University of Reading

# *Liability for bribes and secret commissions at common law: obsolete, unnecessary and probably a fusion fallacy*

Article

Accepted Version

Whayman, D. ORCID: https://orcid.org/0000-0003-1026-5646 (2022) Liability for bribes and secret commissions at common law: obsolete, unnecessary and probably a fusion fallacy. Conveyancer and Property Lawyer, 86 (2). pp. 184-201. ISSN 0010-8200 Available at https://centaur.reading.ac.uk/117613/

It is advisable to refer to the publisher's version if you intend to cite from the work. See Guidance on citing.

Publisher: Sweet and Maxwell

All outputs in CentAUR are protected by Intellectual Property Rights law, including copyright law. Copyright and IPR is retained by the creators or other copyright holders. Terms and conditions for use of this material are defined in the End User Agreement.

www.reading.ac.uk/centaur

**CentAUR**

University of Reading

Central Archive at the University of Reading

Reading's research outputs online

# *Liability for Bribes and Secret Commissions at Common Law: Obsolete, Unnecessary and Probably a Fusion Fallacy*

(2022) 86 Conv 184; accepted for publication in *The Conveyancer and Property Lawyer* in October 2021.

Derek Whayman, Newcastle University.*

## Cases

*Thompson v Havelock* (1808) 1 Camp. 527, 170 E.R. 1045

*Diplock v Blackburn* (1811) 3 Camp. 43, 170 E.R. 1300

*Morison v Thompson* (1874) 9 L.R. Q.B. 480

*Salford Corporation v Lever (No 2)* [1891] 1 Q.B. 168

*Grant v Gold Exploration and Development Syndicate Ltd* [1900] 1 Q.B. 233

*Hovenden and Sons v Millhoff* (1900) 83 L.T. 41

*Mahesan s/o Thambiah v Malaysia Government Officers' Co-Operative Housing Society Ltd* [1979] A.C. 374

*Wood v Commercial First Business Ltd* [2021] EWCA Civ 471, [2021] 3 W.L.R. 395

## Summary

This article tracks the origin of the common law actions for bribes and secret commissions, which seem to be a transplant from equity. While they once had advantages, these have fallen away now equity's remedies, and its fiduciary duty of loyalty, are much more flexible.

## Abstract

Interest in the common law actions against givers and takers of bribes and secret commissions was recently revived by the Court of Appeal in *Wood v Commercial First Business Ltd* [2021] EWCA Civ 471, [2021] 3 W.L.R. 395, a case of a mortgage broker who took a secret commission. They offer the possibility of a more flexible liability not requiring a fiduciary relation but instead only a "duty to be impartial and to give disinterested advice, information or recommendations" (at [102]). This may offer a viable route to liability over novel relations such as non-fiduciary agents, brokers and other non-fiduciary relations.

However, the balance of evidence suggests the origin of these actions was merely the adoption of equity into the common law – a "fusion fallacy". Moreover, an examination of their development and that of their counterpart, the equitable fiduciary duty of loyalty, shows that while the common law actions once offered significant procedural and substantive advantages, these have now fallen away and only increased complexity remains. Conversely, the equitable actions have become more flexible and could now accommodate a relation not generally fiduciary, imposing only a narrower prohibition against taking bribes and secret commissions. Consequently it would be better to abolish the common law actions or assimilate them into the equitable ones.

* I would like to thank the anonymous reviewers and Dr David Gibbs-Kneller for their helpful comments. The usual disclaimer applies.

# 1. Introduction

This article concerns the common law actions against bribe-givers and bribe-takers. They also extend to mere secret commissions, but "bribe" is a convenient shorthand. The remedies are rescission and the recovery from both parties of either the amount of the bribe or compensatory damages in what the Privy Council called money had and received and the "tort of fraud" respectively.[1] They apply to a claimant in a position akin to principal in an equitable fiduciary-principal relation and are analogous to their equitable counterparts of breach of fiduciary duty and dishonest assistance.

*Wood v Commercial First Business Ltd* was a case of a mortgage broker who took a secret commission. Here, the Court of Appeal expended much effort in tracing the actions' history to justify the proposition that a fiduciary duty is not required to obtain relief against a bribe-giver or bribe-taker. Instead, only a "duty to be impartial and to give disinterested advice, information or recommendations" was.[2] This suggests a two-prong approach, relying on the common law actions to raise liability for bribery where a "full" fiduciary duty is inappropriate. These remarks were *obiter dictum* since the case was decided in equity, but no doubt will be influential; Grower considered that the consequence of *Wood* will be "the reinvigoration of the common law of bribery."[3]

This will be a live issue for non-fiduciary relations, particularly employees and the new and unsettled categories of non-fiduciary agents and brokers. It may also affect professional advisers who are non-fiduciary by default but are fiduciary if special facts are present.[4] The facts likely to give rise to liability to bribery absent wider fiduciary duties are when recommendations or information is provided, but any advice is not closely tailored to the client's circumstances.

The question is thus whether the common law actions have any utility over their equitable counterparts. This article argues there are four broad reasons why not. The first concerns the provenance of the common law actions. The weight of evidence suggests that the earliest "common law" cases of 1808 and 1811[5] were really an application of equitable fiduciary principles in the Court of King's Bench, just as was seen in tracing[6] and contractual releases.[7] By the 1870s, the special procedure to decide equity in the common law courts seems to have been forgotten and these old cases were mistakenly treated as authority for a purely common law action.[8] The authority of this line of cases is therefore doubtful.

The second comes from the motivation for creating and developing the actions at common law. In the early nineteenth century, an action at common law offered the advantage of bypassing the under-resourced and dilatory Court of Chancery. Even at around the turn of the twentieth century, it had the advantage of offering a compensatory remedy, which only became

[1] *Mahesan s/o Thambiah v Malaysia Government Officers' Co-Operative Housing Society Ltd* [1979] A.C. 374 at 383 (Lord Diplock).

[2] *Wood v Commercial First Business Ltd* [2021] EWCA Civ 471; [2021] 3 W.L.R. 395 at [102].

[3] Julius Grower, "The Tort of Bribery Bares its Teeth" (2022) 138 L.Q.R. 15, 18.

[4] *Secretariat Consulting v A Company* [2021] EWCA Civ 6; [2021] 4 W.L.R. 20; S. Worthington, "Experts as Fiduciaries – An Academic Distraction" (2021) 80 C.L.J. 241.

[5] *Thompson v Havelock* (1808) 1 Camp. 527; 170 E.R. 1045; *Diplock v Blackburn* (1811) 3 Camp. 43; 170 E.R. 1300.

[6] *Taylor v Plumer* (1815) 3 M. & S. 562; 105 E.R. 721; see L. D. Smith, "Tracing in *Taylor v. Plumer*: Equity in the Court of King's Bench" [1995] L.M.C.L.Q. 240.

[7] *Gibson v Winter* (1833) 5 B. & Ad. 96 at 103; 110 E.R. 728 at 703; see D. Whayman, "The Modern Rule of Releases" (2021) 41 L.S. 493.

