

Contents

	PAGE
<i>Foreword to the First Edition</i>	vii
<i>Foreword to the Second Edition</i>	ix
<i>Foreword to the Third Edition</i>	xi
<i>Foreword to the Fourth Edition</i>	xiii
<i>Preface to the First Edition</i>	xvii
<i>Preface to the Second Edition</i>	xix
<i>Preface to the Third Edition</i>	xxiii
<i>Preface to the Fourth Edition</i>	xxix
<i>Acknowledgments to the First Edition</i>	xlix
<i>Acknowledgments to the Second Edition</i>	li
<i>Acknowledgments to the Third Edition</i>	liii
<i>Acknowledgments to the Fourth Edition</i>	lv
<i>Table of Cases</i>	lxxvii
<i>Table of Legislation</i>	ccxlix
<i>Table of Conventions</i>	cclxvii
<i>Table of Abbreviations</i>	cclxix
<i>Table of Other Sources</i>	cclxxi
Chapter 1	1
Nature, History and Maxims of Equity	
1. General History of Equity	1
2. Equity in Hong Kong	2
3. The Maxims of Equity	4
3.1 Equity will not suffer a wrong without a remedy	4
3.2 Equity follows the law	7
3.3 When equities are equal, the first in time prevails	8
3.4 He who seeks equity must do equity	8
3.5 He who seeks equity must come with clean hands	9
3.6 Equity assists the diligent and not the tardy	15
3.7 Equity is equality	16
3.8 Equity looks to the substance and not the form	19
3.9 Equity regards as done that which ought to be done	20
3.10 Equity imputes an intention to fulfil an obligation	22
3.11 Equity will not assist a volunteer	23
3.12 Equity acts <i>in personam</i>	24
Chapter 2	27
Jurisdiction and Power	
1. Generally	27
2. Equitable Jurisdiction in Hong Kong	28
2.1 Court of Final Appeal	28
2.2 Court of Appeal and High Court	29

2.3	District Court	29
2.3.1	Original equitable jurisdiction	29
2.3.2	Ancillary equitable jurisdiction	30
2.3.3	Extended equitable jurisdiction	30
Chapter 3	Equitable Interests and Priorities	35
1.	Equitable Interests, Mere Equity and Personal Equity	35
2.	Priorities	39
2.1	Priority in realty	39
2.1.1	Land registration - system of registration by deed	39
2.1.2	Creation of interest in land	41
2.1.3	Rules of priority	42
2.2	Priority in personalty	54
2.2.1	The rule in <i>Dearle v Hall</i>	54
3.	The Equity of Redemption	57
4.	Co-ownership in Equity	62
4.1	Tenancy-in-common and joint tenancy	62
4.2	Occupation rent and equitable accounting	63
4.3	Insolvency of a co-owner	64
Chapter 4	Assignments	65
1.	The Concept of Property	65
2.	Nature of Assignment	66
3.	Assignables and Unassignables	67
3.1	Right to sue	67
3.2	Book debt	69
3.3	Personal contracts	70
3.4	Public policy	71
3.5	Agreement or statute prohibiting assignment	72
3.6	Statute authorising assignment	75
4.	Assignments of Future Property	75
5.	Legal Assignment of Legal Interests	80
5.1	Realty	82
5.2	Personalty	83
6.	Equitable Assignments of Legal Interest	84
6.1	Realty	85
6.2	Personalty	88
6.2.1	Intention to assign	88
6.2.2	Notice to the obligor	90
7.	Gift	91
7.1	The Rule in <i>Strong v Bird</i>	94
7.2	<i>Donatio mortis causa</i>	95
8.	The Doctrine of Part Performance	99
9.	Effect of Assignment	101
9.1	Assignor's right	103
9.2	Assignee's right	104
9.3	Obligor's right	105

Chapter 5	Estoppel	107
1.	Estoppel Generally	107
2.	Common Law Estoppel	111
2.1	Estoppel by representation	111
2.1.1	Estoppel by deed	112
2.1.2	Contractual estoppel	114
2.1.3	Estoppel <i>in pais</i>	117
2.1.4	Estoppel by acquiescence	120
2.1.5	Entire agreement clause	122
2.2	Estoppel by record	122
2.2.1	Cause of action estoppel (<i>Res judicata</i>)	124
2.2.2	Extended <i>res judicata</i>	127
2.2.3	The <i>Wytcherley</i> principle	135
2.2.4	Issue estoppel	136
2.2.5	Extended issue estoppel	143
2.3	Estoppel by convention	144
3.	Equitable Estoppel	151
3.1	Proprietary estoppel	152
3.1.1	Proportionality	164
3.2	Promissory estoppel	169
3.3	Estoppel by election	178
4.	Effect and Limitation of Estoppel	184
4.1	Against public and statutory bodies	185
4.2	Validating invalid act and agreement	191
Chapter 6	Fiduciary Obligations	193
1.	The Fiduciary Relationship	193
2.	Fiduciary Duties	201
2.1	Duration of fiduciary duties	202
2.2	Scope of fiduciary duty	203
3.	Conflict Rule and Profit Rule	207
3.1	Conflict rule (1): Conflict of interest	208
3.1.1	General rule	209
3.1.2	Self-dealing rule	209
3.1.3	Fair-dealing rule	211
3.2	Conflict rule (2): Conflict of duty	212
3.2.1	Acting for two principals	212
3.2.2	No competition rule	214
3.3	Profit rule	217
3.3.1	Secret profits and undisclosed commissions	217
3.3.2	Dealing with own property	218
3.3.3	Diversion of opportunities	219
3.3.4	Misuse of fiduciary property	221
4.	Defences: The Duty of Disclosure and Informed Consent	223
5.	Remedies for Breach	227

