreciate what that purpose is.

I have said that the book is selective, and indeed, the more arcane aspects of the subject are not covered in this book at all. All the really central areas *are* covered, however (i.e., the areas which will almost certainly appear in any exam). Also, because examiners tend to concentrate on areas where there have been important new developments, I have included these as well. This is the justification, for example, for chapter 10 (which is new to this edition).

On the other hand, because no attempt has been made to cover the whole of the law of equity and trusts, it has been possible to go into considerably more detail than would be possible in a conventional textbook of this length: this is not intended to be merely an introductory textbook.

I should like to thank my wife, Dr Pauline Todd, for the very substantial assistance she has given me in writing this book. Virtually everything that appears in this book I have discussed at length with her, and though she by no means agrees with everything I have written, two minds on any academic matter really are much better than one. Indeed, if you can find anyone as long-suffering with whom to discuss your work, I would strongly advise it.

Paul Todd
University of Wales College of Cardiff

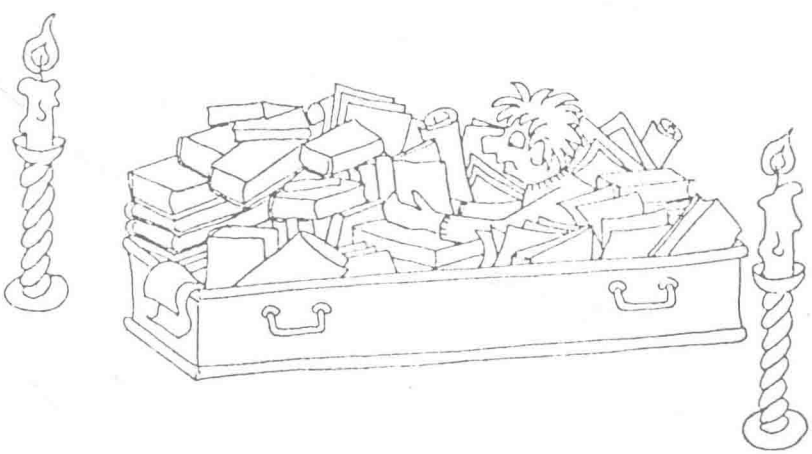
CONTENTS

ONE

PREPARING FOR EXAMS

A myth frequently perpetuated is that some people just cannot do exams. This is simply untrue, though undoubtedly many students under-perform, simply because they fail to appreciate the purpose of examinations, and therefore do not prepare themselves properly for them.

For example, the number of people who revise for exams without studying and working through sample questions, and past papers, never fails to astonish me. Perhaps they think they have too little time. They prefer instead to bury themselves in the same old notes day in day out, without giving a moment's thought to what is actually the aim of the exercise. You have to work towards the specific goal, or study becomes aimless and inefficient. If instead you choose, as many students do, to revise in a vacuum, without considering in detail the final purpose of that revision, much of the work will be wasted.



'buried in notes'

The most depressing feature of all for university and polytechnic teachers is how stringently so many students resist all advice about preparing for and sitting exams, preferring to play 'safe' and bury themselves in their well-worn notes instead. In fact playing 'safe' is usually the worst possible

course, virtually guaranteeing failure to perform to the full extent of one's ability.

Let us consider, then, what exams are for, and what examiners are testing for. Only then will it be possible to study effectively towards them.

Why exams, in equity and trusts in particular?

This is not the place to argue over the merits of the various different methods of assessment, but it is noteworthy that, unlike many other subjects, equity and trusts is almost invariably assessed by traditional three-hour unseen exam. Coursework assessments, or assessed essays, rarely if ever play any part. This is not accidental. There are some skills which can only really be assessed by unseen exam, and once you have appreciated what they are then you will have gone a long way towards appreciating also what examiners in equity and trusts are looking for.

An obvious difference between exams and the other methods of assessment is that memory plays at least a small part in exam success. Yet contrary to general belief, exams at degree or equivalent level are not primarily a memory test, especially where higher marks (e.g., upper second and first class marks) are at stake. At that level at any rate, their *primary* purpose is to test your understanding of the main principles of the subject, and your ability to apply them to a given situation. Even at lower levels, for example at the third class and pass degree levels, exams still serve this purpose, although obviously a lower level of understanding only needs to be demonstrated, whereas conversely, memory probably plays a greater proportionate role.

