

# INDEX

- account of profits, 14, 26, 28, 29, 31, 57–8, 67, 161
  - allowances and, 60–1
  - calculation of, 58–60
  - remedies for breach of confidence and, 203
  - acquiescence, 87–8
    - overlap with laches, 87
  - Baden* scale of knowledge, 180, 182, 185, 186, 408
  - beneficiaries, 213
    - discretionary trusts and, 126
    - duty of trustee to give information to, 283–7
    - express trusts of land and, 127, 209
    - fixed trusts and, 123, 126
    - future, 314
    - indemnification of trustees by, 331–3
    - informed consent and, 171
    - interest, trustees’ right to impound, 334
    - removal of non-performing trustee by, 215
    - right of trustee to recover overpayment from, 335–6
    - right to due administration of trust, 215
    - statutory right of review and, 301
    - sui juris*, 281, 293, 331, 332
    - trustees’ duty to act impartially between, 315–16
    - trustees’ duty to act in best interest of, 313–14
    - unborn, 210
  - breach of confidence, 19, 29, 41, 50, 53, 63, 350
    - Australian developments in doctrine of, 201–2
    - change of position defence, 198
    - development in equity, 190
    - English developments in doctrine of, 199–201
    - equitable relief for, 30
    - invasion of privacy and. *See* invasion of privacy
    - liability for, 20
    - public interest defence, 197–8
    - punitive damages and, 70
    - remedies for, 202–5
  - breach of contract, 33, 34
    - damages and, 37
    - injunctions to restrain, 45–6
  - breach of fiduciary duty, 18, 29, 58, 60, 61, 63, 104, 350
    - calculation of equitable compensation for, 66–8
    - knowledge of, 178, 184
  - breach of fiduciary obligations, 13, 18, 72, 161
    - constructive trusts and, 403–6
    - informed consent as a defence, 170–1
    - participants in. *See* participants in breach of fiduciary obligations
    - remedies for, 172
  - breach of trust, 11, 29, 53, 57, 61, 62, 70, 92, 123, 153, 177, 215, 216, 219, 271, 279, 281, 287, 290, 305, 317, 319, 321, 323, 327, 329, 331, 334, 335, 339
  - assistance in, 184
  - calculation of equitable compensation and, 64–6
  - dishonest and fraudulent, 183
  - equitable defences, 346–8
  - exculpation in the trust instrument and, 339–42
  - general statutory defence, 344–6
  - inducement of, 187–8
  - mitigation of loss and, 69
  - monetary remedies for, 348–53
  - non-monetary remedies for, 353–5
  - standing to sue, 355
  - wilful default and, 343–4
- capricious trusts, 243
  - charitable trusts, 211, 215, 226, 257–8, 313, 355
    - administration of, 270–1
    - for multiple purposes, 269–70
    - historical development of, 258–9
    - public benefit and, 267–9
  - chattels, 46–7, 53, 132, 219, 220
    - possession of, 358
    - title to, 133
  - choses in action, 132, 133, 145, 149
  - cloak for fraud doctrine, 250–1
  - common law
    - adjustments to equitable compensation quantum, 69–70
    - conflict with equity, 6–8
    - Court of Chancery and, 5–6
    - estoppel. *See* estoppel
    - rescission and, 73–4
  - confidence,
    - breach of. *See* breach of confidence

- equitable duty of, 164
- equitable obligation of, 14, 53, 190–1
- obligations of, 57, 61, 123
- promises of, 153
- specificity and, 191
- See also* confidentiality
- confidential information, 192
- circumstances importing obligation of confidence and, 193–4
- compilations of well-known information and, 193
- demonstration of detriment by plaintiff and, 196–7
- misuse of, 194–6
- protection of originality and, 193
- protection of private information and, 199
- public domain and, 192
- confidentiality, 190, 284, 286
- concepts of secrecy and, 192
- obligation to observe, 193
- quality of, 191–3
- reasonable person test, 194
- third parties and, 194
- See also* confidence