Chapter 7	Unconscionable Transactions	229
1.	Equitable Fraud, Mistake and Misrepresentation	229
2.	Undue Influence	232
2.1	Actual undue influence	235
2.2	Presumed undue influence	237
2.3	Class 2(A)	240
2.4	Class 2(B)	242
2.5	Third party and the doctrine of notice	251
2.6	Undue influence in testamentary disposition	260
3.	Unconscionable Bargains	263
3.1	Equitable unconscionability	265
3.2	The Unconscionable Contracts Ordinance (Cap 458)	269
4.	Mistake	271
5.	Misrepresentation	276
5.1	Equitable relief in misrepresentation	277
5.2	Misrepresentation Ordinance (Cap 284)	277
6.	Fraud on a Power	283
6.1	Benefiting a non-object	284
6.2	Corrupt or foreign purposes	284
6.3	Fraud on discretionary power	286
Chapter 8	Penalties and Forfeiture	287
1.	Penalties	287
1.1	Liquidated damages clause	288
1.2	Security for payment clause	294
1.3	'Take or pay' clause	294
1.4	Recent developments	294
1.4.1	The Australian approach	295
1.4.2	The UK approach	295
2.	Forfeiture	298
2.1	Land conveyancing contract	300
2.1.1	Deposit	300
2.1.2	Time of essence provision	302
2.2	Lease and tenancy	303
2.2.1	Rectification of breach	303
2.2.2	Waiver	305
2.2.3	Procedure	307
Chapter 9	Breach of Confidence	313
1.	Jurisdictional Basis	313
2.	Ancient Doctrine and Modern Usage	314
3.	Quality of Confidence	316
4.	Kinds of Confidential Information	317
4.1	Trade secrets	317
4.2	Personal information of public figures	321
4.3	Personal information of individuals	326
4.4	Information of public interest	327
4.5	Privileged documents	328
5.	Conveyance of Information	328

Contents

6.	Circumstances of Receipt	328
7.	Breach and Third Parties	335
8.	Defences	337
8.1	Bona fide purchaser	337
8.2	Public interest	337
8.3	Interest in the administration of justice	340
8.4	Self-interest and self defence	340
9.	Remedies	341
9.1	Damages and account of profits	342
9.2	Springboard injunction	343
Chapter 10	Subrogation	347
1.	Insurers	350
2.	Sureties	355
2.1	Executors and trustees	357
3.	Trust Creditors	358
4.	Liens	359
4.1	Legal lien	359
4.2	Equitable lien	359
4.3	Purchaser's lien	361
4.4	Unpaid vendor's lien	361
4.5	Particular lien	364
5.	Paying Off Prior Securities	365
5.1	Lender volunteer	365
5.2	Equitable tacking of mortgage	366
6.	Unauthorised and Unenforceable Borrowings	369
Chapter 11	Contribution	371
1.	The General Principle	371
2.	Co-ordinate Liabilities	374
3.	Discharge of a Shared Duty	376
4.	Civil Liability (Contribution) Ordinance (Cap 377)	378
Chapter 12	Minor Doctrines	389
1.	Marshalling	389
1.1	Marshalling in mortgages	393
1.2	The equity of exoneration	395
1.3	Marshalling in deceased estates	396
2.	Election	397
3.	Conversion	399
4.	Merger	402
5.	Satisfaction	405
6.	Ademption	406
Chapter 13	The Nature of Trusts	409
1.	Trusts Generally	409
1.1	Historical origin of trusts	409