Especially at the higher levels, then, it is not enough merely to memorise the main principles of the subject, something which, at any rate in equity and trusts, is relatively easy to do: not only are the principles old and well-established, but some have been codified into the 12 equitable maxims, and even those that have not (e.g., 'equity will not allow a statute to be used as a cloak for fraud'), have been reduced into a form that is similar to that of the 12 established maxims. What is being tested is your understanding of these principles, and your ability to apply them to real-life situations. That is, of course, the rationale of any problem question, but even a well-drafted essay question ought to be capable of testing the same skills.

This of course requires you not only to remember but also to analyse the main principles of the subject, to ascertain their exact meaning and extent, and how far they apply. You are also being tested on your ability to advance legal arguments, and master those advanced by others. Thus your technique in distinguishing cases, recognising *rationes* and *dicta*,

assessing the weight of an authority, and applying the principles stated in the cases, are all subject to assessment.

Where will you find the material to enable you to do this? The answer is, primarily in the cases themselves (after all, that is where the main principles of the subject are in fact analysed, and applied to a real-life situation). I have often been surprised, during nearly 15 years of teaching, how reluctant students are to read cases. If I suggest to a student that a case should really be read, the student will almost invariably respond by asking me to summarise it, or to repeat what I said about it in my lectures, or where he or she can find it in a textbook, or whether it is acceptable merely to read the headnote. Almost anything, it seems, is preferable to reading the case itself. And these are not first-year students, since trusts at Cardiff is almost exclusively taught as a final-year subject. Yet once you know what you are looking for, cases are no more difficult to read than lecture notes or textbooks (and they are usually far more interesting). And the plain fact is, that in order to do really well in trusts exams, you need to read the *judgments* of the most important cases (and there are not that many really important cases), and think hard about them.

This important aspect of preparing for exams is too often overlooked by students, many of whom instead concentrate on learning textbook-style general statements. No doubt it is possible to *pass* the exam on that basis, and even (possibly) to obtain a lower second-class degree, but if you are aiming for a higher mark than about 55% you need to show more than the ability merely to memorise textbooks. (I am assuming, by the way that 55% is in the middle of the lower-second class. It is at Cardiff, and in most other universities and polytechnics, but I believe that Oxford, for example, still adopts a letter-based system of marking. 55% would probably translate to around β– at Oxford.) To obtain more than about 55% (which is about the average mark for most university courses), you obviously need to demonstrate that your level of understanding is greater than that of the majority of your colleagues. Remember that what is being tested is an understanding of legal reasoning, rather than legal knowledge *simpliciter*. In trusts, which is not to any great degree a statute-based subject, this means the ability to analyse the primary source materials, which means the main cases.

I hope to show in this book that learning and revising through the cases is not particulary difficult, and is more interesting than concentrating instead on textbooks and lecture notes. Of course it is possible to gear one's revision around textbooks and lecture notes, and if you choose to do that, and also look at past papers so that you have some idea what will be coming up, you may well get by perfectly adequately, since only at the upper levels of achievement is a more detailed understanding required. Remember,

though, that if you adopt this approach exclusively, as apparently many students do, you are almost certainly *limiting* your maximum mark to around 55% (or β– at Oxford). In addition, revising will be very boring, and there is a good chance that you will substantially under-achieve.

Assuming, though, that you are prepared to abandon the rote learning approach in favour of something more interesting (and rewarding), how do you go about it? Let us be clear about this. There is no need to know about every case that is remotely relevant to an area, and in any case time constraints will certainly prevent this. Rather, you should aim to know the most important cases (and there are no more than about half a dozen in each area) really well, even if less important authorities escape you. If a case stands for a major point, you ought to know in which court it was decided, what view has been taken of it in later cases (has the principle been limited or extended?), and whether there were dissenting judgments. Even if the result was unanimous, the reasoning (if more than one judge) may not be.

A good example is the unanimous Court of Appeal decision in *Binions* v *Evans* [1972] Ch 359, considered in chapter 6. Lord Denning MR's reasoning is quite different from that of the other two judges. Change the facts of *Binions* v *Evans* a little and he would reach a different result from them. A really good exam problem will aim to test whether you can apply the different reasoning, say, of Lord Denning MR and Megaw LJ. The least able students, however many revision notes they have learned up, will fail *even to see the main point of the problem*, for which nearly all the marks above about 55% will probably be given. They will have spent too much time on their revision notes, and too little time in reading this most important case in the detail it deserves.

