accounts of profits, 54–5, 169
allowances, 57–8
breach of confidence, 197
calculation of, 55–7
acquiescence, 85–6
as equitable defence to breach of trust, 329–30
overlap with laches, 85–6
advancement
presumption of, 357–9
agency
trusts and, 210–11
aggravated damages, 68
Anton Piller order, 39
Aristotle, 4
assessment of equitable damages, 51
in addition to injunction or specific performance, 51
in substitution for injunction or specific performance, 51–2
assignments
equitable property, 138–9
future property, 137–8
gifts, 133–6
law of, 130
legal property, 131–2
legal property only in equity, 141
legally ineffective, 132
non-assignable rights, 136–7
property terminology, 130–1
relevance of consideration, 132
statutory, 139–41
statutory formalities, 141–3
Baden scale of knowledge, 176–8, 181–2
bankruptcy
trusts and, 242–3
bars to relief
acquiescence, 85–6
delay, 85–4
effect of order on third parties, 89–90
hardship, 88–9, 168
laches, 83–5, 168
limitation of action by analogy, 85
limitation statutes, 84–5
unclean hands, 86–8, 168
beneficiaries, 206
administration of trust and, 207
creditors’ rights and, 313–14
differences between fixed and discretionary trusts for, 207
‘gift-over’ right, 208–9
indemnification of trustees, 311–13
interest, trustees’ right to impose, 314
investment of trust funds, 297, 299
‘list certainty’, 227
sui juris, 278, 312
trust property and, 208
trustees’ right to recover overpayment from, 315
breach of confidence, 17–18, 47, 50, 68
defences to. See defences to breach of confidence remedies for. See remedies for breach of confidence breach of contract
injunctions to restrain, correlation with specific performance, 43–4
breach of fiduciary duty, 100
assistance in, 180–1
knowing receipt and, 175–8
knowledge of, 181
breach of fiduciary obligation, 17
constructive trusts imposed for, 382–5
informed consent as defence to action for, 168–9
knowing receipt as, 174
participants in. See participants in breach of fiduciary obligation remedies for, 169–70
breach of trust, 322
defences for. See defences for breach of trust dishonest and fraudulent, 179–80
remedies for. See remedies for breach of trust ‘but for’ test, 65–6, 333
calculation of equitable compensation, 60–1
breach of fiduciary duty, 63–5
breach of trust, 61–3
calculation of equitable damages
causation standard, 66–5
common law adjustments to quantum, 66–8
categories of constructive trusts, 371
as remedy to proprietary estoppel, 380–2
as restitutionary remedy for unjust enrichment, 380–2
Baumgartner constructive trusts, 375–9
common intention, family property disputes and, 373–5
imposed for breach of fiduciary obligation, 382–5
imposed over property transferred under specially enforceable contracts, 390–1
imposed over stolen money and its proceeds, 385–6
certainty of intention, 216–17
certainty of objects, 216, 225–6
trustees’ duties and, 231
certainty of subject-matter, 216, 224–5
charitable purposes
definition for purposes of Cth legislation, 250
four ‘heads’ of, 249
charitable trusts, 203, 207, 216, 336
administrative schemes, 295–60
advancement of education, 251–2
charitable trusts (cont.)
advancement of religion, 252–3
differences to express trusts, 248
for a valid charitable purpose, 248
historical development of, 249–50
political purposes, 253–5
public benefit, 256–7
public or section of the public, 257–8
purposes beneficial to the community, 253
relief of poverty, 250–1
support for the aged and impotent, 251
	