[8] *Morison v Thompson* (1874) 9 L.R. Q.B. 480.

available in equity a little later. Moreover, the common law actions offered concurrent remedies for loss and gain, but this advantage was taken away in 1977.[9] While the remedy awarded in *Wood* appears to combine loss and gain, and thus this is a live issue again, since that case was ultimately decided in equity this matter is not something specific to the common law.

Third, the equitable fiduciary duty of loyalty is now flexible enough to accommodate a narrower "no-corruption rule" against taking bribes and secret commissions in the absence of wider, more general fiduciary duties not to put one's interest ahead of one's principal's. Hence common law liability is not required to realise this narrower rule.

Fourth, retaining separate common law actions leaves the possibility of diverging rules for liability and remedy. If, as is suggested in *Wood*, the duty not to take a bribe arises from a common reason, then it is incoherent to have diverging rules and there is no advantage in having separate actions to accommodate them.

It is not questioned that there is much merit in imposing liability over bribery relatively widely. The argument is that it is better hosted as part of a flexible fiduciary obligation, reduced to the "no-corruption rule" where appropriate.

## 2. The Origin of the Common Law Actions

The first case where a court definitely decided the matter of a secret commission on what it thought was a common law rule is *Morison v Thompson*, decided in 1874 and before the fusion of the courts of equity and common law.[10] It cited two earlier cases, both decided by Lord Ellenborough CJ in his common law court.

The first old case is *Thompson v Havelock*, though the reasoning in that case might perhaps be characterised as a matter of employment law (then called "master and servant") given the language of the judgment. It does, however, speak in the fiduciary language of "an interest against … duty".[11] The other, *Diplock v Blackburn*, is much less equivocal. The judgment speaks expressly in terms of agent and principal.[12] In both cases, the claimants were the masters of a ship, not a fiduciary relation by modern standards, but they were both acting as agents, and until only recently agency was always (rather than usually) very much a fiduciary relation.[13]

Both were decided in a common law court. The reports are extremely short and at first blush appear to be no more than the applications of a rule against taking bribes and secret commissions. One might conclude that, given the forum, it must be a common law rule. However, a closer look at the conditions for applying equity in the common law courts and the reasons for doing so strongly suggest this is precisely what had happened.

### 2.1 Three Flaws of Old Chancery

There are three main reasons why a litigant would choose a common law court over the Chancery at the time of Lord Ellenborough CJ and Lord Eldon LC. First, the Chancery was then a one-man court and was seriously understaffed given its volume of business. It had built

[9] *Mahesan* [1979] A.C. 374.

[10] *Morison v Thompson* (1874) 9 L.R. Q.B. 480.

[11] *Thompson v Havelock* (1808) 1 Camp. 527 at 528; 170 E.R. 1045 at 1046.

[12] *Diplock v Blackburn* (1811) 3 Camp. 43 at 44; 170 E.R. 1300 at 1300.

[13] P. Finn, "Fiduciary Law and the Modern Commercial World" in E. McKendrick (ed.), *Commercial Aspects of Trusts and Fiduciary Obligations* (Oxford: Clarendon, 1992), p.15: fiduciary "as of course"; cf *Eze v Conway* [2019] EWCA Civ 88 at [38]–[40].

up an enormous backlog of causes. While the first Vice-Chancellor was appointed in 1813, this was too late for *Diplock v Blackburn* and *Thompson v Havelock*, and in any event the judicial staffing issues were still being tackled in 1851 when the first Lords Justices of Appeal appeared.[14] There were two alternatives. The first, until 1841, was the equity side of the Court of Exchequer.[15] The second was the common law courts, albeit under particular restrictions.

Second, given his role in reaffirming what is now called the fiduciary obligation and the remedy of recission for its breach,[16] Lord Eldon displayed a remarkable reluctance to do the same for account of profits for that same breach. While we see a significant number of such cases before his time,[17] we see almost nothing in the Court of Chancery until his retirement, whereupon a flood of cases begins.[18] Indeed, during Lord Eldon's tenure, one enterprising principal claimed his account of profits in the Court of Exchequer.[19] It may have been a safer bet to avoid the Chancery if at all possible.

The third reason was to avoid referrals between the Chancery and the common law courts. It was not until the Chancery Procedure Act 1852 that live evidence and cross-examination were permitted in the Chancery.[20] Until the Common Law Procedure Act 1854, the Chancery could not decide questions of law or try issues of fact by jury.[21] Such matters were instead "sent to law" for determination. This was a time-consuming and costly process, and indeed something Lord Eldon disliked for this reason.[22]

Part of the package of reforms that finally ended in fusion included the formalisation of a long-established procedure allowing equitable defences (but not claims) in the common law courts. This can conveniently be called the "equitable plea-replication mechanism". It is set out precisely in the Common Law Procedure Act 1854, s 85:

> *The Plaintiff may reply, in answer to any Plea of the Defendant, Facts which avoid such Plea upon equitable Grounds; provided that such Replication shall begin with the Words "For Replication on equitable Grounds," or Words to the like Effect.*

---

[14] Sir J. Baker, *An Introduction to English Legal History*, 5th edn (Oxford: OUP, 2019), pp.121–122.
[15] Abolished by the Administration of Justice Act 1841 (5 Vict c 5) s 1.
[16] E.g. *Ex p Bennett* (1805) 10 Ves. Jun. 381; 32 E.R. 893.
[17] E.g. *Keech v Sandford* (1726) Ca. t. King 61; 25 E.R. 223; *Owen v Williams* (1773) Amb. 734; 27 E.R. 474; *Rawe v Chichester* (1773) Amb. 715; 27 E.R. 463; *Massey v Davies* (1794) 2 Ves. Jun. 317; 30 E.R. 651.
[18] *Hichens v Congreve* (1828), reported in *Fawcett v Whitehouse* (1829) 1 Russ. & M. 132; 39 E.R. 51 affd (1831) 4 Sim. 420; 58 E.R. 157 and that case itself; *Lees v Nuttall* (1834) 2 My. & K. 819; 39 E.R. 1157. See *Re Biss* [1903] 2 Ch. 40; *FHR v Cedar* [2014] UKSC 45; [2015] A.C. 250 for consideration of the most prominent cases.
[19] *A-G v Lindegren* (1819) 6 Price 287; 146 E.R. 811.
[20] (15 & 16 Vict c 86) ss.28–29.
[21] (17 & 18 Vict c 125); Sir J. Baker, *An Introduction to English Legal History*, 5th edn (Oxford: OUP, 2019), p.100.
[22] Lord Eldon, *Lord Eldon's Anecdote Book*, A. L. J. Lincoln and R. L. McEwen (eds.) (London: Stevens & Sons, 1960), p.134 no, 213; *Bulkley v Wilford* (1834) 2 Cl. & F. 102 at 177; 6 E.R. 1094 at 1122.

Certainly the common law courts operated other ill-documented restrictions.[23] But the evidence of its use is overwhelming.[24] The releases cases are plentiful and there are at least two well-documented tracing and constructive trusts cases in *Taylor v Plumer*[25] and *Scott v Surman*.[26]

## 2.2 Against the Bribe-Taker

Consider now how that constraint would operate in the case of taking a bribe or secret commission. A principal would claim an account of profits by way of a constructive trust over that profit. Immediately we see how this does not fit the equitable plea-replication mechanism since the principal is the claimant in the equitable claim for breach of fiduciary duty.