Another good example is *Re Baden's Deed Trusts (No. 2)* [1973] Ch 9, another important and unanimous Court of Appeal decision (considered in chapter 4), where all three judges reasoned by totally different routes. The problem question considered in that chapter makes clear why it is important to have read all three.

There are a number of cases, then, where it really is necessary to read, *and think about*, the entire case. Cases of this nature, which develop important points of principle, are not all that numerous, and it is not necessary to adopt the same approach to every single case on the course. Remember always that the aim is to demonstrate a good grasp of principle, and not, for example, that you have a voracious memory.

It does not matter unduly, for example, if details like the name of a minor case, or section of a statute, are forgotten, so long as the mistakes are not so serious as to show a misunderstanding of principle. Some mistakes, apparently of memory, it is true, do make examiners suspicious, but they

are not really mistakes of memory at all. It is not unreasonable to assume that '*Bordman* v *Fips*' suggests that the case has never been read at all, or that anything has ever been read about it. '*Re Vickery* (1919)' also suggests a major misunderstanding, because the decision in that case depends upon legislation which was enacted in 1925.

Conversely, no amount of memorising detail will compensate for the inability to see the point of a rule, or to apply it to answer the question set. Understanding, then, is the foundation of examination success. This is the primary ability (especially at the higher levels) which an examination sets out to test, in conditions where the student has only his or her own resources to draw upon.

If memory is relatively unimportant, then, why assess by unseen exam rather than, for example, a series of essays written at leisure? Unfortunately, it is not at all easy to assess understanding of a subject by essays. Often essays have to be submitted during the course, before all the principles of the course have been grasped. Even if that problem is overcome, so many essays are heavily reliant on source materials and reveal little of the student's true ability. Further, it is impossible without a *viva voce* examination to be certain that the work submitted is really the student's own. I am not suggesting deliberate cheating, but a line of reasoning may appear, for example, without the writer necessarily understanding all the stages, or even the meaning of all the words used. *Viva voce* exams can pick this up, by the device of asking the student to explain the reasoning, but they are both subjective and labour intensive.

The main justification for exams, then, has nothing to do with memory, but is simply that they are the most efficient method of assessing whether you have a genuine grasp of the principles of the subject, and are able to apply those principles to the given fact situation in a problem type of question. That is what you must show, therefore, to attain the highest marks.

A second justification for testing understanding rather than memory is that the exams are only the first step in (hopefully) a long professional career, and the skills required, whether in the legal or any other profession, are not unlike skills required to succeed at exams. In your professional career, you will be very lucky indeed if your clients are so obliging as to arrange their problems to match perfectly the details of the cases which you so laboriously memorised as a student. An understanding of principle, and an ability to reason by analogy, will be essential when you give professional advice. Time and again you will be faced with demands for concise and logical opinions on points of law, often in an embarrassingly short time, and you will be expected to deliver the goods, headache that particular afternoon or not. People who succeed at exams can do all of

these things. It is perhaps not surprising, then, that the professional bodies regard with suspicion attempts to replace exams with alternative forms of assessment.

Now that the true purpose of exams has been revealed, and is no longer shrouded in mystery, it is possible to direct more positive efforts towards preparation for them. Remember that they are not primarily a memory test, but that to succeed you must have a sound grasp of the principles of the subject, and you must be sufficiently flexible to be able to apply your understanding, under pressure of time, to a wide range of situations.

Sitting the exams

By your second or third year of study it should not be necessary to remind you to ensure that you are thoroughly familiar with the times and places of your exams well before they occur, though it is surprising how often students even in their third year fail to turn up to exams because they have mistaken the day or the place.

It is important to examine the rubric. Make special note of how many questions you are required to answer, and whether there is any restriction on choice (e.g., 'at least two of which must be from section B'). Never make assumptions based on past papers. This paper may be unique, and the consequences of getting it wrong are too serious to take any risks.

Exam boards vary in the way they deal with candidates who answer too many questions, or questions from the wrong sections. It is quite possible for questions answered from the wrong section to be scored at zero, which is nearly always disastrous, though sometimes a more lenient approach is adopted, the question being marked subject to a penalty (e.g., being dropped a class). If you answer (say) five questions instead of four, your best four may count, but it is probably more common to count only the first four, and ignore the fifth. But whether a lenient approach is adopted or not, some penalty is inevitable, quite apart from the tactical disadvantage of giving the examiner the idea that you may be stupid!