1.2	Modern trusts	410
1.3	Registration of trusts	412
2.	Chinese Customary Trusts	412
2.1	Ancestral worship trust	413
3.	Trust Receipts	416
4.	The Distinction Between Trusts and Other Institutions	417
4.1	Trusts and fiduciary obligations	417
4.2	Trusts and agency	417
4.3	Trusts and bailment	419
4.4	Trusts and contracts	420
4.5	Trusts and debts	421
4.6	<i>Romalpa</i> (retention of title) clause	421
4.7	Trust and body corporate	423
4.8	Trusts and mortgages	423
4.9	Trustee and personal representative	425
4.10	Trust and partnership	426
4.11	Trust and unincorporated associations	427
4.12	Trust and powers	428
4.12.1	Classification of powers	428
4.12.2	Certainty of object for powers of appointment	432
4.12.3	Powers and testamentary dispositions	433
5.	Trusts and Taxation	435
Chapter 14	Express Trusts	443
1.	Creation of Express Trusts	444
1.1	The requirements of certainty	444
1.1.1	Certainty of intention	444
1.1.2	Certainty of subject matter	449
1.1.3	Certainty of object	453
1.2	Rectification, revocation and forced heirship	457
1.2.1	Rectification	457
1.2.2	Revocation	458
1.2.3	Forced heirship	459
2.	The Hague Trusts Convention	460
3.	Setting up a Voluntary Trust	462
3.1	Declaration of trust	462
3.2	Directions to a trustee	463
4.	Bare (or Simple) Trust	464
5.	Capital Market Trust	465
6.	Discretionary Trust	467
7.	Family Trust	471
8.	Protective Trust	472
9.	Secret Trust	474
10.	Sham Trust	476
10.1	General principles	476
10.2	Subjective intention to mislead	477
10.3	Commonality of intention	478
10.4	Proving sham	479
10.5	Effect of a sham	484
11.	Statutory Trust	484

12.	Trading Trusts	486
13.	Unit Trusts	487
14.	Will Trust	488
Chapter 15	The Variation and Termination of Trusts	491
1.	Variation of Trusts	491
1.1	Variation by all the beneficiaries	491
1.2	Variation by the court	492
1.3	Section 56 of the Trustee Ordinance (Cap 29)	493
1.3.1	Power to invest	494
1.3.2	Power to sell	495
1.3.3	Unclaimed trust property	496
1.4	Section 3 of the Variation of Trust Ordinance (Cap 253)	498
1.4.1	Relevance of settlor's intention	501
1.5	Variation for fiscal advantage	502
1.6	Civil procedure	503
2.	Setting Aside of Unlawful Trusts	504
2.1	Illegality or against public policy	504
2.1.1	Illegality	505
2.1.2	Trust against public policy	507
2.2	<i>Locus poenitentiae</i>	509
2.2.1	Non-reliance on illegality	512
2.2.2	Illegal purpose not attained	514
2.3	Trust to defraud creditors	516
3.	Restraints on Alienation	517
3.1	Equitable restraint	517
3.2	Statutory restraint	519
4.	The Rule against Perpetuities	520
4.1	Applicability of the rule	521
4.2	The common law rule	521
4.3	Perpetuities and Accumulations Ordinance (Cap 257)	522
4.4	Vesting of interest	523
4.5	Presumption in favour of vesting	525
4.6	The commencement of the perpetuity period	525
4.7	Lives in being	526
4.8	Certainty of vesting: unborn widower, fertile octogenarians and others	527
4.8.1	Unborn widower	527
4.8.2	Fertile octogenarian	528
4.9	Statutory wait-and-see rule	529
4.10	Reduction of age contingencies	530
4.11	Other provisions	531
4.12	The class-closing rule	531
4.13	Reform of the all-or-nothing rule	533
4.14	Subsequent interests	534
4.15	Accumulations	534
4.16	Power of appointment and administrative power of trustees	536
5.	Avoidance by the Settlor	536
6.	Termination by the Beneficiaries	537

7.	Termination by Distribution	537
8.	Winding Up a Trust	537
Chapter 16	Charitable Trusts	539
1.	General Principles	539
2.	Trusts for the Relief of Poverty	544
3.	Trusts for the Advancement of Education	546
4.	Trusts for the Advancement of Religion	549
4.1	Tsing Shan Monastery litigations	552
4.1.1	<i>To Kan Chi v Pui Man Yau</i> (1)	553
4.1.2	<i>To Kan Chi v Pui Man Yau</i> (2)	553
4.1.3	<i>Secretary for Justice v To Kan Chi</i>	555
4.1.4	<i>Re Tsing Shan Monastery</i>	557
5.	Trusts for Purposes Beneficial to the Community	558
6.	Private and Public Charities	563
7.	Mixed Charitable Gifts and Non-Charitable Gifts	565
7.1	Compendious gifts	566
7.1.1	Gifts which can be apportioned	568
7.1.2	General gifts to charity	569
8.	The Enforcement and Effectuation of Charitable Trusts	570
8.1	Administrative schemes	571
8.2	Representative proceedings	572
9.	The Lapsing or Failure of Charitable Trusts	574
9.1	Endowed charity	574
9.2	<i>Cy-près</i>	575
9.2.1	Practical impossibility	576
9.2.2	Surplus of funds	579
9.2.3	Deficiency of funds	580
10.	Legislative Reform	581
Chapter 17	Resulting Trusts	583
1.	The Nature of Resulting Trusts	583
2.	Recognised and Unrecognised Categories	585
3.	The Relevance of Actual Express Intention	587
3.1	Two methodologies	587
3.2	Whose subjective intention?	588
3.3	Searching for the subjective intention	590
3.3.1	The rule in <i>Shephard v Cartwright</i>	591
4.	Purchase in Others' Name	596
4.1	Immediate family members	597
4.2	Extended family members	601
4.3	Good friends	602
4.4	Commercial setting	603
5.	Gratuitous Dispositions	604
6.	Loan and Resulting Trust	607
7.	Subsequent Payments and Resulting Trust	608
8.	Resulting Trust and Conveyancing	609
9.	Resulting Trust and Corporate Veil	612