taxation legislation and, 248
chattels, 131
contracts for sale of, 37
injunctions to restrain loss or damage to, 45
chose in action, 131
civil procedure
equitable remedies and, 18–19
civil wrongs
equitable remedies and, 17–18
claiming, 339
‘cloak for fraud’ doctrine, 236–7
coercion, 29
common law
competition with equity, 7–8
differences to equity, 6
remedies, 26
tracing and claiming at, 340
‘common sense’ test, 65–6
compensation, 29, 169
condition
trusts and, 211–12
confidence
breach of. See breach of confidence
equitable obligation of. See equitable obligation of confidence
confidential information
misuse of, 190–1
confidentiality
quality of, 187–8
consent
as equitable defence for breach of trust, 329
consideration
relevance in assignment, 132
constructive trustees, 172–4, 369
constructive trusts, 27, 30, 169, 216, 340, 369
categories of. See categories of constructive trusts compared to express trusts, 370
criteria for imposition of, 373, 376
impact of family law legislation on, 379–80
institutional and remedial, 369–70
unconscionability and, 372
unjust enrichment and, 371–2
wrongdoing and, 372–3
contract law
equity in, 94
contracts
construction, 34–5
equitable remedies and, 14–15
performance of personal services, 35–6
prerequisites to award of specific performance, 36–8
sale of chattels, 37
sale of land, 37
to pay or lend money, 38
trusts and, 212–13, 220–1
contribution, 18
contributory negligence, 67
contractive trusts
compared to resulting trusts, 370–1
Court of Chancery, 5, 203
appointment of chancellors, 6
discretion of chancellors, 7
Earl of Oxford’s Case, 7, 9
issue of writs by, 5–6
petitions to, 6
reform and jurisdiction legislation, 8–10
summons to appear before Chancellor, 6
uses of land disputes, 6–7
criminal liability, 26
criterion certainty test, 226–9
cy-près schemes, 259–60
damages
aggravated, 68
equitable. See equitable damages
exemplary, 67–8
debt
trusts and, 213–14
declaration, 78–9
criteria for award of, 79–80
equitable bars to relief and, 80–1
defences for breach of confidence
change of position, 193
inquiry, 192
defences for breach of trust equitable defences. See equitable defences for breach of trust
culpation in the trust instrument, 322–5
statutory exculpation. See statutory exculpation
defences to breach of confidence
public interest, 192–3
delay, 83–4
discretion
award of a declaration and, 80
discrimination
trusts and, 243–4
disgorgement, 29, 169
doctrine of constructive notice, 176
doctrine of cy-près, 259
doctrine of incorporation by reference, 238
doctrine of mutual wills, 388–90
doctrine of notice, 176
duess, 100
efficient market hypothesis, 291
equitable charge, 211
equitable compensation, 58, 182
calculation of. See calculation of equitable compensation
emergence of jurisdiction to award, 58–60
equitable damages, 49–50
assessment of. See assessment of equitable damages
availability for equitable wrongs, 50
jurisdiction to award Lord Cairns’ Act damages, 50–1
equitable defences for breach of trust, 328–9
acquiescence and release, 329–30
consent, 329
equitable intervention
contribution, 18
general principles of, 99–100
marshalling, 18
subrogation, 18
equitable obligation of confidence, 186–7
Australian developments, 195–6
circumstances importing, 189–90
elements of, 186
English developments, 194–5
misuse of confidential information, 190–1
protection of private information, 193–4
quality of confidentiality, 187–8
showing of detriment suffered, 191–2
specificity, 187
equitable ownership, 125–6
equitable property assignment, 138–9
distinction between legal property, 131
gift of, 139
equitable proprietary interests, 120–2
equitable relief against forfeiture, 115–18
bars to. See bars to relief
equitable remedies, 13–14, 26
bars to. See bars to relief
civil procedure, 18–19
civil wrongs, 17–18
contract, 14–15
discretionary nature of, 26, 83
equitable damages. See see equitable damages ‘equitable defences’, 83
evolution of, 26
injunctions. See injunctions

objectives of. See objectives of equitable remedies
personal, 27
property, 15–17
proprietary remedies. See proprietary remedies
specific performance. See specific performance
equitable wrongs
breach of confidence, 17–18
breach of fiduciary obligation, 17
equities and equitable interests, 127–8

equity
Aristotelian, 4
in contract law, 94
differences to common law, 6
exclusive and auxiliary jurisdictions of, 13–14
institutional. See institutional equity
map of, 13–19
maxims of, 19–21
meaning of, 4
monetary remedies in. See monetary remedies
place in modern law, 12–13
reception of in Australia, 10–11
substantive fairness and, 112–18
tracing and claiming at, 340–1
voidable transactions and, 99–100

estoppel, 83, 94
common law, 94–5
criteria, 96
equitable, 95–9
promise enforcement and, 94
proprietary. See proprietary estoppel
exceptions to indefeasibility, 179
exemplary damages, 67–8
express trusts compared to constructive trusts, 370
definition, 202–3
difference to resulting trusts, 354
differences to charitable trusts, 248

essential characteristics, 204–5
methods of creating. See methods of creating a trust
parties to, 205–6
private, 336
purposes of, 202
resulting trust arising from failure of, 364–5
‘three certainties’ requirements, 216
types of, 206–8

family property
constructive trusts and, 360–3, 373–5
fiduciary obligations, 150, 159–63
authorisation and ratification, 163

