

INDEX

- abstract transfers, causal transfers and
 - common law, 205–12
 - equity, 212–21
 - meaning, 9–10, 201–2
- account of profits
 - breach of fiduciary law, 283, 289–90
 - contract. *See* disgorgement
 - nature of remedy, 279–80
 - patent infringement, 38
- accountability, trustees, 345–7
- accounts, disclosure to beneficiaries, 343, 350–1
- advanced corporation tax, 68
- adverse possession, 230, 233
- agency
 - breach of fiduciary duty, 395–8
 - concept, 393
 - contract and agency problems, 379, 392–401
- articles of association, changing, good faith, 328–9
- assisting breach of trust, 312–17
- Australia. *See* High Court of Australia
- bailment, collision at sea, 234
- bank accounts, theft from, 225
- banking secrecy, 134, 142
- bankruptcy. *See* insolvency
- barter, 204
- beneficiaries 129
 - beneficiary principle, 346
 - information rights, 13, 343–4
 - accountability, 345–7
 - accounts, 343, 350–1
 - confidentiality and, 345, 347–9, 353–4
- discretionary trusts, 351–4
- fixed-interest trusts, 350–1
- inspection of documents, 349
- objects of personal powers, 354
- overriding circumstances, 349–54
- proprietary rights and, 346
- right of notification of beneficial interests, 347–9
- settlers' restrictions, 355–8
- bilateral monopoly, 391–2
- bribery, constructive trusts, 236–7
- Brussels Regulation, unilateral promises, 312
- capacity, minors, 287
- causal transfers
 - abstract transfers and
 - common law, 205–12
 - equity, 212–21
 - meaning, 9–10, 201–2
 - theft, 10
- causation, compensation from
 - fiduciaries, 368–9, 373
- Charities Commissioner, 141
- Chattels. *See* sale of goods
- Chinese Walls, 294, 307
- CISG Convention (1980), 41, 50–1, 52–3, 54–63
- civilian tradition
 - common law and, 160–1
 - contract law, 55
 - natural obligations, 178, 197–8
 - Roman law and, 178
 - theory and, 25, 34
 - unjust enrichment, 201

- classification
 - fluidity, 2
 - good faith, 320–1
 - legal duties, 319–42
- codes, 27
- colonialism, 43
- common law
 - See also* method
 - Australian colonial period, 43
 - Australian unification, 5, 20, 46–7
 - civilian law and, 160–1
 - equity and, 6
 - compensation from fiduciaries, 367–8, 375–6
 - unjust enrichment, 80
 - judges as law-makers, 161–2
 - methodology, 25, 34
 - precedents, 161–2
 - privacy and, 6–7, 87
 - reasons for decision-making, 162–5
 - South African restitution law and, 160–6
- comparative approaches
 - contract, 50–63
 - good faith, 56–63
 - legal education, 65
 - methodology, 3, 45
 - unjust enrichment, 153–4
- compensation from fiduciaries
 - Canson*, 363–4
 - causation, 368–9, 373
 - facts, 364–6
 - foreseeability, 368
 - judgments, 366–9
 - minority judgment, 367–9
 - secret profits, 365
- equity/common law dichotomy and, 367–8, 375–6
- evidentiary difficulties, 373–5
- mitigation, 373
- non-compensatory claims, 369–73
- overview, 13–14
- special rules, 369
- specific performance and, 371–2
- condictio causa data causa non secuta*, 156
- condictio indebiti*, 154, 155, 156, 166, 167
- condictio ob turpem vel iniustam causam*, 156
- confidence, breach of *See also* privacy
 - Canada, 236
 - English privacy rights, 103–7, 112–15
 - incomplete theorizing, 120–4
 - New Zealand, 107
 - overview, 6–7
 - trivial information, 116–19
- confidentiality
 - fiduciary duties, 132
 - continuing duty, 307
 - exclusion, 301, 302–3
 - information rights and, 345, 348, 355–8
 - unconscionability and, 105
- conflict of laws, 42, 309–12
- conflicts of interests, fiduciaries
 - good faith, 330, 333–4
 - identification of fiduciaries, 340–1
 - Mothew* principle, 300
 - self-dealing, 336–9
 - solicitors, 277, 288–90, 308, 364–6
- conscience, natural obligations, 176, 177
- consent, impaired consent, 9–10
- constructive trusts. *See* trusts
- consumer protection, 432
- contemptuous harassment, 99
- context
 - good faith, 322–3
 - trust law, 127–43
- contract
 - agency problems, 379, 392–401
 - boundaries, 2
 - breach of negative covenants, 387–8
 - China, 53–4, 57
 - CISG Convention and, 41, 51
 - civilian tradition, 55
 - consideration, 55–6
 - contractarian view of fiduciary duties
 - anti-contractarian view, 275–6, 297
 - Citigroup*, 293–6
 - fiduciaries and contract terms, 282
 - trusts as three party contracts, 280–1
 - weakened duties, 286–7
 - damages. *See* damages