10.	Presumption of Advancement	613
	10.1 Parent (& person <i>in loco parentis</i>) and child	614
	10.2 Husband and wife	620
	10.2.1 Domestic home	620
	10.2.2 Investment property	624
	10.3 Rebutting the presumption of advancement	624
11.	Incomplete or Failure of Disposition	626
	11.1 Failed trusts	628
	11.2 Events unprovided for	628
	11.3 Trusts to be declared in the future	628
	11.4 Failure of marriage settlement	629
	11.5 Beneficiary disclaiming, releasing or surrendering entitlement	629
	11.6 Surplus assets and income	629
	11.7 Disposition for the payment of debt	630
	11.8 Surplus assets of non-charitable unincorporated associations	630
	11.8.1 Members' claim	631
	11.8.2 Contributor's claim and <i>bona vacantia</i>	633
	11.9 Relief fund without members	634
	11.10 Superannuation and pension fund surpluses	635
	11.11 Surplus after fulfilment of original purpose	637
	11.12 Failure of a specific purpose - <i>Quistclose</i> trust	638
	11.12.1 Jurisprudential basis	639
	11.12.2 Principle	640
	11.12.3 Specific purpose advance	640
	11.12.4 Restriction on the use of money	645
	11.12.5 Mutual intention	648
	11.13 Rule in <i>Hancock v Watson</i>	650
	11.14 Doctrine of acceleration	653
12.	Resulting Trust and Third Parties	656
	12.1 Unregistrability and innocent party protection	656
	12.2 Third party holding trust property	658
Chapter 18	Constructive Trusts	661
1.	Institutional and Remedial Constructive Trusts	661
	1.1 English jurisprudence	661
	1.2 Australian jurisprudence	664
	1.3 Hong Kong position	665
	1.4 Singaporean position	665
2.	Essential Elements of Constructive Trusts	666
	2.1 Identifiable trust property	666
	2.2 Innocent third party interest	667
3.	Unsettled Areas of Constructive Trust	668
	3.1 Abuse of confidential information	668
	3.2 Agency	668
	3.3 Proceeds of crime	670
	3.4 Property obtained by fraud	670

Contents

4. Trustee in Breach of Trust	674	
4.1 Proper trustee and trustee <i>de son tort</i>	674	
4.2 Fiduciary duty trust	674	
4.3 Third party trustee	678	
4.4 Choice of law	678	
4.5 Proving breach of trust	679	
5. Breach of Fiduciary Duty	679	
5.1 Breach of the profit rule	680	
5.2 Secret profits and undisclosed commissions	680	
5.2.1 A proprietary remedy?	681	
5.2.2 Profit from bribe	683	
5.3 Undisclosed advantages to the exclusion of the principal	687	
6. Unfair Advantages Obtained by Mistaken Payment or by Reliance on the Absence of Statutory Formalities	688	
6.1 Mistaken payment	688	
7. Taking Advantage from Failure to Comply with Law	688	
8. Seller under a Specifically Enforceable Contract	694	
9. Common Intention Constructive Trust	696	
9.1 Married couple	699	
9.1.1 Ascertaining common intention	701	
9.1.2 Substantial contribution	703	
9.2 De facto spouses	704	
9.2.1 Property in single name	705	
9.2.2 Property in joint names	710	
9.3 Extended family	713	
9.4 Change in common intention	714	
10. Mutual Will	715	
10.1 Agreement not to revoke	716	
10.1.1 Alteration and revocation	718	
10.1.2 No requirement to confer financial benefit	718	
10.1.3 Effect of a mutual will	719	
10.1.4 Interim administration	720	
11. Third Parties as Constructive Trustees	721	
11.1 Inconsistent dealing	722	
11.2 Knowing receipt	724	
11.2.1 Disposal of assets in breach	724	
11.2.2 Beneficial receipt of traceable trust property	726	
11.2.3 Knowledge of breach	727	
11.3 Knowing (or dishonest) assistance	733	
11.3.1 General principle	733	
11.3.2 Knowledge of breach of trust	735	
11.3.3 Objective test of dishonesty	736	
11.3.4 Subjective elements relevant	739	
12. <i>Pallant v Morgan</i> Equity	745	
Chapter 19	The Trustee	751
1. Appointment of Trustees	751	
1.1 Private appointment	751	
1.2 Court appointment	754	