However, the mechanism fits if the principal is the defendant. This is when the claimant pleads a common law action, which would usually be money had and received or a conversion tort. Next, the defendant attempts to meet that with a replication by way of equitable plea that there is a constructive trust. The claimant, in common law rejoinder, then makes an equitable replication that the equitable plea was not good. One obvious reply is authorisation or consent to the profit. Thus the mechanism was only applicable to the rare case of a fiduciary fighting for what had fallen into the hands of the principal or a third party.

This is precisely what happened in *Taylor v Plumer*.[27] Sir Thomas Plumer was not claiming the traceable proceeds of the fraud from the fiduciary Walsh – a gain made in breach of fiduciary duty. He was defending the claim in trover by Walsh's assignees in bankruptcy on the grounds there was a constructive trust in equity, so the statutory exception to the transfer of legal title to the assignees was engaged.

This is the configuration of *Thompson v Havelock* and *Diplock v Blackburn*. Both masters sued at common law (in money had and received and for an account respectively) and their principals defended by way of equitable plea. Indeed, this explains why the actions were commenced in a common law court; at the start, it was an equity-free claim. Then, rather than going to the Court of Chancery, the defendants took advantage of the plea-replication mechanism.

It would be most satisfying to have clear direct evidence the same mechanism was used in these cases, namely the pleadings, where its use would be obvious. Unfortunately, these cases are nowhere to be found in the docket books held at the National Archives and it is unclear why. Nevertheless, there are five pieces of circumstantial evidence, which taken together are compelling.

The first is simply the configuration itself. This is highly unusual given the preponderance of cases are of principals as claimants suing fiduciaries to recover from fiduciaries as defendants.

---

[23] See *De Pothonier v De Mattos* (1858) El. Bl. & El. 461 at 464; 120 E.R. 581 at 582. N.B. Lord Ellenborough refused to apply equity in *Alner v George* (1808) 1 Camp. 392 at 393; 170 E.R. 966 at 996. There is an initially troubling reason given in the headnote that equity could not be applied because the hearing was at the assizes, since *Diplock v Blackburn* (1811) 3 Camp. 43; 170 E.R. 1300 and *Thompson v Havelock* (1808) 1 Camp. 527; 170 E.R. 1045 were also heard at the assizes. However, *Alner v George* was not an ordinary releases case and was one of a wider fraud, as noted in *Lee v Lancashire and Yorkshire Rly Co* (1871) L.R. 6 Ch. App. 527 at 534.

[24] Fn. 7.

[25] *Taylor v Plumer* (1815) 3 M. & S. 562; 105 E.R. 721.

[26] *Scott v Surman* (1742) Willes 400; 125 E.R. 1235.

[27] *Taylor v Plumer* (1815) 3 M. & S. 562; 105 E.R. 721.

Second, *Thompson v Havelock* and *Diplock v Blackburn* were heard before the same judge who decided *Taylor v Plumer*, Lord Ellenborough CJ. Lord Ellenborough also heard the releases case of *Payler v Homersham*.[28] Plainly this was a judge willing to use it.

Third, not mentioning the mechanism is weak evidence against it not being used. It is true that the judgments in *Thompson v Havelock* and *Diplock v Blackburn*, unlike in some of the release cases, do not spell out what is going on.[29] But this does not amount to much in an era of terse and elliptical judgments where matters not in issue were often omitted from the reports. It simply means the use of the mechanism was not challenged. There is no explanation of its use in *Payler v Homersham*. Neither is it expressly mentioned in *Taylor v Plumer*.

Fourth, as noted above, the judgments of both cases use the language of equity, suggesting use of the mechanism.[30] Further, the substantive replications to the equitable plea were the usual defence to breach of fiduciary duty, consent, specifically on the basis of trade usage. They were unsuccessful. In *Diplock v Blackburn*, Lord Ellenborough derided the proposition that it was the usual practice to allow masters to take such benefits; this was a “usage of fraud and plunder”.[31] Consequently the secret commission “belonged to the owner, and not to the captain”[32] – the consequence of imposing a proprietary constructive trust. One must ask why such language was used if not for its ordinary technical meaning. I conclude, as Lionel Smith did when analysing *Taylor v Plumer*, it is because the common law courts were applying equity.[33]

Fifth, both old cases were cited in another case concerning a ship’s master who had made a private profit in the course of his duty. *Shallcross v Oldham* was heard before the Vice-Chancellor in his court of equity. The action was described as breach of trust (today properly classified as breach of fiduciary duty) and Page Wood V-C described the obligation to account for those profits as “an equitable right to relief”.[34] Thus the old cases were later treated as authorities for an equitable action.

## 2.3 Fusion

*Morison v Thompson* is a common law case where the facts were plainly unsuitable for the plea-replication mechanism, since it was a claim by a principal against a defending fiduciary. Yet it was decided in favour of that principal in the Court of Queen’s Bench, shortly before the fusion of the courts. It should not have been possible for a principal to claim for breach of fiduciary duty in the common law courts. Indeed this is what the defendant argued[35] and what Brett LJ later stated in *Metropolitan Bank v Heiron*.[36] Yet this claim, said to be in money had and received, was allowed.

In *Morison v Thompson*, Lord Cockburn CJ, Blackburn and Archibald JJ treated the old cases of *Diplock v Blackburn* and *Thompson v Havelock* as common law authorities for the

---

[28] *Payler v Homersham* (1815) 4 M. & S. 423; 105 E.R. 890. See n 7.
[29] E.g. *Gibson v Winter* (1833) 5 B. & Ad. 96 at 103; 110 E.R. 728 at 703; *Phillips v Clagett* (1843) 11 M. & W. 84 at 91; 152 E.R. 725 at 728; *Lyall v Edwards* (1861) 6 H. & N. 337 at 344; 158 E.R. 139 at 142.
[30] Above, text to fn.32.
[31] *Diplock v Blackburn* (1811) 3 Camp. 43 at 44; 170 E.R. 1300 at 1300.
[32] *Diplock v Blackburn* (1811) 3 Camp. 43 at 44; 170 E.R. 1300 at 1300.
[33] L. D. Smith, “Tracing in *Taylor v. Plumer*: Equity in the Court of King’s Bench” [1995] L.M.C.L.Q. 240, 256.
[34] *Shallcross v Oldham* (1862) 2 John & H. 609; 70 E.R. 1202.
[35] *Morison v Thompson* (1874) 9 L.R. Q.B. 480 at 482.
[36] *Metropolitan Bank v Heiron* (1880) 5 Ex. D. 319 at 324.

validity of the instant claim.[37] The court also noted a number of master and servant cases, which were taken as authority that employees were liable to their employers for private profits made in the course of their employment.

