

INDEX

- account of profits, 52–3
 - allowances, 57
 - breach of confidence and, 206
 - calculation of, 53–6
- acquiescence, 84, 86–7, 335, 342–3
 - overlap with laches, 87
- administrative unworkability test, 239–40
- advancement, presumption of, 372–5
- agency, trust and, 219–20
- Anton Piller order, 36
- Aristotle, 3
- assignments, 134
 - of equitable property, 143–4
 - equity's approach to, 134
 - future property, 141–3
 - gifts, 137–40
 - of legal property, 135–6
 - legal property only assigned in equity, 146
 - legally ineffective assignments, 136
 - non-assignable rights, 140–1
 - property terminology, 135
 - relevance of consideration, 136–7
 - statutory assignment, 144–6
 - statutory formalities, 146–8
- assault or battery, injunctions to restrain
 - commission of, 43
- Baden* scale, 183, 189, 191
- bankruptcy, trusts and, 252–3
- Barnes v Addy* rule, 180–1
- bars to relief, 82
 - acquiescence, 86–7
 - effect of order on third parties, 91–2
 - hardship, 90
 - laches, 84–6
 - unclean hands, 88–90
- Baumgartner* constructive trust, 388, 390, 393–5, 398
 - assessing contributions, 395–6
 - equitable adjustments to, 396
 - institution or remedy, 396–7
- beneficiaries, 215
 - consent to breach of trust by, 342
 - default beneficiaries, 413
 - general beneficiaries, 413
 - interest, trustee's right to impound, 328
 - on whose behalf a court may approve
 - a variation of trust, 422
 - specified beneficiaries, 413
 - sui juris*, 279, 290, 326
 - trustee's duty to act impartially between, 311
 - trustee's duty to act in best interests of, 309
 - trustee's duty to give information to, 282–5
 - trustee's right of indemnity and, 325–8
 - trustee's right to recover overpayment
 - to, 329–30
- breach of confidence, 17
 - defences to, 200
 - change of position, 201–2
 - protection of private information, *see* protection of private information
 - public interest, 200–1
- injunctions to restrain, 45
- remedies for, 205
 - account of profits, 206
 - compensatory remedies, 206–7
 - injunctions, 205
 - miscellaneous orders, 207
- breach of contract
 - fiduciary obligations and, 161
 - injunctions to restrain, 41–2
- breach of fiduciary duty, calculation of
 - equitable compensation for, 63–5
- breach of fiduciary obligations, 16–17
 - Barnes v Addy* rule, 180–1
 - claims based on tracing, 191
 - constructive trust imposed for, 400–3
 - inducing a breach of trust, 191–2
 - informed consent as defence to action
 - for, 176
 - knowing assistance
 - liability for, 186–8
 - remedies for, 190
 - type of knowledge, 188–9
 - knowing receipt, 181
 - knowledge of breach of fiduciary duty, 182
 - receipt of property by the defendant, 181–2
 - remedies for, 185–6
 - type of knowledge, 183–5
 - participants in, 179–80
 - remedies for, 177
 - trusteeship de son tort, 192
- breach of trust, 335
 - calculation of equitable compensation
 - for, 61–3
 - equitable defences, 342
 - acquiescence and release, 342–3
 - consent, 342

- exculpation and defences, 335
- exculpation in the trust instrument, 335–8
- monetary remedies for
 - compensation for breach of the conflicts rule, 347
 - negligence in performance, 346–7
 - prohibited breaches, 344–6
 - statutory provisions, 347–8
 - unauthorised profits, 344
- non-monetary remedies for, 348–50
- remedies in the context of, 343–4
- standing to sue, 350–1
- statutory exculpation, 338
 - general statutory defence, 339–1
 - wilful default, 339
- ‘but for’ test, 62, 65–6
- capricious trusts, 240–1
- certainty of intention to create a trust, 225–6
 - contract and, 230
 - intention to be proved, 228–9
 - intention to create an immediate trust, 229
 - objective or subjective intention, 226–7
 - precatory trusts, 229
 - sham trusts, 227–8
- certainty of objects
 - fixed trusts, 237
 - powers and certainty, 236
 - conceptual and evidential uncertainty, 236–7
 - trust power, 237–8