Boardman v Phipps, 165–7
breach of. See breach of fiduciary obligation
Chan v Zacharia, 167–8
core, 159–60
deterrence and, 163–4
duty of loyalty, 164
Keech v Sandford, 164–5
stringency of, 163–8
trustees. See trustees’ fiduciary obligations

fiduciary relationships
concurrent contractual, 155–7
distortion of fiduciary concept, 157–8
‘horizontal’ relationships, 154–5
recognised, 150–1
scope of, 158–9
‘vertical’, 152–4
following, 339
forfeiture
equitable relief against, 115–18
fraud
actual, 323
equitable, 323
fraudulent misrepresentation, 100
fusion fallacy, 10
future property assignments, 137–8

Holyroyd v Marshall principles, 391–2

Index
Index

396

gifts, 100, 102, 106, 112, 130, 132–6, 356
distinguishable from trusts, 204
equitable property, 139
to unincorporated associations, 262
hardship, 88–9, 168
in personam principle, 179
informed consent
breach of fiduciary obligation and, 168–9
inquiry, 192
disclosure of, 192
injunctions, 38–9, 94
‘anti-suit’, 39
assessment of equitable damages in addition to, 51
assessment of equitable damages in substitution for, 51–2
breach of confidence, 197
criteria for award of, 40–1
ex parte, 39
exercise of discretion, 47–8
fairness and, 47–8
futility and, 48
interim, 39
interlocutory, 39, 41–2
jurisdiction to award, 40
mandatory, 39, 42–3
perpetual, 39
plaintiff’s remedy if denied, 48–9
quia timet, 39
third party interests and role of public interest, 46–7
to restrain breach of contract, 43–4
to restrain commission of a tort. See injunctions to restrain commission of a tort
injunctions to restrain commission of a tort
injunctions to restrain loss or damage to chattels, 45
injunctions to restrain trespass to land, 44
institutional equity, 5
competition between common law and equity, 7–8
medieval origins, 5–7
inter vivos trusts by declaration, formalities for, 235
by transfer, formalities for, 236–7
investment of trust funds applying other duties of law to, 296
duty to act impartially between investors, 299
duty to act in best interests of beneficiaries, 297
duty to invest in non-speculative investments, 297–8
duty to take advice, 299–300
exculpatory provisions, 302–3
matters to be considered by trustees, 300–1
power to invest, 293
prudent investment, 293–5
review of, 295–6
sources of trustees’ investment powers, 290–2
statutory model, 292
trustees’ duties and, 268, 290
judicature legislation, 9–10
Australia, 11–12
limits of, 9
jurisdiction
award of a declaration and, 79
knowing assistance, 174
liability for, 179–81
remedies for, 182–3
type of knowledge, 181–2
knowing induction, 183
knowing receipt, 174
as breach of fiduciary obligation, 174
knowledge of breach of fiduciary duty, 175
receipt of property by defendant, 174–5
remedies for, 178–9
type of knowledge of breach of fiduciary duty, 176–8
laches, 83–5, 168
overlap with acquiescence, 85–6
legal property assignments, 131–2
distinction between equitable property, 131
only assigned in equity, 141
liens equitable, 13–14
trustee’s liens, 27
limitation of action by analogy, 85
limitation statutes, 84–5
Lord Cairns’ Act, 49–50, 196–7
damages, jurisdiction to award, 50–1
Mareva order, 39
marshalling, 18
methods of creating a trust by transfer, 235–6
self-declaration of trust, 254
misrepresentation, 94
mistake, 94
common, 76–7
unilateral, 77
mitigation of loss, 67
modern portfolio theory, 291
monetary remedies for accounts of profits. See accounts of profits equitable compensation. See equitable compensation
monetary remedies