Contents

2.	Death, Removal and Retirement of Trustees	759
2.1	Death of a trustee	759
2.2	Removal of trustee	759
2.2.1	New statutory power	759
2.2.2	Inherent jurisdiction	760
2.3	Retirement of trustees	761
3.	Vesting of Trust Property	762
3.1	Vesting of trust property in new or continuing trustees	762
3.2	Vesting orders of land	763
3.3	Vesting order in aid of order for sale of judgment debtor's land	769
3.4	Power to appoint a person to convey	770
4.	Duties of a Trustee	770
4.1	Duty of care	771
4.1.1	New statutory duty of care	771
4.1.2	Scope of duty	774
4.1.3	Company interposing – <i>Bartlett</i> duty	774
4.2	Duty to get in the trust property	777
4.3	Duty to insure trust property	779
4.4	Duty to act gratuitously	780
4.4.1	Remuneration authorised by the trust instrument	781
4.4.2	Remuneration by agreement of the beneficiaries	781
4.4.3	Remuneration by order of the court	781
4.5	Duty of loyalty	782
4.6	Duty to keep accounts and supply information	784
4.7	Duty to act personally	787
4.8	Duty to consider	788
4.8.1	Rule in <i>Re Hastings-Bass</i>	788
4.9	Duty of good faith and honesty	794
4.10	Duty to act impartially between beneficiaries	796
4.11	Duty not to distribute trust capital	799
4.12	Duty to review	799
5.	Powers of a Trustee	800
5.1	Power to invest	800
5.2	Power to lend money	804
5.3	Power to sell	805
5.4	Power to give receipts	806
5.5	Power to appoint agents, nominees and custodians	807
5.6	Power to delegate	809
5.7	Power of advancement	812
5.8	Power of appointment	815
5.9	Other powers	816
6.	Rights of a Trustee	819
6.1	Right of indemnity	819
6.1.1	Against the trust	819
6.1.2	Against the beneficiary	824
6.2	Right to indemnity for costs or liability incurred in litigation	825
6.2.1	Legal costs incurred	825
6.2.2	Liability incurred	828

6.3	Right of reimbursement	829
6.3.1	From the trust	829
6.3.2	From beneficiaries	831
6.4	Right to remuneration	832
6.4.1	Court sanction	832
6.4.2	Statutory right	833
6.5	Right to reimbursement and indemnity for carrying on business	834
6.6	Right of contribution	835
6.7	Right to obtain direction from court — administration orders and <i>Beddoe</i> applications	835
6.7.1	Administration orders	835
6.7.2	Determination of trust administration questions – Order 85(1)	837
6.7.3	<i>Beddoe</i> application – Order 85(2)	839
7.	Discharge of a Trustee	846
8.	Liability of a Trustee	847
8.1	Common law	847
8.1.1	Trading liability	847
8.1.2	Trust exemption clause	848
8.1.3	Equitable damages for breach	853
8.1.4	Unauthorised investment	854
8.1.5	Set-off	857
8.1.6	Liability of co-trustee	858
8.1.7	Liability and compensation	858
8.2	Statutory liability	860
8.2.1	Licence for business	860
8.2.2	Directors of corporate trustees	861
8.3	Relief of trustees from liability	862
8.4	Lapse of time	865
8.5	Interests and assessments of losses	869
9.	Defences to Breach of Trust	871
9.1	Acquiescence	871
9.2	Release	872
10.	Managing the Trustees – The Protector	872
Chapter 20	Rights of the Beneficiary	875
1.	Right to Call for Trust Property	875
2.	Right to Trace	878
2.1	Tracing at law and equity	879
2.1.1	Tracing at law	879
2.1.2	Tracing in equity	881
2.2	Mixed and unmixd funds	884
2.3	<i>Re Diplock</i> : charities recipients	886
2.4	Improvements using trust funds	886
2.5	Increase in value	887
2.6	Reduction in value	887
2.7	Apportionment	888
2.8	Backward tracing: overdrawn account	889