 - capricious trusts and power, 240–1
 - executing a trust power, 241–2
 - trustees’ duties and, 241
- chancellors, 5–7
- charitable trusts, 216, 225
 - administrative and cy-près schemes, 269–71
 - duration of, 259, 413
 - for a valid charitable purpose, 258
 - historical development of, 259–60
 - treatment under taxation legislation, 259
 - trusts for multiple purposes, 269
 - trusts for political purposes, 264–6
 - trusts for purposes beneficial to the community, 263–4
 - trusts for sporting and recreational purposes, 266–7
 - trusts for the advancement of education, 262
 - trusts for the advancement of religion, 262–3
 - trusts for the aged and impotent, 261–2
 - trusts for the public benefit, 267
 - benefit, 267
 - public, or a section of the public, 268–9
 - trusts for the relief of poverty, 260–1
- chattels
 - contract for sale of, 34
 - injunctions to restrain loss or damage to, 42–3
- chose in action, 15, 135, 144, 146
- civil procedure, equity and, 17–18
- civil wrongs, equity and, 16–17
- Claflin doctrine, 417
- claiming, 353–4
- cloak for fraud doctrine, 247
- coercion, 26
- ‘common sense’ formulation, 65–6
- compensation, 26
- confidence
 - breach of, *see* breach of confidence
 - equitable obligation of, *see* equitable obligation of confidence
- confidential information, misuse of, 198–9
- confidentiality, quality of, 195–7
- consideration, assignments and, 136–7
- construction contracts, specific performance and, 31–2
- constructive trustee, 387
- constructive trusts, 24, 387–8
 - as a remedy for proprietary estoppel, 398–400
 - as restitutionary remedy for unjust enrichment, 404–5
 - contractual transfers of property, 406–7
 - non-contractual transfer of property, 405–6
- Baumgartner* constructive trust, 393–5
 - assessing contributions, 395–6
 - equitable adjustments, 396
 - institution or remedy, 396–7
- categories and principles, 389
- common intention constructive trust and family property disputes, 390–3
- compared with other trusts
 - express trusts, 388
 - resulting trust, 389
- distinction between institutional and remedial constructive trust, 387–8
- doctrine of mutual wills, 407–8
- impact of family law legislation on, 397–8
- imposed for breach of fiduciary obligation, 400–3
- imposed over property transferred under specifically enforceable contracts, 408–9
- imposed over stolen money and its proceeds, 403–4
- principle of *Holroyd v Marshall* and assignment of future property, 410

- constructive trusts (*cont.*)
 - unconscionability and, 390
 - unjust enrichment and, 389–90
- contract law
 - equity and, 14–15
 - forms of equity in, 95
- contracts
 - construction contracts, 31–2
 - equitable intervention in, 14–15
 - for the performance of personal services, 32–3
 - sale of chattels, 34
 - sale of land, 34
 - specifically enforceable contracts, 33
 - termination of, fiduciary obligations and, 162–4
 - to pay or lend money, 34–5
 - trusts and, 221–2, 230
- contribution, 17
- contributory negligence, equitable compensation and, 66
- Court of Chancery, 4, 6, 7
 - separation of equity from common law courts and, 7–8
- COVID-19, 35
- criterion certainty test, 236, 237
 - status in Australia, 238–9
- cy-près schemes, 270–1, 413
- declaration, 80–1
 - criteria for award of
 - discretion, 81–2
 - jurisdiction, 81
 - standing, 81
 - ‘stand alone’ declaration, 80
- defamatory statements, injunctions to prevent publication of, 43–4
- Dickens, Charles, *Bleak House*, 7
- discretionary trust, 216
 - terminology of, 216
- discrimination, trusts and, 254
- disgorgement, 26
- doctrine of cy-près, 259, 270
- doctrine of incorporation by reference, 248
 - secret trusts, 248–50
- doctrine of mutual wills, 407–8
- doctrine of notice, 129–30, 183
- duty of care, 170, 198, 347
 - trustee’s duty of care, 277, 285
 - trustee’s standard of care, 285–6
- Earl of Oxford’s Case*, 6–8