Answering less than the required number of questions is even more risky, in fact normally disastrous, but surprisingly common. It is worth remembering that a typical system of marking gives each question 70%+ for a first, 60–9 for a higher second, 50–9 for a lower second, 45–9 for a third, with a pass mark of 40. Usually the mark for the paper is based upon the average of the marks for each question. It may not actually end up as the average, since the examiner may be allowed, or even required, to assess the paper as a whole, but the average will almost certainly be the starting point for this assessment, and it is unlikely that the final mark will differ significantly from the average of the marks for each question.

I should perhaps point out that no marking system is universally adopted, but this one, or minor variations of it, is probably the most common.

It is quite easy to score a pass mark on a question, but very difficult to score a first, and virtually impossible to score above about 75%. It therefore follows that the first 40 marks are much easier to obtain than the next 30, and indeed marks become progressively more difficult to obtain as you go higher up the scale (especially, as already explained, above about 55%). So if you have written three decent answers and are stuck for a fourth, it is much more sensible to have a shot at the fourth, even if you are really short of time, than to spend time in trying to improve the answers you have already written. It would be difficult to raise their quality by (say) an extra 30% (that is 10% or a whole class on each question), but relatively easy to coax the examiner into awarding you 30% on the fourth question, even if you are really stuck, especially as he or she will probably sympathise if your other answers are good.

On the other hand, by answering (say) three questions where four are required you will reduce your overall mark by a quarter which, because of the relatively high pass mark, is substantial. Suppose that your three score 60% each (i.e., respectable higher-second answers). Your mark for the paper is 180/4, or a miserable 45% (a bare third). If your marks on the three questions were 50% each (still a decent mark), your average will actually fail you overall (37.5%). Yet I have seen this happen over and over again, presumably because students are unaware of the importance (in all but exceptional cases) of the average mark, and do not appreciate how much more difficult marks are to obtain towards the top of the scale. You should appreciate these points, and never answer less than the required number of questions.

Suppose you have run yourself short of time towards the end. One of the skills for which you are being tested is your ability to argue in English prose, and indeed it is difficult to advance legal arguments fully in any other form, but as a last resort note form is better than nothing. So long as you do this only towards the end of the final question you will probably not lose too many marks (but avoid at all costs the temptation to write 'short of time' in the second question and to carry on in note form from there on).

On the answers themselves, remember that understanding rather than memory is being tested. Therefore the organisation of the answer is more important than the total amount of material contained in it. The most important attribute is the ability to reason logically, and above all clearly. It is a good idea, therefore, to structure your answer in rough before you start, making a note of important points and cases in case you forget them later. Make full use of short paragraphs (perhaps three to a page), each

of which make a distinct point, and make it clear where each paragraph begins and ends, even to the extent of leaving a line between paragraphs. Shoulder headings and diagrams can also be useful, but some examiners do not like these, so try to find out what your examiner's prejudices are if you can.

Of course a first-class script will include a great deal of material (none of it repetitive) in addition to being well organised. A surprising number of good-second scripts, however, are quite short, relying on clarity of presentation and cogency of argument. Conversely, huge quantities of repetitive and unconnected waffle will be penalised. Once you have a sound structure you can build on it, but the structure itself must take top priority.

Problem questions will usually contain more points than any candidate will spot, and indeed even the examiner may not have appreciated all the ramifications, so do not despair simply because you think you may have overlooked something. A far more serious (but very common) mistake with this type of question is where a candidate sees the central point of the problem but avoids it. Commonly this will be a murky area of law, where there is quite simply no clear answer. The candidate writes something like 'The law in this area is very confused', and then moves on.

I still find it difficult to believe that so many people commit this error year after year. Often the candidate is one whom I know to be intelligent and to be aware of the issues involved, but who cannot have given any thought to what the exam is all about. A typical problem is set with a handful of important cases in mind, where though the decisions themselves may be clear enough, the extent to which the reasoning applies is not. The facts of the problem will be deliberately chosen so that no authority clearly applies, though the reasoning of a number might. Favoured cases for this treatment typically contain a number of judgments, all different (like *Binions* v *Evans* or *Re Baden's Deed Trusts (No. 2)*, mentioned in the previous section), the application of each of which to the particular problem would lead to a different result.

