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, 345–4
standing to sue, 350–1
statutory exculpation, 338
‘but for’ test, 62, 65–6
capricious trusts, 240–1
certainty of intention to create a trust, 225–6
capricious trusts and power, 240–1
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
Clapham doctrine, 417
claiming, 353–4
clock 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 restitutory 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
Index

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 auxiliary jurisdictions, 13
institutional equity, 4
medieval origins, 4–6
map of, 12
maxims of, 18–20
meaning of, 5
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
detniment, 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, 36–11
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, 312–14
matters to be considered by trustee when investing, 312–14
review of investments, 307–8
judicature legislation, 8–9
Australia, 10–11
Kanger 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
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 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
creditors' rights subrogated to personal indemnification by beneficiaries, 328
exclusion by the trust instrument, 322–5
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, 255–6, 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, 115
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
recession of, 70
wilful default, 339
wills
creating testamentary trusts, 407–8
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