- constructive trusts, 4, 14, 26, 28, 29, 31, 67, 72, 92, 146, 186, 202, 226, 248, 390
- as remedy for estoppel, 402–3
- as remedy for unjust enrichment, 407–9
- assessing contributions to acquisition of property and, 398–9
- Baumgartner v Baumgartner* and, 398–9, 400
- compared to express trusts, 390
- compared to resulting trusts, 391
- criteria for imposition of, 393, 396
- detriment and, 394
- doctrine of mutual wills and, 409–11
- equitable adjustments and, 399
- family property disputes and, 393–5
- impact of family law legislation on, 400–2
- imposition of for breach of contract, 403–6
- imposition of over property transferred under enforceable contracts, 411–13
- imposition of over stolen money and its proceeds, 406–7
- unconscionability and, 392
- unjust enrichment and, 391–2
- wrongdoing and, 392–3
- contracts, 15–16
- breach of contract. *See* breach of contract
- construction, supervision and, 35
- executory, 73
- for performance of personal services, supervision and, 35–6
- for sale of chattels, 38
- of guarantee, 72
- sale of land, 38, 46
- specifically enforceable, 37, 38
- trusts and, 222, 231–2
- voidable, 72, 78
- Court of Chancery, 4, 41, 210
- conflict with common law, 6–8
- judicature legislation and, 8–10
- jurisdiction, 4, 7
- criterion certainty test, 238, 240, 242
- status in Australia, 241
- cy-près schemes, 271
- damages
  - assessment of, 54–5
  - exemplary, 70
  - in addition to injunction or specific performance, 54
  - in substitution for injunction or specific performance, 55
  - inadequacy of, 37–9
  - punitive, 204
  - restitutionary, 46
- declaration, 30, 82, 247
- criteria for the award of, 82–3
- equitable bars to relief and, 83
- discretionary trusts, 214–15, 216, 237, 240
- doctrine of constructive notice, 179
- doctrine of cy-près, 258, 271, 281
- doctrine of incorporation by reference, 252
- doctrine of marshalling, 20
- doctrine of mutual wills, 409–11
- doctrine of notice, 179, 180
- doctrine of penalties, 116–18, 119
- duress, 4, 15, 37, 72, 73, 103, 105, 106, 228
- duties and powers of trustees
  - certainty of objects and, 244
  - duty of care and, 287–8
  - duty to act gratuitously, 292–3
  - duty to act impartially, 288

- duties and powers of trustees (*cont.*)
  - duty to act personally, 289–91
  - duty to adhere to terms of trust, 280–1
  - duty to consider exercise of powers, 291–2
  - duty to give information to beneficiaries, 283–7
  - duty to keep assets separate, 282
  - duty to take control of trust assets, 281–2
- effect of impropoer exercise of discretion and, 302–3
- exercise of power and review, 296–302
- fair-dealing rule and, 294–5
- investment of trust funds and. *See* investment of trust funds
- keeping and rendering of accounts, 282–3
- self-dealing rule and, 294
- sources of, 279–80
- sources of trustees' powers, 296
- winding up of a trust and, 295–6
- See also* investment of trust funds
- efficient market hypothesis, 306–7
- equitable assignments
  - equitable property and, 141–2
  - future property and, 140–1
  - gifts and, 134–8
  - legal property, 132–4
  - non-assignable rights and, 138–9
  - property terminology in, 132
- equitable assignments
  - relevance of
    - consideration in, 134
  - statutory assignment and, 143–5
  - statutory formalities, 145–7
- equitable compensation, 26, 61, 186
- 'but for' test, 68
- calculation for breach of fiduciary duty, 66–8
- calculation for breach of trust, 64–6
- calculation of, 63–4
- causation and, 64, 67
- common law adjustments to quantum and, 69–70
- 'common sense' test, 68
- emergence of jurisdiction to award, 61–3
- equitable damages, 51–2
  - availability for equitable wrongs, 52–3
- equitable estoppel, 17, 97, 98–102
  - criteria for, 99
  - possible fusion with estoppel, 101–2