- efficient market hypothesis, 303, 310
- equitable charge, trust and, 220
- equitable compensation, 57
 - calculation of, 59–60
 - calculation of for breach of fiduciary duty, 63–5
 - calculation of for breach of trust, 61–3
 - causation standard, 65–6
 - common law adjustments to quantum, 66–8
 - emergence of jurisdiction to award, 58–9
- equitable damages, 47–8
 - assessment of
 - damages in addition to injunction or specific performance, 49
 - damages in substitution of injunction or specific performance, 49–50
 - available for equitable wrongs, 48
 - jurisdiction to award *Lord Cairns’ Act* damages, 48–9
- equitable defences, 84
- equitable lien, 24
- equitable obligation of confidence, 194
 - breach of, *see* breach of confidence
 - circumstances importing
 - an obligation, 197–8
 - elements of, 194
 - misuse of confidential information, 198–9
 - quality of confidentiality, 195–7
 - show of detriment suffered, 199–200
 - specificity, 195
- equitable property rights, 123
 - acts on conscience of legal title holder, 125
 - created informally, 124–5
- equitable ownership
 - nature of, 129
- equities and equitable interests, 130–2
- priority disputes and the doctrine of notice, 129–30
- ways of creation, 124
- equitable relief, against
 - forfeiture, 118–21
- equitable remedies, 12–14, 23
 - bars to, *see* bars to relief
 - comparing proprietary and personal remedies, 25
 - discretionary nature of, 84
 - objectives of
 - coercion, 26
 - compensation, 26
 - disgorgement, 26
 - nullification, 27
 - reformation, 27
 - restitution, 26–7
 - vindication, 27–8

- personal remedies, 24
- proprietary remedies, 24
 - constructive trust, 24
 - equitable lien, 24
- equity
 - Australian judicature legislation, 10–11
 - civil procedure and, 17–18
 - civil wrongs and, 16–17
 - competition between common law, 6–7
 - contract law and, 14–15
 - exclusive and auxillary jurisdictions, 13
 - institutional equity, 4
 - medieval origins, 4–6
 - map of, 12
 - maxims of, 18–20
 - meaning of, 3
 - monetary remedies, *see* monetary remedies
 - place of in the modern law, 12
 - property law and, 15–16
 - reception of in Australia, 9–10
 - reform and the judicature
 - legislation, 7–9
 - substantive fairness and, 115
 - voidable transactions and, 100
- estoppel, 84, 95
 - common law estoppel, 95–6
 - criteria giving rise to
 - assumption, 97
 - detriment, 97
 - failure to prevent detriment, 97
 - inducement, 97
 - knowledge, 97
 - reliance, 97
 - equitable estoppel, 96–100, 126
 - promissory estoppel, constructive trust
 - as remedy for, 398–400
 - proprietary estoppel, 14, 98, 124–8
 - establishment of, 125
- express trust, 211
 - compared with constructive trust, 388
 - definition, 211–12
 - duration of, 413
 - essential characteristics, 213–14
 - parties to
 - beneficiary, 215–17
 - settlor, 214
 - trustee, 214–15
 - ‘three certainties’ of, 225
 - trust and powers, 217–18
 - types of
 - charitable trust, 216
 - discretionary trust, 216
 - fixed trust, 215–16
 - types of powers of appointment
 - general, 218–19
 - hybrid, 219
 - special, 219
- fair dealing rule, 291
- fiduciary concept, abuse of, 164
- fiduciary obligations, 166–70
 - authorisation and ratification, 170–1
 - breach of, *see* breach of fiduciary obligations
 - conflicts rule, 58, 63, 64
 - compensation for breach of, 347
 - contract and
 - breach of contract, 161
 - duties part of the contract, 162
 - modification of obligations by terms
 - of a contract, 160–1
 - termination of the contract, 162–4
 - core fiduciary obligations
 - avoidance of duty-duty disputes, 166–7
 - obligation to not make a profit at expense
 - of beneficiary, 167
 - obligation to not permit conflict, 166
 - ‘no conflict’ and ‘no profit’
 - principles, 167
 - profits rule, 63–4, 195, 337, 340
 - stringency of obligations, 171–2
 - Boardman v Phipps*, 172–5