These cases were run into the same argument, which suggests the court saw them as being part of the same family, at least in the sense that there was a rule at common law permitting recovery generally, since the broker in *Morison v Thompson* was not an employee. When the court turned to what it described as "the cases in equity"[38] it referred not to *Diplock v Blackburn* and *Thompson v Havelock*, but *Massey v Davies*,[39] *Turnbull v Garden*[40] and *Kimber v Barber*.[41] Saying they were "to the same effect"[42] suggests the court saw the latter three cases as coming from a different family and, conversely, *Diplock v Blackburn* and *Thompson v Havelock* as authority for a common law action. *Shallcross v Oldham*,[43] unfortunately, was not cited.

It therefore seems likely that the court committed a "fusion fallacy", i.e. it took substantive equitable rules and applied them to a common law claim. This is quite understandable. It would have appeared to the judges of 1874, who were of a newer generation where law reporting was better and judgments considerably less elliptical, that *Diplock v Blackburn* and *Thompson v Havelock* were authority for what their reports said on their face, i.e. a common law action for bribes and secret commissions.

## 2.4 Against the Bribe-Giver

The emergence of the common law action against the bribe-giver, or accessory, or third party, is considerably simpler to explain. First, note the well-established equitable action against the bribe-giver, as seen in the contemporaneous case of *Bagnall v Carlton*.[44] This was in what was to become known as knowing assistance and later dishonest assistance.[45]

The counterpart action against a third party at common law emerged in *Salford Corporation v Lever (No 2)*.[46] Curiously, the existence of the action was not an issue in the case. It was simply assumed to exist, despite the factual differences with *Morison v Thompson*. The issue in dispute was whether the claims against bribe-giver and bribe-taker were independent (and we return to this point later). The former Brett LJ, now Lord Esher, and the other judges, simply had nothing to say on the action's existence. Hence it seems that the common law action against the bribe-giver was also born of a mishap.

This new action was soon applied in *Grant v Gold Exploration and Development Syndicate Ltd*[47] and *Hovenden and Sons v Millhoff*.[48] When Lord Diplock analysed this line of cases in *Mahesan s/o Thambiah v Malaysia Government Officers' Co-Operative Housing Society Ltd*,

---

[37] The court also relied on *Rogers v Boehm* (1799) 2 Esp. 702; 170 E.R. 502, but a closer inspection reveals this case is merely authority that the equitable rule that interest can be claimed also applies to money had and received at common law.
[38] *Morison v Thompson* (1874) 9 L.R. Q.B. 480 at 484.
[39] *Massey v Davies* (1794) 2 Ves. Jun. 317; 30 E.R. 651.
[40] *Turnbull v Garden* (1869) 38 L.J. Ch. 331.
[41] *Kimber v Barber* (1873) L.R. 8 Ch. App. 56.
[42] *Morison v Thompson* (1874) 9 L.R. Q.B. 480 at 484.
[43] *Shallcross v Oldham* (1862) 2 John & H. 609; 70 E.R. 1202.
[44] *Bagnall v Carlton* (1877) 6 Ch. D. 371.
[45] *Barnes v Addy* (1874) 9 L.R. Ch. App. 244 was cited by counsel: *Bagnall v Carlton* (1877) 6 Ch. D. 371 at 380.
[46] *Salford Corporation v Lever (No 2)* [1891] 1 Q.B. 168.
[47] *Grant v Gold Exploration and Development Syndicate Ltd* [1900] 1 Q.B. 233.
[48] *Hovenden and Sons v Millhoff* (1900) 83 L.T. 41. It was also mentioned in *Boston Deep Sea Fishing & Ice Co Ltd v Ansell* (1888) 39 Ch. D. 339 at 367.

he gave a compelling explanation for its functional outcome. It is a logical development of the right of rescission in equity against a third party sufficiently involved in the fraud.[49] If rescission were possible, the purchase price – increased by at least the value of the bribe above the market price – would be returned, whereby the purchaser could then buy the goods at that market price, leaving her with the difference (at least the value of the bribe, but possibly more). Disregarding consequential losses, this is the value that can be obtained in the simple action directly against the bribe-giver even if rescission is no longer possible.

This is consistent with the outcome in *Grant v Gold*, where both bribe-taker vendor and bribe-giver purchaser were liable for the value of the original secret commission stipulated in the first agreement for it, even though it was reduced in a second agreement. Indeed, Collins LJ went so far as justifying this measure on the basis it was the increase in the sale price.[50] The bribe's original value was evidence of this increase.[51]

## 3. Benefits of the Common Law Actions

At this time, the common law developed while equity lagged behind. But soon enough, equity caught up with and later surpassed the common law. Consequently, any advantages the common law had fell away, although this process was not completed until the twenty-first century.

### 3.1 Former Flaws of Old Chancery

The three flaws of the old Court of Chancery were highly relevant to the old cases of *Thompson v Havelock* and *Diplock v Blackburn*. They offered the unquestionable advantages of reducing the time spent in litigation and having a more sympathetic judge.

By the time of *Morison v Thompson* in 1874, the only advantage left, if indeed that is an advantage, was the facility of jury rather than judge determination of fact. Jury determination was used to establish that:

> *[F]irst, that the defendant was the agent of the plaintiff for the purpose of purchasing the ship as cheaply as she could be got: and, secondly, that the plaintiff could have got the vessel cheaper but for the arrangement between the vendor and [the broker.]*[52]

But these matters are simple, so the need for better fact-finding can hardly have been the reason for litigating at common law. And while compensatory damages were then not available in the Chancery, they were not sought; account of profits was and was indeed obtained. Furthermore, it has been clear since *Keech v Sandford* that is not necessary to show a loss to the principal,[53] so the second determination should not have mattered to the result.

Thus there was no obvious reason for litigating at common law in *Morison v Thompson*, where the only issue was the secret commission. It remains a mystery. But in subsequent cases there were clear advantages.

### 3.2 Compensatory Damages

In most cases of this ilk, rescission is impossible since it is too late to effect *restitutio in integrum* or some other bar such as the creation of third-party rights has descended. And if

---

[49] *Mahesan* [1979] A.C. 374 at 381.
[50] *Grant v Gold* [1900] 1 Q.B. 233 at 249.
[51] This is arguably not damages proper, but instead a reversal of value measure. See P. Birks, "Unjust Factors and Wrongs: Pecuniary Rescission for Undue Influence" [1997] R.L.R. 72.
[52] *Morison v Thompson* (1874) 9 L.R. Q.B. 480 at 481.
[53] *Keech v Sandford* (1726) Ca. t. King 61; 25 E.R. 223; see also *Boardman v Phipps* [1967] 2 A.C. 46.

there is no profit made or remaining, that leaves only compensation. That compensatory damages were then not available in equity was probably the motivation for the claimant to sue at common law in *Salford Corporation v Lever*. Here, the defendant third party bribe-giver had paid £1,500 over to one Hunter, a manager working for the Corporation of Salford, in order to secure sales of coal. However, the losses suffered by the Corporation were more than £1,500, being at least £2,329. This is presumably because the bribe-giver had inflated the price of the coal not only by the value of the bribe, but by an additional amount for his own benefit too. This remedy was said to be 'damages'.[54]

This advantage was not to endure either. A mere 24 years later, *Nocton v Lord Ashburton* was decided, permitting the recovery of compensation for breach of fiduciary duty.[55] The remedy seems to be compensation proper, thus reaching consequential losses.[56] While there once appeared to an irrebuttable presumption that the breach caused the loss,[57] this appears to have settled into a rebuttable presumption.[58] Thus there is in fact a significant advantage to suing in equity nowadays.