- equitable proprietary interests
  - nature of equitable ownership and, 125–6
  - priority disputes and doctrine of notice and, 126–7
- equitable relief, 19
  - coercion, 28
  - compensation, 28–9
  - disgorgement, 29, 31
  - nullification, 30
  - reformation, 30
  - restitution, 29–30
  - vindication, 30
- equitable remedies, 13–15
  - discretionary nature of, 25, 85
  - effect on third parties, 92–3
- equitable damages. *See* equitable damages
- injunctions. *See* injunctions
- objectives of, 28–31
- personal, 26
- proprietary remedies. *See* proprietary remedies
- specific performance. *See* specific performance
- equitable rights, 40
- equitable wrongs, 19
- equities and equitable interests, 127–9
- equity
  - civil procedure and, 19–20
  - contract and, 15–16
  - definition, 3–4
  - Earl of Oxford's Case*, 7, 9
  - exclusive and auxiliary jurisdictions of, 14–15, 40
  - institutional, 4, 5–6
  - maxims of, 20–1
  - medieval origins of, 5–6
  - place in modern law, 13
  - property and, 16–18
  - reception of in Australia, 10–13
  - rescission in. *See* rescission
  - substantive fairness and, 116–21
  - valuable consideration, 37
  - voidable transactions and, 103–5
- estoppel, 15, 85, 97, 98
  - constructive trusts and, 402–3
  - possible fusion with equitable estoppel, 101–2
- express trusts, 209, 305
  - administrative unworkability and, 242–3

- certainty of intention
    - and, 227–8, 231–2
  - certainty of objects and, 237–8
  - certainty of subject-matter and, 235–7
  - compared to constructive trusts, 390
  - conceptual and evidential uncertainty and, 238–9
  - created by transfer, 249
  - declaration of, 247–8
  - definition, 209–11
  - essential characteristics of, 211–12
  - objective or subjective, 228–9
  - parties to, 212–14
  - private, 273, 355
  - proof of intention to create, 230
  - public policy and, 253–5
  - ‘three certainties’ of, 226
- family trusts, 300
- fiduciary duty
  - breach of. *See* breach of fiduciary duty
- fiduciary obligations, 53, 57, 66
  - authorisation and ratification and, 164–5
- concept of, 153
- core, 163
- duty to act in good faith and, 164
- equitable duty of care and, 164
- fiduciary relationships and. *See* fiduciary relationships
- profits and conflicts rule and, 66–7
- remedies for breach of, 172
- stringency of, 165–70
- trustees and, 279
- fiduciary relationships
  - concurrent contractual relationships and, 159–61
  - distortion of, 161
  - non-recognised, ‘horizontal’, 158–9
  - non-recognised, ‘vertical’, 155–8
  - recognised, 154–5
  - scope of, 161–2
  - undertaking test, 156, 157
- fixed trusts, 214, 215, 216, 237, 239
- forfeiture
  - relief against, 118–21
- fraud
  - actual, 340
- fraudulent
  - misrepresentation, 73, 105
- Garcia* doctrine
  - ‘sufficient steps’ and, 115–16
  - ‘surety’ and, 115
  - ‘volunteer’ and, 115
  - ‘wife’ and, 114–15
- gifts, 72, 97, 105, 107, 109, 134–8, 221, 227, 269, 376, 377
  - as valid trusts, 274
  - attempted, of equitable property, 148
  - charitable, 270
  - conditional, 221
  - distinguished from trusts, 211
  - invalid, 247
  - unincorporated associations and, 274, 275
  - void, 255
- hardship, 64, 91
- immediate trusts, 231
- implied trusts, 248
- incompletely constituted trusts, 252–3
- injunctions, 26, 30, 40–1, 97
- anti-suit, 41
- Anton Piller order, 41
- criteria for the award of, 42
- damages in addition to, 54
- damages in substitution for, 55
- ex parte, 40
- exercise of discretion in, 49–50
- fairness and, 50
- final, 43
- interlocutory, 43–4, 91
- jurisdiction to award, 41–2
- mandatory and prohibitory, 40, 44–5
- Mareva order, 41
- negative, 45
- perpetual, interim and interlocutory, 40
- plaintiff’s remedy if denied, 51
- quia timet, 40, 42
- remedies for breach of confidence and, 202–3