- contract (*cont.*)
 development in Australia, 5, 42–8
 disgorgement damages, 387–8
 services, 388, 389
 distinctiveness of Australian law,
 64–6
 doctrinal view, 11–12, 300–2
 Canson v Broughton, 284
 exclusion clauses, 290–6
 international debate, 276–8
 legal education, 143–8
 parental relations, 287–8
 party autonomy, 275, 281
 pro bono work, 286
 public interest and, 276, 288–90
 Rothko Re, 281
 Schmidt, 284–6
 Strother, 282–4, 289–90
 Tornroos v Crocker, 281–2
 efficient breach, 390–2
 express trusts and, 143–8
 forfeiture. *See* forfeiture relief
 freedom of contract, 267
 gambling contracts, 182
 good faith, 56, 57–63
 implied terms, 60–1, 279, 301–2
 inducing breach, 315–16
 information asymmetry, 393
 internationalization, 42, 49–63
 CISG Convention (1980), 41, 50–1,
 52–3, 54–63
 good faith, 56–63
 implied terms, 60–1
 Lando Principles (PECL), 52–63
 model clauses, 56
 post-contract conduct and
 interpretation, 60
 practices and usages, 61
 unfair terms, 61–3
 UNIDROIT principles, 50,
 52–63
 methodology, 42–9
 minors, 287
 party autonomy, 64
 penal clauses, 260–1, 266–72
 practices and usages, 61
 pre-contractual negotiations and
 interpretation, 59–60
 property transfers and
 common law, 205–12
 effects of contract, 202–5
 self-executing contracts, 209–12
 separate contracts, 205–9
 rescission. *See* rescission
2nd Restatement, 49
 sale of goods. *See* sale of goods
 sale of land. *See* land
 sources of law, 64
 specific performance, 254–7
 land, 381
 substitutability. *See* substitutability
 time of the essence clauses, 256–7, 259
 unfair terms, 61, 62
 EC Directive, 62
 internationalization, 61–3
 trustee exemption clauses, 148, 306
 Uniform Commercial Code, 50, 54
 unilateral mistake, 430–1
 unjust enrichment and, 34–7, 67, 83–4
 failure of consideration, 71–2
 implied contract theory, 67, 72
 unlawful interference, 315–16
 conversion
 damages, 229, 234, 455
 evidence, 375
 corrective justice, 19
 covenants, breach of negative
 covenants
 agency problem, 398–401
 fiduciary duty and, 392–4
 substitutability, 387, 394–5
 credit crunch, 139
 credit rating agencies, 138
 Crown supremacy in Australia, 29
 culture. *See* legal culture
cy-près, 129
 damages
 breach of privacy, 94, 95
 contract
 disgorgement. *See* disgorgement
 damages
 efficient breach, 390–2
 intentional breaches, 380
 nature of remedy, 279
 scenario, 370

- conversion, 229, 234
- exemplary damages, Australia, 31–2
- fiduciaries. *See* compensation from fiduciaries
- penal damages, 270
- specific performance with, 258
- trespass, 94, 95, 234
- debts
 - scenario, 370
 - specific performance and, 371–2
- deceit, evidence, 375
- defamation
 - free speech and, 30
 - privacy and, 89–90, 95, 103
- deposits, forfeiture, 267–8, 269
- directors
 - good faith, 325–6, 335–6
 - self-dealing, 337, 338
- discretionary trusts, beneficiaries' information rights, 351–4
- disgorgement damages in contract
 - agency problems, 379, 392–401
 - breach of fiduciary duty, 395–8
 - breach of negative covenants, 398–401
- breach of negative covenants, 387
 - agency problems, 398–401
 - fiduciary duty and, 392–4
 - substitutability, 387, 394–5
- expectation damages, 382–3
- overview, 14
- principles, 377, 379
- public policy and, 400–1
- second sales, 379, 380–92
 - efficient breach, 390–2
 - goods and chattels, 383–5
 - land, 381–3
 - services, 386–90
 - shares, 386
- substitutability, 14, 378–401
- distributive justice, 19
- duress, 158, 202, 433
- easements, 458, 462
- education. *See* legal education
- efficiency, efficient breach of contract, 390–2
- equity
 - See also* unconscionability
 - boundaries, 2
 - breach of trust. *See* compensation from fiduciaries
 - clean hands, 213
 - common law and, 6
 - compensation from fiduciaries, 367–8, 375–6
 - unjust enrichment, 80
 - conflict of laws and, 309–11
 - conscience and, 143
 - forfeiture relief. *See* forfeiture relief
 - maxims, 203
 - overview, 10–13
 - parliamentary sovereignty and, 465–6
 - paternalism, 252
 - privacy and, 103–7
 - property transfers
 - causality and abstraction, 212–21
 - effects of contracting, 203–5
 - punitive remedies and, 32
 - redemption, 252–3
 - unjust enrichment. *See* unjust enrichment
- estoppel. *See* proprietary estoppel
- European Convention on Human Rights, private and family life, 103, 114
- European Union, unfair contract terms, 62
- excise, meaning, 29
- exemplary damages
 - breach of good faith, 31–2
 - equity and, 32
- expectation damages, 382–3
- fiduciary duties
 - breach
 - agency problems, 395–8
 - assisting, 312–17
 - compensation. *See* compensation from fiduciaries
 - constructive trusts, 33–4, 77, 279–80, 282, 448, 450
 - exemplary damages, 31–2
 - negative covenants and, 392–4