© in this web service Cambridge University Press

www.cambridge.org
Index

397

disgorgement, 29
nullification, 30
reformation, 30
restitution, 29–30
vindication, 30–1
participants in breach of fiduciary obligation, 172–3
_Barnes v Addy_, 173–4
third parties. See third party liability
participatory liability
 Baden scale of knowledge, 176–8, 181–2
claims based on tracing, 183
inducing a breach of trust, 183
trustee de son tort, 183–4
penalties doctrine, 112–15
perpetuity
trusts and, 244–6
personal remedies, 27
compared to proprietary remedies, 28
power of appointment, 208
appointee, 209
bare, 208–9, 229–30
certainty and, 226
donors, donees and objects, 209
general, 209–10, 225
hybrid, 210, 226
non-fiduciaries, 209
special, 210, 225
types of, 209–10
prerequisites to award of specific performance
inadequacy of damages, 36–8
specifically enforceable contracts, 36
valuable consideration, 36
presumed resulting trusts
purchase money resulting trusts, 354
voluntary transfer resulting trusts, 354
priority disputes and doctrine of notice, 126–7
private information, protection of, 195–4
property
assessment of contribution, 377–8
contractual transfer of, 388
equitable. See equitable property
equitable adjustments, 378
equitable remedies and, 15–17
family. See family property future. See future property legal. See legal property
non-contractual transfers of, 386–8
recovery through claiming, 339
specially enforceable contract transfers, 390–1
transfer of. See assignments trust. See trust property
voluntary transfers of, resulting trusts and, 363
proportionate liability, 334
proprietary estoppel, 122–5
constructive trust as remedy for, 380–2
proprietary remedies, 10–11
compared to personal remedies, 28
constructive trusts. See constructive trusts equitable lien, 13–14
public benefit
charitable trusts and, 250–7
public interest
defence to breach of confidence, 192–3
publication
trusts and, 241–2
_Quistclose_ trusts, 214, 221–3, 261, 365–7
rectification, 76, 94
common mistake, 76–7
construction and, 78
effect of, 78
elements of, 76–8
unilateral mistake, 77
reformation, 30
relationships of influence presumed, 102–3
proven, 103–4
release
as equitable defence for breach of trust, 390
remedies
_Baumgartner_ constructive trust as, 378–9
breach of fiduciary obligations, 169–70
constructive trusts, unjust enrichment and, 380–2
knowing assistance, 182–3
knowing receipt, 178–9
promissory estoppel, constructive trust and, 380–2
remedies for breach of confidence, 196
account of profits, 197
compensatory remedies, 197–8
injunctions, 197
miscellaneous orders, 198
remedies for breach of trust, 330
monetary. See monetary remedies for breach of trust
non-monetary, 335–6
standing to sue, 336–5
rescission, 29, 94, 99–100
aim of, 70–1
at common law and equity, 71–2
bars to, 75
election to rescind, 72–3
meaning of, 70
partial, 72
pecuniary, 75–6
proprietary consequences to, 74–5
restoring parties to pre-contractual position, 73–4
total, 72
voidable transactions, 70
restitution, 29–30
restitution of property, 169
resulting trusts, 216, 340, 354
application of presumptions to family property, 360–3
arising on failure of express trust, 364–5
automatic, 354–5
compared to constructive trusts, 370–1
difference to express trusts, 354
history of development of, 356–7