 - Chan v Zacharia*, 175
 - Keech v Sandford*, 172
- fiduciary relationships
 - outside the recognised fiduciary relationships
 - ‘horizontal’ relationships, 159–60
 - ‘vertical’ relationships, 157–9
 - recognised fiduciary relationships, 155–6
 - scope of, 165–6
 - ‘undertaking test’, 158
- fixed trusts, 215–16, 237
- following, 353
- forfeiture, equitable relief against, 118–21
- fusion fallacy, 9
- future property, 141–3
 - assignments of, 410
- gifts, 137–40
 - conditional, 221
 - equitable property, 144, 149
 - invalid, 244
 - legal property, 150
 - to unincorporated associations, 273
- hardship, 35, 46, 49, 50, 60, 66, 82, 84, 90

- in personam principle, 186
- incompletely constituted trusts, 250
 - general principles applicable to, 250
 - non-simultaneous declaration and vesting, 250–1
- indestructible trusts, rule against, 254
- injunctions, 36–7
 - anti-suit injunctions, 37
 - criteria for award of, 38–9
 - damages in addition to, 49
 - damages in substitution of, 49–0
 - ex parte injunctions, 36
 - exercise of discretion, 45–6
 - fairness to both parties, 45–6
 - interim injunctions, 36
 - interlocutory injunctions, 36, 39–40
 - jurisdiction to award, 37–8
 - mandatory and prohibitory injunctions, 36, 40–1
 - perpetual injunctions, 36
 - plaintiff's remedies if denied, 46–7
 - quia timet injunctions, 36
 - third party interests and the role of public interest, 44–5
 - to restrain breach of contract, 41–2
 - to restrain the commission of a tort
 - injunctions to prevent publication of a defamatory statement, 43–4
 - injunctions to restrain loss or damage to chattels, 42–3
 - injunctions to restrain the commission of assault or battery, 43
 - injunctions to restrain trespass to land, 42
- institutional equity, 4
 - medieval origins, 4–6
- inter vivos trusts, 244
 - by declaration, 245
 - by transfer, 246–7
- investment of trust funds
 - applying other duties of law and equity to, 308
 - duty to act impartially between beneficiaries, 311
 - duty to act in best interests of beneficiaries, 309
 - duty to invest in non-speculative investments, 310–11
 - duty to take advice, 312
- exculpatory provisions, 314–15
- investing prudently, 305–7
- matters to be considered by trustee when investing, 312–14
- review of investments, 307–8
- judicature legislation, 8–9
 - Australia, 10–11
- Karger v Paul* test, 297
- knowing assistance
 - liability for, 186–8
 - remedies for, 190
 - type of knowledge, 188–9
- knowing receipt, 181
 - knowledge of breach of fiduciary duty, 182
 - receipt of property by the defendant, 181–2
 - remedies for, 185–6
 - type of knowledge, 183–5
- laches, 46, 52, 60, 66, 67, 76, 84–6, 335
 - overlap with acquiescence, 87
- Lord Cairns' Act*, 47, 48
 - damages, jurisdiction to award, 48–9
- Mareva order, 36
- marshalling, 17–18
- methods of creating a trust, 244
 - formalities for inter vivos trusts by declaration, 245
 - formalities for inter vivos trusts by transfer, 246–7
 - self-declaration of trust, 244
 - trust created by transfer, 246
 - declaration of trust, 245–6
 - valid transfer of intended trust property, 246
- modern portfolio theory, 303, 304, 307–8, 310–11, 313–15
- monetary remedies
 - accounts of profits, 52–3
 - allowances, 57
 - calculation of, 53–6
 - equitable compensation, 57
 - calculation of, 59–60
 - calculation of for breach of fiduciary duty, 63–5
 - calculation of for breach of trust, 61–3
 - causation standard, 65–6
 - common law adjustments to quantum, 66–8
 - contributory negligence and, 66
 - emergence of jurisdiction to award, 58–9
- More, Sir Thomas, 5
- nullification, 27
- penalties doctrine, 115–18
- personal remedies, 24
- personal services, contracts for the performance of, 32–3
- precatory trusts, 229

- private information, protection
 - of, *see* protection of private information
 - property
 - assignment of legal property, 135–6