- fiduciary duties (*cont.*)
 remedies, 279–80, 332–9
 Torrens system and, 448–51
 choice of law, 309–12
 confidentiality, 132
 continuing duty, 307
 exclusion, 301, 302–3
 information rights and, 345, 348, 355–8
 conflicts of interests. *See* conflicts of interests
 contractarian view
 anti-contractarian view, 284, 275–6, 286–90, 297
 arguments supporting, 282, 286–90
Canson v Broughton, 284
Citigroup, 293–6
 doctrinal view, 11–12, 300–2
 economic analysis and, 275, 298
 fiduciaries and contract terms, 282–4
 international debate, 276–8
 legal education, 143–8
 overview, 11, 275–82
 parental relations, 287–8
 party autonomy, 275, 281
pro bono work, 286
 public interest and, 276, 288–90
Rothko Re, 281
Schmidt, 284–6
 significance, 275–6
Strother, 282–4, 289–90
Tornroos v Crocker, 281–2
 trusts as three party contracts, 280–1
 US terminology, 276
 weakened duties, 286–7
 development in England, 298
 exclusion clauses, 291, 293
 confidentiality, 301, 302–3
 contractarian view and, 290–6
 excludable duties, 302–6
 implied exclusions, 302–3
 negligence, 304–5
 unconscionability, 292–3
 unfair contract terms and, 148, 306
 gap-filling function, 279
 good faith. *See* good faith
 guardians, 287
 honesty, 305
 identification of fiduciaries, 339–41
 information asymmetry, 279
 lawyers, 282–4
 loyalty. *See* loyalty, duty of
 moral dimension, 275–6, 284
 paradigm relationship, 278–9
 parents, 287–8
 public interest and, 276, 288–90
 termination, 306–8
 terminology, 276
 unjust enrichment and, 23, 33–4, 36, 70, 78–9
 misuse of information, 33–4, 77, 78–9
 voluntary undertakings, 11–12, 298–9, 300–2
force majeure, 56
 forced heirship, 132
 forfeiture relief
 arguments for instalment relief
 assessment, 273
 clauses by way of security, 265
 improvements, 273
 inequitable divestment of
 property interests, 272
 overview, 265–72
 penal clauses, 266–72
 unconscionability, 268–9
 waiver or estoppel, 266, 273
 arguments for property relief
 assessment, 263–4
 clauses by way of security, 257–9
 inequitable divestment of
 property interests, 261
 overview, 257–64
 penal clauses, 260–1
 waiver or estoppel, 259–60
 clarification of principles, 251
 deposits, 267–8, 269
 equitable doctrine
 description, 251–3
 disappearance thesis, 11, 249–51, 273–4
 failure to pay on time, 256