The *whole point* of such a problem is to test your ability to handle legal arguments, and application of principles and authorities, where the law itself is uncertain. The conclusion you reach is far less important than the quality of the argument. After all, there *is* no correct answer, though you should generally express a preference. A great number of marks will be allocated to this particular test, so you *must* have a go at it. The student who avoids the issue in the way described above is throwing marks away, and the most frustrating part about it is that often he or she knows of the authorities in question.

This is a classic example of the pitfalls of burying yourself in notes rather than gearing yourself up for the exam itself. Further, your notes will not

usually provide the material and ideas necessary to deal with this type of question, which is probably why so many people avoid the issue.

Now some small points. Never waste time by rewriting the question. Not only will this not score any marks (it will almost certainly be simply crossed out), but it is quite likely to annoy the examiner, because it looks like bluff. And never joke — it is very difficult to amuse an examiner!

When the paper is over avoid at all costs the pointless exercise of the post-mortem. It is almost invariably depressing, and in any event your mind should be turning towards the next exam. You can do something about the exams to come, but nothing at all about the exams you have finished. Further, any other candidate who tries to involve you in this exercise should be scrupulously avoided. Indeed, if your circle of friends includes people outside your own course seek them out after the exam, and shun those who are on your course.

There is only one excuse for a post-mortem, and that is when you think it likely that a *viva voce* exam may be required. Even here, though, wait until the other exams are over, since the *viva* will usually not take place until considerably later.

Your performance in the exam may have been adversely affected by illness or some domestic difficulty. Exam boards vary as to the extent these are taken into account, but many boards take a sympathetic view, at least if you are on a borderline. But no board can act in the absence of knowledge, so if you are ill get a medical certificate, and if there are other difficulties make sure the faculty or department office (or whoever is the appropriate person) is informed, so that they can be taken into account as appropriate.

Revising

One of the saddest, but apparently inevitable aspects of the examination run-up is the almost universal practice of students to revise in the manner least likely to lead to examination success. Every year the majority of students guarantee that they will perform at less than their full capability. Every year sensible advice on how to revise effectively is steadfastly ignored. It is the playing-safe mentality coming to the fore again, which is in fact the most dangerous way to play.

Consider what happens. Several weeks before the exam it suddenly becomes possible to find seats in the library again. The university empties, candidates shutting themselves away in their residences, or at home. They have 'finished' the course, and need use the library no more. All the information they now need is contained in their notes, possibly combined with the main textbook recommended for the course. All that is necessary,

surely, is to rewrite the notes in a more comprehensible form, and learn them up for the examination.

Also, as the exams loom closer stress builds up, more hours are spent beavering away in this manner. Balanced life-styles are thrown into turmoil as recreations, and even meals, are cut out. Weekends vanish. Eight hours a night of sleep are condensed at both ends. Worse still, pep pills or other evil and noxious substances are taken to boost performance on the great day.

Not only does this show a fundamental misunderstanding of what exams are all about, and what examiners are looking for, but it also ensures that the revision itself is done in the most boring, and therefore least efficient, manner possible.

In fact, many candidates during this time seem to forget that they are working towards an exam at all. Revision becomes an abstract exercise. 'These notes must be learnt. No time to worry why.' Few even look back over the past papers, and gear their learning towards the particular types of question that are likely to arise. Of course, in some subjects past papers can be of little use, if, for example, the syllabus or examiner has changed recently, but this is unlikely to be the case in trusts, where variations between courses and types of exam are not usually great.

Always work towards the exam. That is the entire purpose of revision. Immerse yourself thoroughly in past papers, perhaps even to the extent of practising answering some of them under simulated exam conditions. Whether or not this is worthwhile depends on the time available, as it is a time-consuming exercise, but at the very least consider how you would structure an answer on the types of question you think most likely to arise, or on the areas in which you are most interested. Consider also what the examiner is looking for in the question, especially in problem questions.

Should you try to spot questions? There are pros and cons. The advantage is that by reducing breadth of coverage (assuming there will be a reasonable choice of questions) you can increase depth of coverage, and develop real expertise on some parts of the course.

The disadvantage of question spotting is obvious, that there is an element of risk involved. The predicted questions may not come up. Also, questions often contain issues from more than one area. For example, take the following question:

'Equity will not permit a statute to be used as a cloak for fraud.' Discuss.

This question does not confine itself conveniently to any self-contained area of the course, and shows up well the penalties of concentrating too narrowly during exam revision. This question encompasses a number of