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, 143–6
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, 83–4
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
impound, 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, 65–6
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,
259–60
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, 360–70
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 judicature 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
iniquity, 192
defences for breach of trust equitable defences. See equitable defences for breach of trust
exculpation 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
duress, 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 equity 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 equitable remedies
specific performance. See specific performance
equitable wrongs
breach of confidence, 17–18
breach of fiduciary obligation, 17
equities and equitable interests, 127–8

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, 554
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

396

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 inducement, 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
accounts of profits. See accounts of profits
equitable compensation. See equitable compensation
monetary remedies for breach of trust
compensation for breach of conflicts rule, 334
negligence in performance, 333
prohibited breaches, 331–3
statutory provisions, 334–5
unauthorised profits, 331
More, Sir Thomas, 6
mutuality, 33
negligent misstatement, 100
non-assignable rights, 136–7
non-charitable trusts, 260
problems with, 260–1
nullification, 30
objectives of equitable remedies
coercion, 29
compensation, 29
resulting trusts (cont.)
premised, 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
bars to, 38
correlation with injunctions
to restrain breach of
contract, 43–4
fairness to both parties, 33–4
mutuality, 33
plaintiffs remedy if denied, 48–9
prerequisites to award of. See
prerequisites to award of
'strict performance'
'ready and willing' to
perform, 33–4
supervision. See supervision
standing
award of a declaration and,
80
statutory exculpation, 325
genral statutory defence, 326–8
wilful 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
bars 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
305–6
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
c co-trustees, 314–15