- fairness and, 256–7, 259, 260–1, 266–7, 269, 272
 fluctuating approaches, 250–1
 forfeiture clauses, 256–7
 by way of security, 257–9, 265
 commercial reasons, 258
 penal clauses, 260–1, 266–72
 waiver, 259–60
 forfeiture of instalment payments
 arguments against, 265–72
 overview, 11, 264–73
 unjust enrichment, 264–5
 heads of jurisdiction, 251–2
 hypothetical scenario, 249
 overriding contract, 252–3
 paradigm case, 253–4
 property forfeiture
 arguments against, 257–64
 circumstances of relief, 254–7
 specific performance, 254–7
 time of the essence clauses, 256–7, 259
 forgery, 226
 France
 1789 Revolution, 169
 causal property transfers, 201
 judgments
 conclusions and rapports, 170–1
 hidden reasoning, 168–72
 legal culture, 168–72
 privity of contract, 172
 unjust enrichment, 8
 contours, 166–8
 enrichissement sans cause, 166, 168
 répétition de l'indu, 166, 167
 uncertainty, 166, 173
 fraud
 fiduciaries, 291
 assistance to, 312–15
 disposal of trust land, 448–51
 limitation periods and, 463
 passing of title and, 202, 207–11
 Torrens registration system and, 455
 disposal of trust land, 448–51
 personal equities exception,
 460–6
 Statute of Frauds (1677), 463, 464,
 465, 466
 victims' title, 226
 free expression, 21–2, 30–1, 102
 fusion fallacy, 31, 58
 gambling
 natural obligations, 182, 186–8
 public policy and gambling debts,
 176
 regulation, 178, 187
 Germany
 codification of law, 159
 contract, termination for just
 cause, 56
 natural obligations and unjust
 enrichment
 limitation of actions, 193
 marriage brokering, 197
 wagers, 178
 privacy law, 88
 property transfers, 201–2
 tax avoidance in Liechtenstein, 135
 torts, 164
 unjust enrichment, 154–5, 161
 good faith
 CISG Convention (1980) and, 51
 context, 322–3
 contract, comparative law, 56–63
 controlling fiduciaries' actions,
 323–7
 bad faith, 334
 exercise of power, 324–5, 334–6
 good faith as source of obligation,
 325–7
 exemplary damages, Australia, 31–2
 fiduciary duty, 300
 conflicts rules, 330, 333–4, 340–1
 core duty, 304, 319
 meaning, 327–8
 other's interests, 330–2
 remedies, 332–9
 functionalism, 322
 identification of fiduciaries, 339–41
 legal classification, 320–1
 consequences, 321–3
 meaning, 12
 non-fiduciaries, 319, 327–9
 insurance, 329
 limitation on economic freedom,
 329

- good faith (*cont.*)
 mortgagees, 327
 receivers, 327
 shareholders, 328–9
 prohibiting harm to principals, 322
 remedies, 332–9
 conflicts of interest, 333–4
 interaction, 338–9
 self-dealing, 336–9
 trustees, 146–7
 goods. *See* sale of goods
 guardians, fiduciary obligations, 287
- Hague Trust Convention (1985), 310
 harassment, 99
 hardship clauses, 56
 High Court of Australia, method
 acceptability of top-down method,
 27–38
 common law decisions, 30–8
 constitutional interpretation, 28–30
 evolution of method, 42–9
 free speech, 21–2, 30–1
 overview, 4–5, 19–40
 Posner and, 4, 20–1, 25, 38–40
 statutory interpretation, 30
 understanding of top-down
 method, 25–7
 unjust enrichment, 6, 22–4, 33–8, 67
 hire purchase, 261
 honesty, fiduciary duty, 305
 Human Rights Act, 103, 119, 120
- improvements, forfeiture relief
 and, 273
*in pari delicto potior est conditio
 defendentis*, 211
 incrementalism, 110–15, 121–3
 inducement to breach of contract,
 315–16
 infants
 contracts, 194
 resulting trusts, 238
 information asymmetry
 contracts, 393
 fiduciary relations, 279
 information rights. *See* beneficiaries
 injunctions, privacy and, 94–5
- insolvency
 thieves, 231
 trustees, 203
 unjust enrichment and, 38, 56,
 82–5, 198
 insurance, utmost good faith, 329
 intellectual property rights
 accounts for profits, 38
 disgorgement damages, 394–5
 internationalism, contract law, 42,
 49–63
- judgments, reasons for decisions,
 162–5
jus commune, 157, 159
- knowing receipt, 70, 77–8, 449–50
 knowledge
 degrees, 312–13
 disposal in breach of trust, 449
 Torrens registration system and,
 459–60
- land
 contracts for sale
 constructive trusts, 205, 382
 disgorgement damages, 381–3
 expectation damages, 382–3
 specific performance, 381
 substitutability, 381–3
 disposal in breach of trust, 448–51
 estoppel. *See* proprietary estoppel
 registration. *See* Torrens system
 status, 381
 Lando Principles (PECL), 52–63
 Law Commission, 147–8, 292, 306
 leases
 forfeiture clauses, 258
 forfeiture relief, 262
 legal classification. *See* classification
 legal culture
 meaning, 153–4
 unjust enrichment and, 173–4
 legal development
 Australia, 42–9
 colonial period, 43
 isolationism, 47
 judges as law-makers, 46