 - contractual transfers of, 406–7
 - distinction between legal and equitable property, 135
 - equitable intervention in, 15–16
 - equitable property assignment, 143–4
 - family, resulting trusts and, 375–9
 - future property, 141–3, 410
 - non-contractual transfer of, 405–6
 - terminology, 135
 - transferred under specifically enforceable contracts, 408–9
 - voluntary transfers of, 379
 - property rights, equitable, *see* equitable property rights
 - proprietary estoppel, 14, 98, 124–8
 - constructive trust as remedy for, 398–400
 - establishment of, 125
 - proprietary remedies, 24
 - protection of private information, 202
 - Australian developments, 204–5
 - English developments, 202–3
 - public interest
 - as defence to breach of confidence, 200–1
 - injunctions against, 45
 - public policy, trusts and, 251–2
 - purpose trusts, problems with, 271–2
- Quistclose* trust, 223, 230–3, 272–3, 381–3
- rectification, 77
 - construction and, 79–80
 - effect of, 80
 - elements of
 - common mistake, 77–8
 - correct words must be identified, 79
 - true intention of the parties and, 78–9
 - unilateral mistake, 78
 - written instruments, 77
 - reformation, 27
 - rescission
 - advantages of, 71
 - aim of, 70–1
 - at common law and in equity, 71–2
 - bars to, 76
 - election to rescind, 73–4
 - meanings of, 70
 - pecuniary restitution, 76–7
 - proprietary consequences of, 75–6
 - restoring parties to pre-contractual position, 74–5
 - total and partial, 72
 - voidable transactions, 70
 - restitution, 26–7
 - resulting trusts, 369–70
 - application of the presumption to family property, 375–9
 - arising in other cases of failure of basis, 381–3
 - arising on failure of an express trust, 379–81
 - automatic resulting trusts, 370
 - compared with constructive trust, 389
 - history of development of, 371–2
 - illegality and, 383–5
 - presumed resulting trusts, 369, 370
 - purchase money resulting trust, 369
 - voluntary transfer resulting trust, 369
 - presumption of advancement, 372–5
 - recent issues with in Australia, 373–4
 - voluntary transfers of property, 379
 - why equity recognises, 372
 - rule against indestructible trusts, 254, 256
 - rule against perpetuities, 254, 271
 - rule against remoteness of vesting, 254–6
- Saunders v Vautier*
- critique of, 417
 - rule, 413–17
- secret trusts, 248–50
 - self-dealing rule, 290–1
 - settlor, 214
 - sham trusts, 227–8
 - specific performance, 30
 - construction contracts, 31–32
 - contracts for the performance of personal services, 32–3
 - damages in addition to, 49
 - damages in substitution of, 49–50
 - general considerations, fairness to both parties, 30–1
 - plaintiff's remedy if denied, 46–7
 - prerequisites to award of
 - bars to specific performance, 35
 - inadequacy of damages, 33–5
 - specifically enforceable contracts, 33
 - valuable consideration, 33
 - supervision requirement, 31
 - stolen money trust, 404
 - subrogation, 17
- termination of trusts
- critique of *Saunders v Vautier*, 417
 - Saunders v Vautier* rule, 413–17
- testamentary trusts, 244, 247–8
 - wills creating, 247–8

- third party interests, injunctions and, 44–5
- title to land, transfer of, 135–6
- tracing, 16, 353
 - claims based on, 191
 - at common law and in equity, 354–5
 - defences to tracing claims, 364–5
 - distinguished from following and claiming, 353–4
 - equitable methods for tracing a plaintiff's property, 354–5
 - as fiduciary requirement, 355–6
 - mixing money in a bank account, 356–4
 - variables relevant to determining tracing rule, 356
- trespass to land, injunctions to restrain, 42
- trust
 - agency and, 219–20
 - condition and, 221
 - contract and, 221–2
 - debt and, 222–3
 - equitable charge and, 220
- trust instrument
 - exculpation in, 335–8
 - exemption clauses, 335–8
- trustee, 214–15
- trustees' duties and powers, 277–8
 - duties of performance