- role of public interest in award of, 48–9
- supervision and, 50
- to prevent publication of a demfamatory statement, 48
- to restrain assault or battery, 47–8
- to restrain breach of contract, 45–6
- to restrain commission of a tort, 46–8
- to restrain loss or damage to chattels, 46–7
- to restrain trespass to land, 46
- inter vivos trusts, 247
  - by declaration, formalities for, 248–9
  - by transfer, formalities for, 250–1

- invasion of privacy, 199
  - recognition of in Australia, 201
- investment of trust funds, 282
  - duty to act impartially between beneficiaries and, 315–16
  - duty to act in best interest of beneficiaries, 313–14
  - duty to invest in non-speculative investments and, 314–15
  - exculpatory provisions, 319–21
  - matters to be considered by trustees, 317–19
  - power to invest and, 308–9
  - prudent investment and, 309–11
  - review of investments and, 311–12
  - sources of trustees investment powers, 305–7
  - statutory model of, 307–8
  - trustees’ duty to take advice and, 316–17
- judicature system
  - Australia, 11–13
  - Judicature Act 1873*, 8–10, 210
- knowing assistance
  - liability for, 183–4
  - remedies for, 186–7
  - type of knowledge and, 185–6
- knowing receipt, 177–9
  - remedies for, 182–3
  - type of knowledge and, 179–82
- laches, 57, 64, 78, 85–7, 171
  - definition, 85
- overlap with
  - acquiescence, 87
  - Law of Property Act 2000* s 182, 143
  - Lord Cairns’ Act*, 53, 201, 204
  - damages, jurisdiction to award, 53–4
  - enactment in Australia, 52
- managed investment trusts, 232
- misrepresentation, 15, 72, 75, 97, 103, 228
- mistake, 15, 72, 79, 81, 97, 228
  - common, 80
  - unilateral, 79, 80, 103
- modern portfolio theory, 306, 307, 314, 320
- non-charitable trusts, 272
  - problems with purpose trusts and, 272–3
- oral trusts, 248, 250
- ordinary prudent business person standard, 287, 288
- participants in breach of fiduciary obligations, 174
  - knowing assistance and. *See* knowing assistance
  - knowing receipt and. *See* knowing receipt
  - third party liability, 176–7
  - tracing and. *See* tracing
- participatory liability. *See* participants in breach of fiduciary obligations
- pecuniary restitution, 78
  - bars to, 78–9
- penalties
  - relief from, principles governing, 117–18
- personal remedies
  - comparison with proprietary remedies, 27–8
  - powers of appointment, 237
    - general, 217
    - hybrid, 218, 237, 238, 243
    - special powers, 218
  - precatory trusts, 230–1
  - presumptive relationships of influence
    - child–parent, 107
    - client–solicitor, 107
    - disciple–religious adviser, 107
    - fiancée–fiancé, 108
    - husband–wife, 108, 113
    - patient–doctor, 107
  - private trusts, 254
  - promissory estoppel. *See* equitable estoppel
  - property, 16–18
    - interests, assignment of, 17, 132–4
  - proprietary estoppel, 97, 102–3
    - criteria for enforcement of, 102–3
  - proprietary remedies, 26–7
    - comparison with personal remedies, 27–8
  - constructive trusts. *See* constructive trusts
  - equitable lien, 27
- Quistclose* trust, 223–4, 232–5, 273–4, 386–8
- ready and willing to perform test, 34
- rectification, 79, 97
  - construction and, 81
  - effect of, 81
  - elements of, 79–80
- rescission, 16, 73–4, 97, 104, 105
  - advantages of, 74
  - aim of, 73
  - bars to, 78–9
  - definition, 72

- election to rescind, 75–6
- proprietary
  - consequences of, 77
- restoration of parties to
  - pre-contractual position and, 76–7
- total and partial, 74–5
- voidable transactions and, 72
- resulting trusts, 226, 248, 373–4
  - arising on failure of
    - express trusts, 384–6
  - automatic, 373–4
  - compared to constructive trusts, 391
  - difference from express trusts, 373
  - family property and, 379–83