© in this web service Cambridge University Press
resulting trusts (cont.)
presumed, 354
presumption of advancement, 357–9
Quistclose trusts and, 365–7
recognition of in equity, 355–7
voluntary transfers of property and, 363
settlor, 205, 234
sham trusts, 218–19
special disability, 106–7
exploitation of, 108
specific performance, 33, 94
assessment of equitable damages in addition to, 51
assessment of equitable damages in substitution for, 51–2
bears to, 38
correlation with injunctions to restrain breach of contract, 43–4
fairness to both parties, 33–4
mutuality, 35
plaintiff’s remedy if denied, 48–9
prerequisites to award of. See prerequisites to award of specific performance
‘ready and willing’ to perform, 33–4
supervision. See supervision standing
award of a declaration and, 80
statutory exculpation, 325
general statutory defence, 326–8
willful default, 326
subrogation, 18
substantive fairness, 112–18
supervision, 34
construction contracts, 34–5
contracts for performance of personal services, 35–6
third parties
as constructive trustees, 172–3
bears to relief and, 89–90
interests, role of public interest, 46–7
trustees’ right of indemnity
and, 310–11
third party liability, 173–4
knowing assistance. See knowing assistance
knowing receipt. See knowing receipt
tracing, 183, 339
as equitable requirement, 341
at equity, 340–1
claims, defences to, 340–50
distinguishable from following and claiming, 339
mixing money in a bank account, 341–9
rules, variables relevant to, 342
transfer of property. See assignments
trust funds, investment of. See investment of trust funds
trust power, 208–9, 226
administrative, 208
administrative unworkability, 229–30
capricious, 230–1
criterion certainty test, 226, 227–9
discretionary trust, 227–8
execution of, 231–2
powers of appointment. See power of appointment
trust property
beneficiaries and, 208
definition of express trust and, 203
fixed trusts and, 227
misapplications, 64
trustees and, 305–6
trustee de son tort, 183–4
trustees, 205–6
breach of trust and. See breach of trust constructive, 172–4
non-performing, removal of, 207–8
right of indemnity. See trustees’ right of indemnity
rights. See trustees’ rights
trust property and, 203
trustees’ duties, 266
certainty of objects and, 231
duty to adhere to terms of trust, 267–8
duty to get in the assets, 268
duty to keep assets separate, 269
entitlement information to beneficiaries, 270
information concerning the trust, 271–3
investment of trust funds. See investment of trust funds
keeping and rendering accounts, 269–70
sources of, 266–7
trustees’ duties of performance
duty of care, 273
duty to act impartially, 274
duty to act personally, 275–7
duty to consider exercise of power, 277
standard of care, 273–4
trustees’ fiduciary obligations, 204
duty to act gratuitously, 278–9
fair dealing rule, 279–80
self-dealing rule, 279
winding up of a trust, 280–1
trustees’ liabilities, 305
directors of trustee companies, 310
trustees’ powers, 266, 281
administrative, 281
effect of improper exercise of discretion, 286–8
exercise of, 281–6
Karger v Paul test, 285–6
review of, 286
sources of, 266–7, 281
trustees’ right of indemnity, 305–6
calculation of value of, 307–9
creditors’ rights and, 313–14
indemnification by beneficiaries, 311–13
out of trust assets, exclusion by trust instruments, 309
status of, 306
third parties and, 310–11
trustees’ rights
of contribution from co-trustees, 314–15
of indemnity. See trustees’
rights of indemnity
to impound beneficiary’s
interest, 314
to recover overpayment from
beneficiary, 315
to seek directions from court,
316–17
trusts
administration of,
beneficiaries and, 207
advancement of purposes,
203
agency and, 210–11
bankruptcy and, 242–3
capricious, 230–1
certainty of intention, 216–17
certainty of objects, 225–6
certainty of subject-matter,
224–5
certainty requirements, 216
charitable. See charitable
trusts
conceptual and evidential
uncertainty and, 226–7
condition and, 211–12
costive. See constructive
trusts
contracts and, 212–13, 220–1
debt and, 213–14
disciplinary, 206–7, 226
discrimination and, 243–4
distinguishable from gifts, 204
elements of, 203
enforceability, 203
equitable charge and, 211
express. See express trusts
fixed, 206, 226–7
for non-charitable purposes.
See non-charitable trusts
half-secret, 239
immediate, intention to
create, 220
incompletely constituted,
240
intention to be proven, 219
inter vivos. See inter vivos
trusts
lack of legal personality,
204
multiple purposes, 258
non-charitable. See
non-charitable trusts
non-consensual. See
constructive trusts;
resulting trusts
‘non-exhaustive’, 208
non-simultaneous
declaration and vesting,
240
objective intention or
subjective intention,
217–18
obligation and, 203
perpetuity and, 244–6
preatory, 219–20
public policy and, 241–2
Quistclose, 214, 221–5, 261,
365–7
resulting. See resulting trusts
secret, 238–9
sham, 218–19
testamentary, 237–8
unauthorised profits, 331
unclean hands, 86–8, 168
unconscientious conduct, 105–6
exploitation of special
disability, 108
knowledge of disability, 107
rule in Yerkey v Jones and
Garcia, 110–12
special disability, 106–7
statutory unconscionability,
106–9
unconscionability, 94, 100
constructive trusts and, 372
undue influence, 94, 100–1
actual, 101
presumed, 101
rebutting presumption of,
104
relationships of influence.
See relationships of
influence
third parties and, 105
unjust enrichment
constructive trust as
restitutional remedy for,
380–2
constructive trusts and, 
371–2
vindication, 30–1
voidable transactions
equity and, 90–100
rescission and, 70
wills
doctrine of incorporation by
reference, 238
half-secret trusts, 239
mutual, doctrine of, 388–90
secret trusts, 238–9
testamentary trusts, 237–8
writs
Chancery, 5–6
common law, 6
wrongdoing
constructive trusts and, 372–3