 - duty of care, 285–6
 - duty to act impartially, 286
 - duty to act personally, 286–9
 - duty to consider exercise of powers, 289
 - duties on assumption of trusteeship
 - duty to adhere to terms of the trust, 278–9
 - duty to get in the trust assets, 279–80
 - duties on winding up of a trust, 292
 - duty to give information to beneficiaries
 - information concerning
 - entitlements, 281–2
 - other information concerning the trust, 282–5
 - effect of improper exercise of discretion, 298–300
 - exercise of power and review, *Karger v Paul* test, 297
 - fair dealing rule, 291
 - ongoing management duties
 - duty to keep trust assets separate, 280
 - investment of trust funds, 280
 - keeping and rendering accounts, 280–1
 - sources of, 278
 - trustee's right of indemnity, calculating the value of, 320–2
 - trustees' fiduciary obligations
 - duty to act gratuitously, 290
 - self-dealing rule, 290–1
 - trustees' investment powers
 - power to invest, 305
 - sources of, 302–4
 - statutory model, 304
 - trustees' powers, 292–3
 - exercise of power and review, 293–8
 - trustees' liabilities, 318
- trustees' rights
 - of contribution from co-trustees, 17
 - of indemnity, 318–19
 - creditor's rights subrogated to personal indemnification by beneficiaries, 328
 - exclusion by the trust instrument, 322–3
 - indemnification by beneficiaries, 325–7
 - liability of directors of trustee companies, 323–4
 - status of, 319–20
 - third parties and, 324–5
 - to impound beneficiary's interest, 328
 - to recover overpayment from
 - a beneficiary, 329–30
 - to seek directions from the court, 330–1
- trusteeship de son tort, 192
- trusts
 - bankruptcy and, 252–3
 - certainty of intention to create, *see* certainty of intention to create a trust
 - certainty requirements for, 225
 - certainty of objects, 235–6, *see also* certainty of objects
 - certainty of subject matter, 233–5
 - contract and, 230
 - discrimination and, 254
 - methods of creating, *see* methods of creating a trust
 - and perpetuity, 254–6
 - public policy and, 251–2
- trusts for non-charitable purposes, 271
 - basic conceptual objections to, 271
 - problems with purpose trusts, 271–2
- unclean hands, 46, 49, 50, 52, 60, 66, 76, 82, 84, 88–90, 229
- unconscientious conduct, 107–8
 - Garcia* case, 115
 - special disability, 108–9
 - exploitation of special disability, 110–11
 - knowledge of the disability, 109–10
 - statutory unconscionability, 111–12
 - Yerkey v Jones* rule, 113
- unconscionability, constructive trusts and, 390
- unconscionable conduct, *Garcia* case, 113
- undue influence, 101
 - actual undue influence, 101–3

- presumed relationships of influence
 - child, parent, 103
 - client, solicitor, 104
 - disciple, religious adviser, 103–4
 - patient, doctor, 104
- presumed undue influence, 103
- proven relationships of influence, 104–5
- rebutting the presumption of undue influence, 105–6
- third parties and, 106–7
- unincorporated associations, gifts to, 273
- unjust enrichment
 - constructive trust as restitutionary remedy for, 404–5
 - contractual transfers of property, 406–7
 - non-contractual transfers of property, 405–6
- constructive trusts and, 389–90
- variation of trusts, 417–18
 - beneficiaries on whose behalf a court may approve a variation, 422
 - expediency jurisdiction, 419–20
 - meaning of benefit, 422–4
 - Trustee Act 1936* (SA) s 59C, 424–5
 - critique, 425
 - Variation of Trusts Act* jurisdictions, 420–1
 - variation or resettlement, 424
- vindication, 27–8
- voidable transactions
 - equity and, 100
 - rescission of, 70
- wilful default, 339
- wills
 - creating testamentary trusts, 247–8
 - doctrine of mutual wills, 407–8
 - documents that can be validly incorporated into, 248
- written instruments, rectification and, 77
- Yerkey v Jones* rule, 150, 202, 225
 - preconditions to application of, 226