### 3.3 Alternative or Cumulative Remedies

The general law for causes of action with different remedies is that one has to elect between them if they are alternative (or inconsistent) but not if they are cumulative (or consistent).[59] Thus if the loss is the price of the profit, one cannot recover twice, since that would amount to impermissible double recovery. A good example is of a purchasing agent who inflates the ostensible purchase price presented to her principal in order to take a secret commission. The principal cannot recover the loss (the missed opportunity to purchase at a lower price) and the agent's gain (the amount the price was inflated by) concurrently.

However, there is a respectable argument, made by Birks, for allowing cumulative remedies in this context.[60] If the gains-based account of profits remedy for breach of fiduciary duty – which includes taking a bribe – does not depend on whether loss was suffered by the principal, then it is independent of that loss-based remedy. If so, there is not necessarily an inconsistency in recovering both loss and gain from both parties jointly and severally and no need to elect between them.

For a while, the courts tended towards Birks' position. In *Salford Corporation v Lever* Lord Esher, with whom Lindley LJ agreed, stated clearly that the actions of the purchasing manager (agent) and the sellers were "separate and distinct fraud[s] … one in his character of agent, the other by reason of his conspiracy with the third person with whom he has been dealing."[61] It is true that there was a complex compromise agreement between the Corporation and the purchasing manager, but Lord Esher was clear that this did not change the reasoning.[62] As against the fiduciary, the amount received, i.e. the bribe, could be recovered. As against the

[54] *Salford Corpn v Lever* [1891] 1 Q.B. 168 at 176, 177.
[55] *Nocton v Lord Ashburton* [1914] A.C. 932.
[56] *Swindle v Harrison* [1997] 4 All E.R. 705 and *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048; [2004] 1 B.C.L.C. 131 concern merely "compensation".
[57] *Brickenden v London Loan & Savings Co* [1934] 3 D.L.R. 465.
[58] See particularly *Swindle v Harrison* [1997] 4 All E.R. 705 at 718, 726, 733; C. Mitchell, "Equitable Compensation for Breach of Fiduciary Duty" (2013) 66 C.L.P. 307, 327 et seq.
[59] See generally S. Watterson, "Alternative and Cumulative Remedies: What is the Difference?" [2003] R.L.R. 7.
[60] P. Birks, "Inconsistency Between Compensation and Restitution" (1996) 112 L.Q.R. 375.
[61] *Salford Corpn v Lever* [1891] 1 Q.B. 168 at 176. This conclusion is accurately summarised in the headnote according to Lord Diplock in *Mahesan* [1979] A.C. 374 at 381. See also *Bagnall v Carlton* (1877) 6 Ch. D. 371 at 399 to similar effect.
[62] *Salford Corpn v Lever* [1891] 1 Q.B. 168 at 176.

accessory, the measure was damages.[63] After some prevarication in *Grant v Gold*,[64] this position was affirmed in *Hovenden and Sons v Millhoff*.[65]

In *Mahesan*, Lord Diplock characterised it as "a new chapter … in the law of civil remedies for bribery."[66] But it was one he restrained. Lord Diplock declared the law as follows. The claimant may recover against the bribe-giver the alternative remedies of money had and received to the value of the bribe, or damages for actual losses in fraud, "but he cannot recover both".[67] Unfortunately, Lord Diplock did not offer much theorisation as to why the remedies are alternative. In any event, *Mahesan* was soon applied to the equitable counterpart claims in *Tang Man Sit v Capacious Investments Ltd*.[68] Here, the Privy Council treated the losses caused as the price of the profit, so the two remedies were not cumulative. Neither court engaged with Birks' point head on.

The argument against Lord Diplock's rule is that it undermines the deterrent function of fiduciary law. The principal is incentivised to sue only one party if it is simply more convenient and then there is nothing to be gained from suing the other. The other may get away with the fruits of their wrongdoing, something which exercised Lord Esher greatly in *Salford*. Lord Diplock's rule means the principal will not be enriched, but this is not a matter that usually troubles fiduciary law: "better the principal receive a windfall than that the fiduciary retain the profit", as Lord Millett puts it.[69]

Thus, until very recently, this matter was uneasily settled by authority. However it was overlooked in *Wood v Commercial First Business Ltd*. Here, the claimant won against the lender on liability in both the High Court and the Court of Appeal. She won on all remedies at the High Court and this point was not appealed.[70] She disgorged the secret commission and also secured rescission of the loan agreement. The practical effects of the latter are to avoid the security charge and in effect strike down the agreed interest rate, since the restitution and counter-restitution of repayments and loan monies means the court will impose its own interest rate for the net balance.[71]

This outcome is double recovery. Mrs Wood's losses, for which she received compensation, included the difference between the inflated interest rate charged and what she could have got. But since the secret commission was ultimately paid for by the increase in rate, the account of profits remedy was cumulative with that compensation. Yet Mrs Wood received both. *Wood*, therefore, implicitly adopts the position in *Salford* that the fiduciary has engaged in two independent wrongs – and goes further in awarding them against the same person.

Yet equity usually steps back from forfeiture or punitive measures against a fiduciary or accessory *qua* individual.[72] This is plainly in tension with Birks' argument. This tension might be resolved as follows. The rule against double recovery should be restricted to measures

[63] *Salford Corpn v Lever* [1891] 1 Q.B. 168 at 176, 177.
[64] *Grant v Gold* [1900] 1 Q.B. 233.
[65] *Hovenden v Millhoff* (1900) 83 L.T. 41; see Lord Diplock's analysis in *Mahesan* [1979] A.C. 374 at 382.
[66] *Mahesan* [1979] A.C. 374 at 382.
[67] *Mahesan* [1979] A.C. 374 at 383.
[68] *Tang Man Sit v Capacious Investments Ltd* [1996] A.C. 514.
[69] Lord P. Millett, "Bribes and Secret Commissions Again" (2012) 71 C.L.J. 583, 600 (writing extra-judicially).
[70] *Wood v Commercial First Business Ltd* [2019] EWHC 2205 (Ch); [2020] C.T.L.C. 1 affd [2021] EWCA Civ 471; [2021] 3 W.L.R. 395.
[71] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] A.C. 669.
[72] *A-G v Alford* (1854) 4 De G.M. & G. 843 at 853; 43 E.R. 737 at 742; *Vyse v Foster* (1872) 9 L.R. Ch. App. 309 at 333.

against a single party for these actions. When both are sued, any windfall the principal recovers is justified by the role this plays in upholding the fiduciary obligation. Since both parties caused both loss and gain, the available sums would be the accumulation of both loss and gain jointly, subject to a cap: each party's liability would be limited by the greater of the two figures, this cap reducing pound for pound as recovery against the other increases.