Contents

2.9	Untraceable trust assets	890
2.9.1	For repayment of debts	890
2.9.2	Deposit into mixed accounts	890
2.9.3	To an innocent purchaser	892
2.9.4	For building on own land	893
3.	Right to an Account	893
3.1	Equitable accounting vs account of profits	893
3.2	Common instances of account	897
3.2.1	Mutual accounts	897
3.2.2	Account by fiduciary in breach	897
3.2.3	Administration actions	903
3.2.4	Mortgagee in possession	904
3.2.5	Co-tenancy	904
3.3	Defence to an action to account	905
3.3.1	Falsifying accounts	905
3.3.2	Limitation of actions	905
4.	Right to Bring Derivative Action	905
4.1	Single derivative action	906
4.2	Multiple derivative action	907
4.3	Rule against reflective loss	908
5.	Right to Information	911
6.	Control of Trustee Discretion	913
7.	Rights of Discretionary Beneficiaries	915
Chapter 21	Specific Trustees	917
1.	Judicial Trustee	917
1.1	Circumstances of appointment	917
1.2	Appointment of a judicial trustee	918
1.3	Administration by judicial trustee	922
1.4	Remuneration of judicial trustee	924
1.5	Resignation, removal and discontinuance of judicial trustee	925
2.	Official Trustee	925
3.	Trustee in Bankruptcy and the Official Receiver	927
3.1	Appointment of trustee in bankruptcy	927
3.2	Administration by trustee in bankruptcy	928
3.3	Court supervision of trustee in bankruptcy	932
3.4	Termination, removal and replacement of a trustee in bankruptcy	933
4.	Custodian (Bare) Trustee	934
4.1	Role of custodian (bare) trustee	934
4.2	Appointment of custodian trustees	937
4.3	Rights of beneficiaries under a bare trust	938
5.	Trust Corporations	940
5.1	Registration as trust corporations	940
5.2	Appointment of trust corporations	941
5.2.1	Deceased's estate	941
5.2.2	Settled trust	942

5.3	Administration by trust corporations	942
5.4	Review of trusts administered by trust corporations	943
5.5	Liability of trust corporations	944
Chapter 22	Equitable Defences	945
1.	Laches	945
1.1	Redemption of mortgages	950
1.2	Fraud, deliberate concealment and mistake	950
1.3	Specific performance and rescission	952
1.4	Breach of fiduciary duty	954
1.5	Breach of trust	956
1.6	Breach of DMC	963
2.	Acquiescence	964
2.1	Defences to laches and acquiescence	965
2.2	Effect of defence	966
3.	Set-off	966
3.1	Legal set-off	967
3.2	Equitable set-off	967
3.3	Set-off under statute	976
3.4	Statutory prohibition	977
4.	Release and Waiver	977
4.1	Release	977
4.2	Waiver	978
4.2.1	General principles	978
4.2.2	General contract law	981
4.2.3	Lease and payment of rent	983
4.2.4	Insurance and subrogation	984
4.2.5	Land conveyancing	988
4.2.6	Effect of waiver	990
4.2.7	Defence to waiver	991
Chapter 23	Specific Performance	993
1.	General Principle	993
2.	Effect of Order	995
3.	Election	996
4.	Complete, Binding and Valid Contract	997
4.1	Complete and binding contract	997
4.2	Valid contract	1000
4.3	Certainty of contractual terms	1001
5.	Inadequacy of Relief at Common Law	1003
5.1	Contract for sale of land	1003
5.2	Contract for sale of goods	1005
5.3	Other contracts	1007
6.	Defences to a Claim of Specific Performance	1008
6.1	Defective titles	1009
6.2	Hardship and mistake	1011
6.2.1	Hardship	1011
6.2.2	Mistake	1013

6.3	Mutuality and inability to perform	1014
6.3.1	Mutually binding agreement	1014
6.3.2	Able to perform	1015
6.3.3	Time	1017
6.4	Delay and time of essence	1018
6.5	Substantial performance by the applicant	1022
6.6	Court supervision	1023
6.6.1	Personal contracts	1023
6.6.2	Contracts requiring constant supervision	1024
6.7	Frustration	1024
6.8	Misdescription	1025
6.9	Express contractual exclusion	1026
Chapter 24	Injunctions	1031
1.	Power to Grant Injunction	1035
2.	Interim (<i>Ex Parte</i>) Injunctions	1038
2.1	Extreme urgency or secrecy	1039
2.2	Notice of ex parte application	1043
2.3	Drafting orders	1044
2.4	Representative defendants and parties by description	1046
2.4.1	Representative defendants	1046
2.4.2	Parties by description	1047
3.	Interlocutory Injunctions	1048
3.1	Final disposal of action	1050
3.2	Serious question to be tried	1053
3.3	Balance of convenience	1056
3.3.1	Irreparable damage	1058
3.4	Cross-undertaking as to damages	1061
3.4.1	Extent of undertaking	1063
3.4.2	Defendant's undertaking	1064
3.4.3	Effect of undertaking	1065
3.4.4	Release of undertaking	1065
3.4.5	Security for undertaking	1066
3.4.6	Challenging and fortification of undertaking	1067
3.4.7	Pursuing undertakings	1071
4.	Interlocutory Injunctions in Various Areas	1076
4.1	Administration of justice	1076
4.2	Arbitration	1078
4.2.1	Domestic arbitration	1078
4.2.2	Arbitration Ordinance (Cap 609)	1080
4.2.3	Foreign arbitration	1081
4.3	Banking	1083
4.3.1	Letters of credit cases	1083
4.3.2	Customer confidentiality	1086
4.4	Companies and securities law	1087
4.4.1	Specific power of court	1087
4.4.2	Shareholders and general meetings	1087
4.4.3	Directors and board meetings	1089
4.4.4	Injunction by or against creditors	1090
4.4.5	Injunction against the company	1091