- precedents, 45, 47, 48–9
- Privy Council appeals, 43, 44
 - to 1983, 43–4
 - 1983–95, 44–6
 - to the present, 46–9
- unified common law, 5, 20, 46–7
 - Canada, 45
 - New Zealand, 45
- legal duties, classification, 319–42
- legal education
 - comparative approaches, 65
 - through case law, 126–7
 - trusts. *See* trusts
- Lewin on Trusts*, 348, 353, 357
- liens, 204, 205, 263, 272
- limitation periods, 191–4, 226, 233, 258, 463
- loyalty, duty of
 - contractarian view, 283
 - exclusion clauses, 291
 - gains-based remedies, 279
 - meaning, 279
- malicious falsehood, 87
- maritime law, 42
- marriage brokering, 197
- method
 - See also* top-down reasoning; unjust enrichment
 - bottom-up reasoning
 - breach of confidence, 113
 - incrementalism, 110–15
 - civilian tradition, 166
 - incomplete theorizing, 120–4
 - incrementalism, 110–15, 121–3
 - judicial method and substantive law, 8, 173–4
 - mapping, 2–4
 - muddling through, 110–11, 116
 - overview, 4–7
 - pluralism, 2–5, 10
 - reasons for decision-making, 162–5
 - teaching, 7
 - top-down reasoning
 - acceptability, 27–38
 - bottom-up method and, 3–4
 - privacy debate, 110–11
 - common law decisions, 30–8
 - concept, 25–7
 - constitutional interpretation, 30–8
 - debate, 25–7
 - Dixon* and, 28–9
 - Farah*, 1, 25–6, 33–4, 36, 77
 - High Court disapproval, 4–6, 19–40
 - judicial habits, 24–5
 - Lumbers*, 24, 34–8
 - Roxborough*, 71–6
 - statutory interpretation, 30
 - term of abuse, 20–1
 - unjust enrichment, 6, 22–4, 33–8, 73–4
 - top-down v bottom-up, 3–6, 19–40
 - Posner and, 4, 20–1, 25, 38–40
 - privacy debate, 110–11
 - unjust enrichment, 8
- minors, capacity, 287
- mistakes, restitution, 215
- mitigation, compensation from
 - fiduciaries, 373
- monism, 3
- monopolies, bilateral monopolies, 391–2
- moral hazard, 393
- morality, fiduciary obligations and, 275–6, 284
- mortgages, 252–3, 258, 259, 327
- muddling through, 110–11, 116
- national security, 102, 400
- natural obligations
 - categories
 - Canada, 186–98
 - civilian examples, 178, 197–8
 - discharged bankrupts, 198
 - gambling, 182, 186–8
 - infancy contracts, 194
 - limitation periods, 191–4
 - other categories, 196
 - promises, 196
 - usurious contracts, 188–91
 - definition, 176
 - enforceability
 - Canada, 182–4
 - categories of obligations, 186–98

- natural obligations (*cont.*)
 juristic reasons, 182–4
 overview, 181–4
 test, 184–5
 unjust factors, 181–2
 gambling, 186–8
 German law, 178, 197
 legal history, 177–84
 legal v natural rights, 176–7
 Louisiana, 178, 184, 197–8
 moral duty, 198
 public policy and, 176
 Quebec, 178
 Roman law, 177–8
 terminology, 176–7
 traditional common law, 179–80
 unjust enrichment and, 8–9, 182–4
 usurious contracts, 188–91
- negligence
 damages, 101–2
 fiduciary duties and, exclusion
 clauses, 304–5
 presumption, 375
 principles, 97, 160, 164
nemo dat quod non habet, 227, 244
 nuisance, privacy and, 91–3, 96–7, 103
- OECD, 136
 offshore trusts, 131, 132–6
 orphan structures, 133
- parents, fiduciary obligations, 287–8
 parliamentary sovereignty, 29, 460,
 465–6
- party autonomy
 civil law, 326
 contract, 64
 contractarian view of fiduciary
 duties, 275, 281
- patents, infringement, 38
 paternalism, 252
 pension funds, surpluses, 284–6
 perpetuities, 133–4
 possessory title, 228–30
 Praetors, 177
- precedents
 bottom-up methodology, 28
 doctrine, 161–2
 legal development, 45, 47, 48–9
ratio decidendi, 163
 reshaping, 19–20
 presumptions, 30, 375
- Principles of European Contract Law
 (Lando Principles), 52–63
- privacy, 6–7
 See also confidence, breach of
 adapting tortious causes of action,
 87–98
 balance of interests, 102–3, 115–20
 breach of confidence and, 103–7,
 112–15
 common law means, 6–7, 87
 creation of tort, 98–103
 damages, 94, 95
 defamation actions, 89–90
 equity, 103–7
 gaps, 86–7
 German law, 88
 Human Rights Act and, 103, 119, 120
 incomplete theorizing, 120–4
 incrementalism, 110–15, 121–3
 information privacy, 86
 injunctions, 94–5
 intrusion, 86
 malicious falsehood, 87–8
 nuisance actions, 91–3
 remedies, 94–7
 right, 111, 119–20
 trespass, 88–9
 trivial information, 116–19
- private international law, 42, 309–12
 private law, method. See method
- Privy Council
 Australian abolition of appeals to,
 44
 colonial court, 43
- property rights
 express trusts and, 144–5
 trust beneficiaries, 346
- property transfers. See title, passing of
- proprietary estoppel
 circumstances, 464
 equity, 403–4
 forfeiture clauses, 259–60, 266, 273
 proportionality principle, 406–7, 422
 Statute of Frauds (1677) and, 464