  - origins of, 375–6
  - other cases of failure of basis and, 386–8
  - presumed, 373
  - presumption of
    - advancement and, 376–9
  - recognition in equity, 374–6
  - voluntary transfers of property and, 384
- right of indemnity, 323–4
  - calculating value of, 325–7
  - status of, 324–5
  - third parties and, 329–31
- trust instrument and, 327–8
- rule against perpetuities, 254
- sham trusts, 228, 229
- specific performance, 43, 97
  - bars to, 39
  - damages in addition to, 54
  - damages in substitution for, 55
  - fairness to both parties, 33–4
- injunctions to restrain
  - breach of contract and, 45–6
  - plaintiff's remedy if denied, 51
  - prerequisites to award, 36–9
  - supervision. *See* supervision
- superannuation trusts, 209, 210, 217, 232, 285, 301, 306
- supervision, 34–5, 45
  - construction contracts and, 35
  - contracts for performance of personal services and, 35–6
- testamentary trusts, 247, 251, 300
  - for charitable purposes, 257
- Torrens land system, 133, 183
- tracing, 357–8
  - at common law and in equity, 358–9
  - claims based on, 187
  - defences to equitable tracing claims, 368–9
  - distinguished from following and claiming, 357–8
  - rules. *See* tracing rules
- tracing rules, 17, 387
  - equitable, 36, 360–8
- trust funds, investment of. *See* investment of trust funds
- trust powers, 216, 237
  - administrative, 216
  - certainty and, 238
  - execution of, 244–5
  - powers of appointment. *See* powers of appointment
  - validity of, 241
- trustees, 6, 210, 211, 212
  - appointment of agents by, 291
  - constructive, 176, 179, 186, 279, 305
  - de son tort, 188
  - duties and powers of. *See* duties and powers of trustees
  - express, 186
  - fiduciary obligations of, 211, 279
  - lien over trust property, 27, 124
  - limitation to number of, 213
  - management of property and, 210
  - misappropriation of trust fund and, 29
  - multiple, 290
  - power to invest trust funds, 216
  - professional, 285, 310, 342
  - responsibility of account to the beneficiaries, 64
  - responsibility to reconstitute trust estate, 62
  - resulting, 279, 305
  - rights and liabilities of. *See* trustees' rights and liabilities
  - unanimity rule and, 290
- trustees' rights and liabilities, 323
  - creditors' rights and, 333
- directors of trustee companies and, 328–9
- indemnification by the beneficiaries and, 331–3
- right of contribution from co-trustees, 334–5
- right of indemnity. *See* right of indemnity
- right to impound beneficiary's interest, 334
- right to recover overpayment, 335–6

trusts	for the advancement of religion, 262–3, 267	knowledge of a disability and, 112
condition and, 221–2	for the relief of poverty, 259–60, 267, 269	special disability and, 111–12
contracts and, 222	for the support of the aged and impotent, 260–1	undue influence, 4, 15, 20, 63, 72, 97, 103, 104, 105–6, 228, 251, 350
created by declaration, 214	unclean hands, 57, 64, 78, 88–91, 171	actual, 106
debt and, 222–4	unconscientious conduct. <i>See</i> unconscionable conduct	presumed, 106
differences to agency, 218–19	unconscionability, 97, 99, 103, 104, 105, 228	presumptive relationships of influence. <i>See</i> presumptive relationships of influence
differences to bailment, 219–20	constructive trusts and, 392	proven relationships of influence, 108–9
differences to equitable charge, 220–1	procedural, 120	rebuttal of the presumption of, 109–10
for other purposes	statutory, 113	unjust enrichment, 31
beneficial to the community, 263	unconscionable conduct, 15, 72, 100, 110–11	constructive trusts and, 391–2, 407–9
for political purposes, 264–6	exploitation of special disability and, 112–13	unworkability test, 242
for sporting and recreational purposes, 266–7		
for the advancement of education, 261–2, 267		