In any case, the law is in an inconsistent state; *Mahesan* and *Wood* are irreconcilable on this point, unless one takes Lord Diplock to have confined his restricting pronouncements to a single party. This seems unlikely since he did not qualify his propositions. A future court may well be invited to decide the issues, and it must be hoped it will take a first principles approach to doing so. But in any event, there is no advantage in suing at common law any more. Furthermore, any reconciliation of this problem is unlikely to be applied to only the common law and not equity.

## 4. The Reformed Fiduciary Duty of Loyalty

Of course, being able to sue in equity for breach of fiduciary duty requires there to be a fiduciary duty in the first place. The difficulties are thus around persons not subject to "full" fiduciary duties who need to be subject to a minimal "no-corruption" rule, a duty against corrupting the (quasi-) principal's business by taking bribes or secret commissions. There are the famous cases of an army sergeant,[73] a police sergeant,[74] a factory foreman,[75] a purchasing manager[76] and a crown prosecutor[77] successfully made liable. But it is hard to see how such persons owe fiduciary duties on the present law, where the main categories of fiduciary relation are trustee-beneficiary,[78] executor-legatee,[79] director-company,[80] partner-partnership,[81] solicitor-client[82] and agent-principal.[83] Moreover, there are also relations such as professional advisers, who do not owe any fiduciary duties by default,[84] and non-fiduciary agents[85] – where the agent's duties are not so ministerial that they lack the ability to corrupt the principal's business – who may need to be subject to the same liability.

Unless there is a way of solving this problem in equity, the common law is the obvious place to go. But equity has already solved this problem. Lord Sales has described the fiduciary duty of loyalty as a "modulated" duty,[86] capable of responding to peculiar facts and not one which prohibits all behaviour which potentially puts the fiduciary's interests ahead of her principal's. We can see how the duty of loyalty shifted in this way in concrete detail in two respects: first, in the general conceptual shift of the duty of loyalty and second, through the specifics of one types of relation, employer-employee.

---

[73] *Reading v A-G* [1951] A.C. 507.
[74] *A-G v Goddard* (1929) 28 L.J. K.B. 743.
[75] *Lister v Stubbs* (1890) 45 Ch. D. 1.
[76] *Salford Corpn v Lever* [1891] 1 Q.B. 168.
[77] *A-G for Hong Kong v Reid* [1994] A.C. 324.
[78] *Boardman v Phipps* [1967] 2 A.C. 46.
[79] *Docker v Somes* (1834) 2 My. & K. 655; 39 E.R. 1095.
[80] *Guinness plc v Saunders* [1990] 2 A.C. 663.
[81] *Featherstonhaugh v Fenwick* (1810) 17 Ves. Jun. 298; 34 E.R. 115.
[82] *Bristol and West Building Society v Mothew* [1998] Ch. 1.
[83] *Kelly v Cooper* [1993] A.C. 205.
[84] *Indata Equipment Supplies Ltd v ACL Ltd* [1998] F.S.R. 248 at 254.
[85] Most agents owe fiduciary duties; see fn.13.
[86] Lord Sales, "The Interface between Contract and Equity" (Lehane Memorial Lecture, Sydney, 28 August 2019).

## 4.1 From Status to Contract

Generally, there was a shift in emphasis from status to contract with the duty of loyalty, meaning it became imposed and scoped (meaning the interests to which it applied became limited and targeted) according to the nature of the engagement rather than merely because the parties fell into a standard category of relation. Hence bailees and factors ceased to be fiduciary by default.[87] By the late nineteenth century partners were allowed to engage in business on their own account provided it was outside of the scope of the partnership agreement.[88]

In the twentieth century the courts were imposing fiduciary duties in commercial engagements found to be analogous to the standard categories, such as joint ventures sufficiently similar to partnerships.[89] By the late twentieth century the courts were seriously considering imposing fiduciary duties on the basis of first principle to novel categories.[90] They were asking if the engagement, on its facts, demanded a duty of "single-minded loyalty", defined by Millett LJ as where the fiduciary must put his principal's interests ahead of his own.[91] In the twenty-first century successful cases became commonplace.[92]

These changes reflect Finn's proposition, accepted by Millett LJ in *Bristol and West Building Society v Mothew*, that a fiduciary "is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary".[93] The "fiduciary obligation" is not monolithic, but a targeted set of obligations or, in short, a modulated or scoped fiduciary duty. "Fiduciary", the noun, is simply shorthand for someone who owes some fiduciary, the adjective, duties, but tells us little as to how far they go. There is therefore scant difficulty in seeing how the no-corruption rule could be raised absent other fiduciary obligations. Persons subject to this rule would owe a duty of loyalty in this narrow scope only, but otherwise could put their own interests first.

## 4.2 Employees

To see how this no-corruption rule has already developed out of the broader duty of loyalty we need look no further than the case of the employee. One reason it is hard to see how the aforementioned list of persons could made liable on the present law[94] is because the category of employee-employer seemingly came off the list of relations fiduciary by default in the early twenty-first century, certainly if one takes *Snell's Equity* as authority. In the chapter *Fiduciaries and Fiduciary Relationships*, Conaglen was tentative as to the fiduciary status of employees in the 31st and 32nd editions, noting that "Crown servants have been held to owe fiduciary duties to the Crown".[95] No doubt he was cognisant of the strong terms in which this

[87] A. Televantos, "Losing the Fiduciary Requirement for Equitable Tracing Claims" (2017) 133 L.Q.R. 492, 497 et seq.

[88] *Aas v Benham* [1891] 2 Ch. 244; *Dean v Macdowell* (1878) 8 Ch. D. 345.

[89] *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 C.L.R. 1; *Global Container Lines Ltd v Bonyad Shipping Co (No 1)* [1998] 1 Lloyd's Rep. 528 at 546. See also *O'Sullivan v Management Agency and Music Ltd* [1985] Q.B. 428; *English v Dedham Vale Properties Ltd* [1978] 1 W.L.R. 93 cases of self-appointed agents.

[90] *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 W.L.R. 1126; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 C.L.R. 41.

[91] *Mothew* [1998] Ch. 1 at 18.

[92] E.g., *University of Nottingham v Fishel* [2000] I.C.R. 1462 at 1491; *Murad v Al-Saraj* [2004] EWHC 1235 (Ch) this point not raised on appeal: *Murad v Al-Saraj* [2005] EWCA Civ 959; [2005] W.T.L.R. 1573; *Ross River Ltd v Waveley Commercial Ltd* [2013] EWCA Civ 910.

[93] *Mothew* [1998] Ch. 1 at 18; P. D. Finn, *Fiduciary Obligations* (Sydney: Law Book Co, 1977), p.2.

[94] Above, text to fn.75.

[95] J. McGhee, *Snell's Equity*, 31st edn (London: Sweet & Maxwell, 2005) [7–06]; J. McGhee, *Snell's Equity*, 32nd edn (London: Sweet & Maxwell, 2010) [7–06]. Older editions do not have a separate, comprehensive treatment of fiduciary duties.

was said in *A-G v Blake (Jonathan Cape Ltd Third Party)*.[96] Starting with the 33rd edition a more confident position is taken: "employees … do not usually owe fiduciary duties".[97]

This is probably due to the increasing acceptance of the breakthrough case of *University of Nottingham v Fishel*, which came after *Blake* in the Court of Appeal but before the latter's final appeal.[98] The difficulty was what to do with an employee such as Dr Fishel who did not act so egregiously. A case concerning a notorious traitor like Blake selling the story of his treachery might not be expected to yield much nuance, and in respect of the fiduciary obligation, did not.