- unconscionability
 - approaches, 14–15, 402–3
 - extent of responsibility approach, 402, 413–15, 422–3
 - ‘in the round’ approach, 403, 415–22, 423–6
 - limits, 421–6
 - reliance and expectations, 403–7
 - reprehensibility approach, 402, 407–13
- public interest, fiduciary obligations and, 276, 288–90
- public policy
 - disgorgement damages and, 400–1
 - natural obligations and, 176
- purpose trusts, 133, 145
- quasi ex contractu*, 179
- ratio decidendi*, 163
- real estate investment trusts (REITs), 139–41
- reasons for judicial decisions, 162–5
- receivers, good faith, 327
- redemption, 252–3
- registration of land. *See* Torrens system
- REITs, 139–41, 143
- remedies
 - See also* specific remedies
 - breach of fiduciary law, 279–80, 332–9
 - compensation. *See* compensation from fiduciaries
 - good faith, 332–9
 - Torrens system. *See* Torrens system
- rescission, 212
- partial rescission
 - academic debate, 427
 - meaning, 427–8
 - operation of law, 428
 - overview, 15
 - perpetrator-sided, 428–36
 - opposing authorities, 432–5
 - summary, 435–6
 - supporting authorities, 428–31
 - species of rectification, 430–1
 - unilateral mistake, 430–1
 - victim-sided, 436–45
- legislation, 437–8
- opposing authorities, 442–4
- summary, 444–5
- supporting authorities, 436–42
- restitutio in integrum*, 157, 166, 209, 210, 427, 429, 432
- restitution. *See* compensation from fiduciaries; unjust enrichment
- restraint of trade, 389
- resulting trusts. *See* trusts
- retention of title clauses, 258, 261
- rule of law, 29–30, 85
- sale of goods
 - CISG Convention (1980), 41, 50–1
 - disgorgement damages in contract, 383–5
 - passing of title, 202–3, 206–8, 209–12
 - proprietary effects of contracting, 202–3
 - sales in market overt, 227
- securities regulation, 293–6
- securitization, 137–9, 143, 146–7
- self-dealing, 336–9
- services
 - breach of negative covenants, 387
 - restraint of trade, 389
 - specific performance, 386–90
- settlers, restrictions on beneficiaries’ information rights, 355–8
- shareholders, good faith, 328–9
- shares, specific performance of contracts, 386
- slaves, 177
- Society of Trust and Estate Practitioners, 148
- solicitors
 - acting *pro bono*, 286
 - fiduciary duties, 282–4, 300–2
 - compensation claims, 363–6
 - conflicts of interest, 277, 288–90, 308, 364–6
 - termination, 308
- South Africa
 - English legal influence on, 158–9
 - Union of South Africa (1910), 158
 - unjust enrichment, 8