Contents

4.4.6	Injunction against receivers	1092
4.4.7	Injunction by the SFC	1092
4.5	Confidential information	1094
4.5.1	Private information	1094
4.5.2	Solicitor-client communication	1096
4.5.3	Springboard injunction	1097
4.6	Contract	1100
4.7	Employment law	1103
4.7.1	Restraint of trade	1104
4.7.2	Confidential business information	1105
4.8	Estate administration	1108
4.9	Family law	1109
4.9.1	A relaxed approach	1109
4.9.2	Matrimonial asset-related injunctions	1109
4.9.3	Child abduction	1110
4.9.4	Domestic violence	1113
4.10	Intellectual property	1113
4.10.1	Passing off	1113
4.10.2	Copyright	1116
4.10.3	Patent	1118
4.10.4	Registered design	1119
4.10.5	Trade marks	1120
4.11	Land	1122
4.11.1	Breach of the DMC	1122
4.11.2	Action for possession	1124
4.11.3	Breach of covenant in lease	1125
4.11.4	Others	1125
4.12	Landlord and tenant	1126
4.13	Maritime and shipping law	1127
4.13.1	Mortgage and sale of vessel	1127
4.13.2	Payment of charter party fees	1128
4.13.3	Marine cargo claims	1128
4.14	Misrepresentation and fraud	1129
4.15	Mortgage	1130
4.16	Partnership	1132
4.17	Taxation	1133
4.18	Torts	1133
4.18.1	Defamation	1133
4.18.2	Conspiracy to injure	1138
4.18.3	Trespass	1138
4.18.4	Nuisance	1139
4.19	Trust and fiduciary relationships	1141
5.	Full Disclosure	1145
5.1	<i>Ex parte</i> interim injunction	1145
5.1.1	Defendant's undertaking	1148
5.1.2	Possible defence	1148
5.1.3	Defendant's financial position	1150
5.1.4	Adverse material	1150
5.1.5	Settlement negotiations	1151
5.1.6	Alternative claim and other existing litigation	1152

Contents

5.1.7	Frankfulness	1153
5.1.8	Discharge: right or discretion?	1157
5.2	Fresh <i>inter parte</i> application	1159
5.2.1	Merits and justice	1160
5.2.2	Other relevant factors	1161
5.3	<i>Ex parte Mareva</i> injunctions	1161
6.	Other Discretionary Considerations	1162
6.1	Hardship	1162
6.2	Delay and acquiescence	1163
6.3	Clandestine conduct	1166
6.4	Court supervision	1166
7.	Mareva Injunction	1167
7.1	Generally	1167
7.2	Serious question to be tried	1169
7.3	Out of jurisdiction	1170
7.4	Jurisdiction to grant	1171
7.5	Risk of dissipation	1174
7.6	Other discretionary factors	1179
7.6.1	Ordinary business transactions	1180
7.6.2	Fraudulent and other defying conduct	1181
7.6.3	Foreign defendant	1182
7.6.4	Injunction as pressure	1182
7.6.5	Balance of convenience and form of orders	1183
7.7	Worldwide <i>Mareva</i>	1183
7.7.1	Foreign judgment	1186
7.7.2	Third party interest	1189
7.7.3	Application for registration	1193
7.7.4	Location of assets	1194
7.7.5	Undertaking by plaintiff	1195
7.8	Post-judgment <i>Mareva</i>	1195
7.9	Competing creditor	1196
8.	Prohibitory Permanent Injunction	1197
9.	Orders in Aid	1199
9.1	Discovery of evidence	1200
9.1.1	Against a non-party - <i>Norwich Pharmacal</i> order	1200
9.1.2	Costs of third party	1208
9.1.3	Against a party - Asset disclosure order	1209
9.1.4	Extent of disclosure	1215
9.1.5	Solicitors' duties to assist disclosure	1215
9.2	Delivery up and cancellation	1217
9.3	Appointment of interim receiver and provisional liquidator	1218
9.4	Prohibitor Order	1220
9.4.1	<i>Ne exeat regno</i>	1220
9.4.2	Statutory order	1221
9.4.3	Extension of order	1227
9.5	Anton Piller order	1227
9.5.1	Drafting of orders	1229
9.6	Preservation order (Order 29 rule 2, Rules of the High Court)	1230