In *Fishel*, Elias J took the bold step of distinguishing the ordinary loyalty owed by a mere employee from the duty of single-minded loyalty owed by a fiduciary. He took a first principles approach, relying on Lord Millett's extra-judicial article, "Equity's Place in the Law of Commerce"[99] and judgment in *Mothew*.[100] Employees, without more, do not exercise powers for the benefit of another and thus do not affect the autonomy of their employers. Thus they are not obliged to pursue their employer's interests at the expense of their own.[101] Plainly some employees will be so obliged, but that will depend on any facts peculiar to their special engagement with their employers that mean fiduciary concerns are engaged.

On the facts, Dr Fishel was not liable for accepting work from overseas clinics since he had not relied on his university connections. There was no risk of a possible conflict of interests here. But he was liable for using University embryologists in connection with private work because here there plainly was.[102] One can see immediately that employees with less autonomy than Dr Fishel probably would not owe any fiduciary duties at all. Thus Elias J got around the rather blanket statements in *Blake* that employees owed fiduciary duties in a principled way. It was via the now-uncontroversial propositions that the fiduciary duty and can be scoped and arises where the circumstances demand it.[103]

Indeed, his judgment was soon twice endorsed by the Court of Appeal.[104] This was enough to firmly establish the first principles approach to finding a fiduciary relation in England. It is probably also fair to say it led to employer-employee being struck off the list of fiduciary categories. But Elias J never went so far as to say that it would take peculiar facts to hold an employee liable for taking a bribe or secret commission. On the contrary, he expressly said that *every* employee was subject to this liability.[105] This seems to be the residue of the duty of loyalty owed by all employees after the functions now dealt with by the duties of fidelity and

[96] *A-G v Blake (Jonathan Cape Ltd Third Party)* [1998] Ch. 439 at 454, this point not challenged on appeal: [2001] 1 A.C. 268.
[97] J. McGhee and S. T. Elliott, *Snell's Equity*, 34th edn (London: Sweet & Maxwell, 2020) [7–006], also [7–004]; J. McGhee, *Snell's Equity*, 33rd edn (London: Sweet & Maxwell, 2015) [7–004]–[7–006]. See also *Hospital Products* (1984) 156 C.L.R. 41 at 96, containing employer-employee (in Australia).
[98] *Fishel* [2000] I.C.R. 1462.
[99] P. J. Millett, "Equity's Place in the Law of Commerce" (1998) 114 L.Q.R. 214.
[100] As Millett LJ. Above, text to fn.93.
[101] *Fishel* [2000] I.C.R. 1462 at 1490–1491.
[102] *Fishel* [2000] I.C.R. 1462 at 1496, 1497.
[103] *Fishel* [2000] I.C.R. 1462 at 1490, 1493 quoting *Kuys* [1973] 1 W.L.R. 1126 at 1130. See also *Blake* [1998] Ch. 439 at 454
[104] *Helmet Systems Ltd v Tunnard* [2006] EWCA Civ 1735; [2007] F.S.R. 16 at [36]; *Ranson v Customer Systems plc* [2012] EWCA Civ 841; [2012] I.R.L.R. 769 at [28]: a "masterly judgment".
[105] *Fishel* [2000] I.C.R. 1462 at 1490–1491 (emphasis added).

confidence were spun off.[106] It also yields a template to apply to other relations where loyalty is only required up to the point of the no-corruption rule.

## 4.3 The Residual No-Corruption Rule as Template

This, it is submitted, is an attractive position that is consistent with much authority. It accommodates the otherwise troublesome cases of the army sergeant, police sergeant, factory foreman, purchasing manager and crown prosecutor. It seems they are small-scope fiduciaries, only subject to the no-corruption rule. Moreover, this does not appear to offend the principle that there is an irreducible core of the duty of loyalty.[107] While the irreducible core would be smaller in such relations, it would still be impossible to exclude liability for breaching its obligations.

The question is then whether this template fits the new and more uncertain categories, professional advisers (non-fiduciary by default) and non-fiduciary agents and brokers. The answer must be yes. There is no conceptual or practical reason why the no-corruption rule could not be imposed where the facts demand it.

At one end of the spectrum most agents will owe full-blown fiduciary duties.[108] Towards the other, there will be some agents who only provide "ministerial services" who do not owe fiduciary duties, but for whom the law of bribes and secret commission does apply, as noted in *Eze v Conway*.[109] At the other end are persons such as the actual "agent" in that case, who had no authority, was little more than a "chivvier" and was not liable to disgorge the secret commission he took.

It is the middle case that is likely to cause difficulties. This will come up, as the Court of Appeal said in *Wood*, where there is a "duty to be impartial and to give disinterested advice, information or recommendations".[110] One should add that it will likely be where the advice requested and given was generic and not tailored to the principal's precise circumstances so as to avoid full fiduciary status. This might be advice limited to eligibility rather than suitability. Internet price comparison sites – the new brokers – are a possible case in point. A decision clarifying this point in these circumstances or others would be welcome.

Similarly, it seems entirely possible and appropriate for the no-corruption rule to apply to a professional adviser who does not attain full fiduciary status. On the other hand, it is possible that it simply will not be needed. It could be that the economic torts, particularly that of causing loss by unlawful means, already do this job. The details will have to be worked out when the facts come along.

Those details are important, but do not affect the main argument. Equity is now amply flexible enough to cover this range of options. The common law actions therefore do not have any advantage in this respect. They only bring more complexity simply by existing and because they could diverge in some way. That is no advantage at all, unless there are positive benefits to having divergences.

[106] R. Flannigan, "The (Fiduciary) Duty of Fidelity" (2008) 124 L.Q.R. 274; cf A. Frazer, "The Employee's Contractual Duty of Fidelity" (2015) 131 L.Q.R. 53.
[107] *Armitage v Nurse* [1998] Ch. 241 at 253.
[108] *Kelly v Cooper* [1993] A.C. 205; *FHR v Cedar* [2014] UKSC 45; [2015] A.C. 250.
[109] *Eze v Conway* [2019] EWCA Civ 88 at [40].
[110] *Wood* [2021] EWCA Civ 471; [2021] 3 W.L.R. 395 at [102].