- South Africa (*cont.*)
 burden of proof, 155–6
 codification and, 159–60
 common law method and
 substantive law, 160–6
 English influence, 158–9
 historical roots, 156–60
 illegal transactions, 155
 invalid contracts, 155
jus commune and, 157, 159
 mistake, 155
 unjust factors, 154–6
- specific performance
 debts and, 371–2
 discretionary remedy, 204–5
 forfeiture relief and, 254–7
 land contracts, 381
 restraint of trade and, 389
 sale of goods, 383–5
 sale of shares, 386
 services, 386–90
 substitutability and, 378
- statutory interpretation, 30
- sub-prime mortgages, 137–9
- substitutability
 disgorgement damages in contract
 and
 agency problems, 379,
 392–401
 breach of negative covenants, 387,
 394–5, 398–401
 efficient breach, 390–2
 goods and chattels, 383–5
 land contracts, 381–3
 overview, 14, 378–401
 principle, 378–80
 second sales, 379, 380–92
 services, 386–90
 shares, 386
 specific performance and, 378
- swaps, 68, 185, 186
- taxation
 offshore trusts and, 131,
 135–6
 Stop Tax Haven Bill (US), 136
 tax evasion, 135–6
 unjust enrichment, 68, 71–6
- taxonomy. *See* classification
- theft
See also trusts
 bankruptcy of thieves, 231
 constructive trusts, 224
 limitation periods, 226
 passing of title, 225–7
 possessory title, 228–30
 resulting trusts, 224
 trusts and, 10
 trusts of proceeds
 innocent recipients, 240–3
 overview, 237–45
 purchase money resulting trusts,
 237–40
 victims retaining legal title, 244–5
- trusts of stolen assets
 assets and proceeds, 225
 debate, 230
 overview, 224–37
 possibility of trust, 228–30
 victims' title, 225–7
- time of the essence clauses, 256–7, 259
- title, passing of
 causal v abstract transfers
 common law, 205–12
 equity, 212–21
 meaning, 9–10, 201–2
 self-executing contracts, 209–12
 separate contracts, 205–9
 common law, 205–12
 conditional transfers, 202
 effects of contracting, 202–5
 equity, 212–21
 impaired consent, 9–10
 land registration, 203, 208
 possessory title, 228–30
 proprietary effects of contracting
 common law, 202–3
 equity, 203–5
 overview, 202–5
 proprietary restitution, 213–14
 power model, 215–17
 rescission, 212
 retention of title clauses, 258, 261
 sale of goods, 202–3, 206–8,
 209–12
- theft. *See* theft
- top-down reasoning
See also method

- acceptability, 27–38
- Australia
 - acceptability, 27–38
 - common law decisions, 30–8
 - concept, 25–7
 - constitutional interpretation, 28–30
 - debate, 25–7, 34
 - Farah*, 25–6, 33–4, 36, 77–82
 - High Court disapproval, 4–6, 19–40
 - judicial habits, 24–5
 - Lumbers*, 24, 34–8
 - Roxborough*, 25–6, 71–6
 - statutory interpretation, 30
 - term of abuse, 20–1
 - unjust enrichment and, 6, 22–4, 33–8, 73–4
- Posner and, 4, 20–1, 25, 38–40
- Torrens system
 - easements, 458, 462
 - exceptions to indefeasibility of title, 15–16
 - Australian fraud exception, 208
 - claims *in rem* and *in personam*, 457–8
 - Farah*, 449–51, 454
 - fraudulent disposal of trust property, 448–51
 - personal equities exception, 460–6, 467
 - personal liabilities and, 452–66
 - personal liabilities as limits to, 453–60
 - unconscionability, 461
 - unregistered interests, 458–9
 - indefeasibility
 - ejectment, 456–7
 - notice, 458, 459–60
 - paramountcy provisions, 455–6, 460
 - introduction, 452
 - statutory interpretation, 462–3
 - widespread system, 447
- torts
 - See also specific torts*
 - Germany, 164
 - privacy and
 - adapting torts, 87–98
 - creating privacy tort, 98–103
 - tracing
 - stolen assets, 223–7
 - unjust enrichment, 70, 80
 - trespass
 - damages, 94, 95, 234
 - injunctions, 94–5
 - privacy and, 88–9
 - trivial information and breach of confidence, 116–19
 - trust, breach of
 - account of profits, 283, 289–90
 - agency problems, 395–8
 - assisting, 312–17
 - compensation. *See* compensation from fiduciaries
 - constructive trusts, 33–4, 77, 279–80, 282, 448, 450
 - exemplary damages, 31–2
 - land disposal, 448–51
 - notice, 449
 - remedies, 279–80, 332–9
 - trustees
 - See also* fiduciary duties
 - accountability, 345–7
 - compensation from. *See* compensation from fiduciaries
 - fiduciary duties
 - core duties, 147
 - exemption clauses, 147–8, 290–6, 302–6
 - good faith, 146–7
 - professional trustees, 147–8
 - fraud, 291
 - indemnity insurance, 147
 - insolvency, 203
 - unjust enrichment, 23
 - trusts
 - See also* fiduciary duties
 - beneficiaries' information rights
 - accountability principles, 345–7
 - accounts, 343, 350–1
 - confidentiality and, 345, 347–9, 353–4
 - discretionary trusts, 351–4
 - fixed-interest trusts, 350–1

trusts (*cont.*)