10.	Injunctions and Third Parties	1231
11.	Anti-suit Injunction	1235
	11.1 Ousting of jurisdiction	1235
	11.2 Domestic arbitral or court proceedings	1236
	11.3 Foreign proceedings	1237
	11.3.1 General principle	1237
	11.3.2 Single forum – foreign arbitration	1239
	11.3.3 Single forum – foreign court proceedings	1241
	11.3.4 Alternative forum cases	1248
12.	<i>Quia Timet</i> Injunctions	1251
13.	Mandatory or Restorative Injunctions	1256
	13.1 Mandatory interim and interlocutory injunctions	1256
	13.2 Mandatory permanent injunctions	1265
	13.3 Variation and discharge	1268
	13.3.1 Variation	1268
	13.3.2 Discharge	1271
14.	Breach of Injunction	1274
	14.1 Contempt of court	1274
	14.2 Certainty of terms	1275
	14.3 Service of order	1277
	14.4 Third party liability	1278
	14.5 Breach of undertaking	1280
	14.6 Contempt by the plaintiff	1281
	14.7 Contempt by company director	1281
	14.8 Burden and standard of proof	1283
	14.9 Punishment for contempt	1285
	14.10 Discharge of contemnor	1287
15.	Appeal	1288
16.	Costs	1292
	16.1 Interim ex parte injunction applications	1292
	16.2 Interlocutory inter parte injunction	1292
	16.3 Costs of discharge and final hearing	1295
	16.4 Costs on appeal	1295
	16.5 Third party’s costs and costs against third party	1295
	16.6 Injunction for costs	1296
Chapter 25 Declarations		1299
1.	Nature of Declarations	1301
	1.1 Public and private law	1302
	1.2 Negative declarations	1305
	1.3 Consequential declarations	1307
	1.4 ‘Lesser’ declarations	1307
	1.5 Trivial matters	1307
	1.6 Finality of order	1308
	1.7 Third parties	1309
	1.8 Evidentiary matters	1309
	1.9 Enforcement of declaration	1309
2.	Principles in Granting Declaratory Relief	1310
	2.1 Controversy between parties	1310
	2.2 Proceedings must involve a ‘right’	1313

2.3	<i>Locus standi</i>	1314
2.4	Jurisdiction over the subject matter	1314
2.5	Defendant's real or proper interest	1317
2.6	Hypothetical question	1318
Chapter 26	Damages in Equity	1323
1.	Jurisdiction	1323
1.1	Lord Cairn's Act 1858	1324
1.2	Time to ascertain jurisdiction	1326
2.	Cumulative or Alternative Remedy?	1327
2.1	Damages and account	1327
2.2	Damages and injunction	1329
2.3	Damages awarded in substitution for equitable relief	1330
2.3.1	No known cause of action at law	1330
2.3.2	<i>Quia timet</i> damages	1331
2.3.3	Breach of a purely equitable right	1331
2.3.4	Damages awarded in addition to equitable relief	1334
3.	Assessment of Equitable Damages	1334
3.1	Restorative (gain base) not compensatory (loss base)	1335
3.2	Proof of actual damages	1339
3.3	Causation and remoteness	1342
3.3.1	Relevance of remoteness	1342
3.3.2	Relevance of Causation	1344
3.4	Date of assessment of loss	1350
3.4.1	No discount for tax saved	1352
3.5	Exemplary or punitive damages	1353
3.6	Compound interest	1354
3.7	Pleadings	1355
Chapter 27	Minor Remedies	1357
1.	Rescission	1357
1.1	Grounds of rescission	1358
1.1.1	Misrepresentation	1359
1.1.2	Mistake	1362
1.1.3	Breach of contract	1362
1.1.4	Equitable fraud: Undue influence	1364
1.2	Loss of right of rescission	1364
1.2.1	Acquiescence, election and waiver	1364
1.2.2	Substantial restitution	1366
1.2.3	Third party intervention	1367
1.2.4	Misdescription	1368
1.3	Effect of rescission	1368
2.	Restitution	1369
2.1	Incontrovertible benefit	1371
2.1.1	Valuation of benefit	1372
2.2	At the Expense of the plaintiff	1374
2.3	Enrichment unjust	1374
2.3.1	Recovery of money paid under a mistake	1375
2.3.2	Recovery of money for a total failure of consideration	1380

Contents

2.3.3	Recovery of money acquired by tort	1384
2.3.4	Requests and free acceptance	1385
2.3.5	Contracts discharged for breach	1386
2.4	Defence: change of position	1386
3.	Rectification	1390
3.1	Instruments amendable to rectification	1391
3.2	Rectification of trust and will	1392
3.3	Rectification against unilateral mistake	1393
3.3.1	Equitable fraud	1393
3.3.2	Unilateral transaction	1396
3.4	Rectification against common mistake	1397
3.5	Evidence and standard of proof	1401
3.6	Defence	1402
3.7	Statutory rectification	1403
4.	Delivery-up and Cancellation of Documents	1404
4.1	Exercise of jurisdiction	1404
4.2	Confidential and privileged documents	1405
4.3	Order in aid	1405
5.	Appointment of Receivers and Managers	1406
5.1	Appointment of receiver	1407
5.2	Liability of a receiver	1410
5.3	Duty of a receiver	1410
6.	Powers of a Receiver	1411
6.1	Remuneration of a receiver	1411
Index		1413