## 5. Potential Divergences between the Common Law and Equitable Claims

In this section, we examine that possibility. If there are good reasons for having differences, this opens up a new and useful role for separate common law actions. If it does not, we might expect to see a riposte such as Birks', who said of the idea of developing a fiduciary duty of care:

> *Millett LJ was quite right to nip in the bud the development of specious meta-wrong, parallel to the tort of negligence but inexplicably bidding for different rules of causation, remoteness, limitation, and so on.*[111]

If liability is ultimately based on the same thing, as was said in *Wood*,[112] then it seems unlikely that there are benefits in having diverging remedies, just as there are not in having a separate equitable duty of care. While one could argue that each of the principles or rules for the common law claim will simply settle into convergence with its equitable counterpart, this is precisely the problem. It will cost time and money to litigate this for no long-term benefit to the law as individual litigants argue for different rules with their own short-term benefit in mind.[113] It would be better to abolish or assimilate the common law actions into their equitable counterparts and bring in any required differences later. Starting from a position of harmony on the basis the general justifications are the same and diverging later on a principled basis, if necessary, will mean less litigation since any justifiable divergences are likely to be few and, in any case, must be no more than the number of potential divergences.

There are three broad groups of principles that do or may diverge. The first concerns the rules required to authorise a commission such that it is lawful. Bare agreement or assent is insufficient; what is required is fully informed consent, where what is fully informed depends on the circumstances, particularly the knowledge and sophistication of the principal. There are a large number of sub-rules.[114] The potential for divergence and litigation is particularly acute here.

The second group of principles concerns quantification. *Mahesan* is one example of litigation over these principles, ultimately deciding that the remedies are alternative. Indeed the problem of *Wood* being inconsistent with it shows this problem is real. There is plainly also the possibility of there being different rules for causation, remoteness and even measure. These have not been fully worked out for the general case of equitable compensation for breach of fiduciary duty.[115] There is the risk of the required effort being doubled.

The third group concerns the personal or proprietary status of the remedy. For the action to recover the bribe or its traceable proceeds, the equitable remedy was finally definitively declared to be proprietary in *FHR European Ventures LLP v Cedar Capital Partners LLC*. This came after a series of "inconsistent judicial decisions over the past 200 years".[116] But common law remedies (other than those for the recovery of property) are not proprietary. What was once

[111] P. Birks, "The Content of Fiduciary Obligation" (2002) 16 T.L.I. 34, 50; see *Mothew* [1998] Ch. 1.
[112] *Wood* [2021] EWCA Civ 471; [2021] 3 W.L.R. 395 at [102].
[113] Precisely what happened in *Mothew* [1998] Ch. 1; *Target Holdings Ltd v Redferns* [1996] 1 A.C. 421; *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58; [2015] A.C. 1503.
[114] L. Tucker, N. Le Poidevin and J. Brightwell, *Lewin on Trusts*, 20th edn (London: Thomson Reuters, 2020) [46–043].
[115] C. Mitchell, "Equitable Compensation for Breach of Fiduciary Duty" (2013) 66 C.L.P. 307 particularly 327 et seq.
[116] *FHR v Cedar* [2014] UKSC 45; [2015] A.C. 250 at [1].

called money had and received certainly is not. Thus we risk reopening this debate and adding to it this doctrinal difficulty.

One positive is that the rules concerning the level of knowledge necessary for a third party to be affected by a fiduciary wrong are not likely to cause trouble here. Technically, there has to be a way for the third party to be affected, since the underlying wrong is between principal and fiduciary. The present equitable rule requires the third party have a level of knowledge close to actual knowledge, including “blind-eye knowledge”.[117] But here, the third party is not merely carrying out instructions. He is the instigator and obviously knows of the wrongdoing. There is no doubt this is enough.

Moreover, there is one significant advantage to claiming in dishonest assistance. Since *Novoship (UK) Ltd v Mikhaylyuk* it has been clear that there is a remedy of account of profits against a dishonest assistant, the bribe-giver in this context.[118] This means, provided the relevant conditions are met, any secondary profits the bribe-giver makes by reason of the corrupt scheme may be disgorged. There is simply no sign of this in the common law cases.

It must be noted, as Grower points out in his analysis of *Wood*, that rescission for torts at common law is a self-help remedy, whereas in equity it is at the court’s discretion. Therefore, if rescission is sought where the exercise of this discretion is in doubt, the common law actions are stronger.[119] He notes the cases of ‘half-secret commissions’ in equity, where the existence of the commission is not secret but the amount is. Then, while account of profits is available, rescission is not.[120] But this assumes the common law actions even stretch to half-secret commissions. It has of course been argued here that they are of equitable origin, so the remedies ought to be the same (here, the money remedy would be available, coming from account of profits, but rescission would not). But on Lord Diplock’s explanation of their origin, the conclusion is the same: they developed from the right to rescission *in equity*.[121] It is therefore seems unlikely that framing the claim as a purely common law one would make a difference, and if it did, it would represent a further development in the law.

All in all, the equitable rules are stronger. This is unsurprising since these matters have traditionally been equity’s territory. And taking a bribe or secret commission is probably the worst kind of breach of fiduciary duty. The starting point should therefore be the stronger rules in equity. There may well be good reasons for different liability in some peculiar circumstances. But it is unlikely the present common law rules, born in different circumstances, are the best starting point for getting there.

## 6. Conclusion

It is more likely than not that the common law actions against bribe-takers or briber-givers were an ill-conceived fusion fallacy. They were developed to overcome the restrictions of an era long overcome, so they are obsolete. Even if not so, given the increased flexibility and expanded remedies of equity’s counterpart actions, any advantages they once have fallen away. Thus they are unnecessary. All that is left is the increased complexity from having two parallel claims.

---

[117] *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 W.L.R. 1256 at 1621; *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567; [2017] 2 Lloyd’s Rep. 621.
[118] *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908; [2015] Q.B. 499.
[119] Julius Grower, “The Tort of Bribery Bares its Teeth” (2022) 138 L.Q.R. 15, 18.
[120] *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299, [2007] 1 W.L.R. 2351.
[121] Above, text to n 49.

Moreover, in *Wood v Commercial First Business Ltd*, the Court of Appeal took the view that what mattered was the underlying circumstances. If they were in place, then there would be a prohibition on taking bribes and secret commissions, irrespective of the historic origins of the actions at law and in equity. On this basis, it is illogical to have different equitable and common law remedies for the same wrong.[122]

Given the equitable actions have the flexibility to accommodate this liability, it is the common law actions that should go. The equitable actions have the best starting point and the authority for the common law versions is doubtful. It is true, as Lord Diplock said, that despite all the difficulties, the action against the bribe-giver at common law was “too well established in English law to be questioned”.[123] But, it is submitted, that does not apply to its mere doctrinal compartment if its substance is maintained.

This would leave the equitable duty of loyalty, as applied to lesser engagements where the “ordinary” and broader fiduciary duty of loyalty is inappropriate, as a “no-corruption rule” not to take a bribe or secret commission. It would particularly apply to non-fiduciary (in the broad sense) agents, brokers and perhaps some professional advisers. Indeed, it already seems to be in place for employees. This would be another step in the transformation of the rigid fiduciary duty of the nineteenth century and earlier. It would also be the most effective way of doing the job required.

[122] *Wood* [2021] EWCA Civ 471; [2021] 3 W.L.R. 395 at [53]–[102], particularly [102]. See also the comments in *AIB v Mark Redler* [2014] UKSC 58; [2015] A.C. 1503 particularly at [138].
[123] *Mahesan* [1979] A.C. 374 at 383.