- inspection of documents, 343, 349
- objects of personal powers, 354
- overriding circumstances, 349–54
- overview, 13, 343–4
- property rights, 346
- right of notification of beneficial interests, 347–9
- settlers' restrictions, 355–8
- beneficiary principle, 133, 145
- confidentiality, 132
- constructive trusts
 - breach of fiduciary duties
 - information misuse, 33–4, 77
 - knowing receipt, 450
 - nature of remedy, 279–80
 - Torrens system, 448
 - bribery, 236–7
 - coherence and, 34
 - contract for sale of land and, 205, 382
 - murder and manslaughter, 237
 - resulting trusts and, 237–8
 - rhetoric, 220
 - theft. *See* theft
- contractarian view. *See* fiduciary duties
- donative instruments, 280
- exclusion clauses, 147–8
- flexibility, 131, 229
- forced heirship and, 132
- Hague Convention (1985), 310
- importance of trust law, 134–5
- legal education, 7, 125–49
 - case law method, 126–7
 - contextualizing, 127–43
 - contractarian basis of express trusts, 143–8
 - historical structures, 128–9
 - secondary sources, 142–3
 - Singapore example, 134–5
 - trust practitioners as teaching resources, 141–2
- offshore trusts, 131, 132–6
- origins, 203
- orphan structures, 133
- overview, 10–13
- perpetuities, 133–4

- proprietary view of, 144–5
- purpose trusts, 133, 145
- REITs, 139–41, 143
- resulting trusts
 - constructive trusts and, 237–8
 - pension fund surpluses, 285–6
 - theft. *See* theft
- securitization, 137–9, 143, 146–7
- theft and. *See* theft
- wealth management vehicles, 129–32

UNCITRAL, 50

unconscionability

- confidentiality and, 105
- express trusts and, 143–2
 - exclusion clauses, 292–3
- forfeiture of instalment payments, 268–9
- proprietary estoppel
 - approaches, 14–15, 402–3
 - extent of responsibility approach, 402, 413–15, 422–3
 - in the round approach, 403, 415–22, 423–6
 - limits, 421–6
 - reliance, expectations and, 403–7
 - reprehensibility approach, 402, 407–13
- Torrens registration system and, 461, 462
- unjust enrichment, 6, 73, 75–6, 220
- undue influence, 81, 213, 216, 219, 287, 292, 293, 433
- UNIDROIT, 50, 52–63
- Uniform Commercial Code, 50, 54
- unilateral promises, conflict of laws, 312
- unjust enrichment
 - Australian reasoning
 - See also* High Court of Australia, method
 - corporate insolvency, 24, 38, 82–5
 - disappointment, 68
 - equity, 80–1
 - Farah*, 25–6, 33–4, 36, 77–82
 - forms of action and, 84
 - knowing receipt, 77

- Lumbers*, 24, 34–8, 82–5
 no enrichment objection, 73, 74–5
 rejection of top-down method,
 22–4, 33–8, 73–4
 requirements, 232–3
Roxborough, 25–6, 71–6
 strict liability, 23, 77–82
 survey, 67
 unconscionability, 6, 73, 75–6
 wrong reasoning, 6
- boundaries, 2
 change of position defence, 70
 civilian v common law, 3–4, 8, 9,
 160, 166, 201
 conceptual framework, 69
 constructive trusts. *See* trusts
 contract and, 34–7, 83–4
 failure of consideration, 71–2
 implied contract theory, 67, 72
 development, 68, 70
 equitable tracing, 70, 80
 equity and, 22–3, 70, 212–21
 power model, 9–10, 215–16,
 218–20
 fiduciary duties and, 23, 33–4, 36
 forfeiture of instalment payments,
 264–5
 France. *See* France
 Germany, 154–5, 161
 insolvency and, 24, 38, 82–5, 198
 knowing receipt, 70
- leapfrogging, 83
 legal culture and, 173–4
 natural obligations. *See* natural
 obligations
 overview, 7–10, 68–71
 perfect quadrature, 22
 proprietary restitution
 immediate vested model,
 214
 power model, 9–10, 215–16
 stolen assets and proceeds.
 See theft
 requirements, 69, 232–3
 Roman law, 155, 157
 South Africa. *See* South Africa
 strict liability, 23, 70, 77–82
 Torrens system and, 451
 unjust factors, 69–70
- unlawful interference with
 contractual relations,
 315–16
 usurious contracts, 188–91
 usury regulation, 189
- Vienna Sales Convention. *See* CISG
 Convention (1980)
vindicatio, 449, 450, 451
- wagers. *See* gambling
 waiver, forfeiture clauses,
 259–60, 266