BRIBERY AND SECRET COMMISSIONS: A COMMON LAW-EQUITY DIVIDE?

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Abstract

This article examines the remedies for bribery and secret commissions at common law and equity. It takes as its central premise that differences between the two cannot be justified by reference to history alone and should only arise where the rules are responding to different concerns. In the context of the civil remedies for bribery, both common law and equity are responding to the same concern: to ensure that an agent acts free from any conflict of interest in performing their duties to the principal. The article therefore argues that the differences between common law and equity in this area are unjustified and should be eliminated.

1 INTRODUCTION

A fundamental, albeit controversial,[1] proposition of English private law is that differences between rules at common law and in equity cannot be justified by reference to the jurisdictional origin of those rules alone.[2] If distinctions are to persist today, it should only be because the rules themselves are addressing different concerns: "there is no reason why common law and equity should continue to give competing answers to the same question".[3]

In many respects, the law has moved in that direction. English law no longer recognises a broad doctrine of common mistake in equity that can render a contract voidable,[4] as opposed to void (which is the common law position).[5] Certain cases of illegitimate pressure, namely threats to prosecute family members, which were once treated as instances of the equitable doctrine of undue influence,[6] have now been rationalised within the common law doctrine of duress, which deals with illegitimate pressure.[7] And even the rules for equitable compensation for breach of trust have been aligned somewhat, at least in certain contexts, and for better or worse, with the common law rules for damages for breach of contract.[8]

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[1] Andrew Burrows, "We do this at Common Law but that in Equity" (2002) 22 OJLS 1, 3–5.

[2] FW Maitland, *Equity: a Course of Lectures* (2nd edn, Cambridge University Press 1936), 20; Burrows (2002) 22 OJLS 1; Ben McFarlane, "The Persistence of Equity: Lessons from the Trust" in Ben McFarlane and Steven Elliott (eds), *Equity Today: 150 Years after the Judicature Reforms* (Hart Publishing 2023) 3 (hereafter "*Equity Today*"), 9.

[3] McFarlane, "The Persistence of Equity: Lessons from the Trust" in *Equity Today*, 9.

[4] *Solle v Butcher* [1950] 1 KB 671, but see now *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2003] QB 679, [157]–[160].

[5] At least on the orthodox account. For an argument that that doctrine of common mistake is better explained by implied conditions to be found in the parties' agreement, see Jordan English, *Discharge of Contractual Obligations* (Oxford University Press, 2025), Ch 7 (forthcoming).

[6] *Williams v Bayley* (1866) LR 1 HL 200; *Kaufman v Gerson* [1904] 1 KB 591; *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389.

[7] *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2021] UKSC 40; [2021] 2 Lloyd's Rep 234; [2023] AC 101, [5]–[9]; [89]–[90].

[8] *Target Holdings Ltd v Redferns* [1996] AC 421; *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58; [2015] AC 1503, esp. [71], although cf [136]–[137]. See also Paul S Davies, "Concurrent Liability: A Spluttering Revolution" in Sarah Worthington, Andrew Robertson, and Graham Virgo, *Revolution and Evolution in Private Law* (Hart Publishing 2018), 273, 291.

Yet there is an area in which complex and conflicting rules at common law and in equity have been allowed to proliferate—the law concerning the remedies for bribery and secret commissions.[9] In this context, the common law-equity divide is stark. In an attempt to get into the common law's seemingly more generous remedial armoury when it comes to bribes and secret commissions,[10] cases are fought on the ground of whether a commission is "fully secret" (i.e. undisclosed) such that the common law rules on bribery are applicable, or "half-secret" (i.e. partially disclosed) with the result that "the payment is not in law a bribe but, where there is a fiduciary relationship, equitable remedies are available if the disclosure is insufficient for informed consent".[11] The result is that significant differences in treatment flow from minor factual differences.

This article examines whether the remedies for bribery and secret commissions should differ at common law and in equity. It argues that they should not. The article takes as its central premise that "if… the duty not to take a bribe arises from a common reason, then it is incoherent to have diverging rules".[12] It will be shown that both common law and equity are concerned to ensure that an "agent" acts free from any conflict of interest in performing their duties to the "principal".[13] Given that they are responding to the same concern, a claimant should not be advantaged in this area by framing their claim as one at common law or in equity.

The article proceeds in four parts. Part II ("Why liability for bribery matters") explains why, on the state of the present law, liability for bribery at common law matters, as opposed to liability for breach of fiduciary duty or liability for dishonestly assisting a breach of fiduciary duty in equity. In other words, why might a claimant wish to frame their claim as a common law rather than equitable one? Part III ("What is required to trigger the common law remedies for bribery?") then considers the triggers for the common law's remedial response. The purpose of this part is to show that common law and equity are both concerned with the agent's obligation not to let their interests conflict with the duties owed to their principal. In addition to setting out what constitutes a bribe or secret commission and whether for the common law to be engaged the payment (or promise of payment) must be made either to an "agent", a person who owes fiduciary obligations, or a person who owes "a duty to be impartial and to give disinterested advice, information or recommendations"[14] (a "disinterested duty"), this part considers the distinction between undisclosed (secret) and partially disclosed commissions.

Part IV ("Should the remedies be different?") then focuses on the core question of this article. It addresses two key areas in which the greatest divergence exists between common law and equity: (i) rescission following the payment of a bribe and (ii) the liability of the bribe offeror or bribe giver (the "briber").

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[9] This article uses the language of "bribes" and "secret commissions" interchangeably. Sir Peter Millett argued that a "bribe" is a payment for made for a corrupt purpose whereas because it is not necessary that a payment be made for a corrupt purpose to be recoverable on this ground, such payments were best described as "secret commissions": Sir Peter Millett, "Bribes and Secret Commissions" (1993) 1 RLR 7, 7 fn 2. While it will sometimes be useful to keep this distinction in mind, a secret commission is treated as a bribe for the purposes of civil law claims: *Johnson v Firstrand Bank Ltd (London Branch) T/A Motonovo Finance* [2024] EWCA Civ 1282, [53]. Therefore no distinction will be drawn between them in this article.

[10] Cf the suggestion in Paul S Davies, "Bribery" in Paul S Davies and James Penner (eds), *Equity, Trusts, and Commerce* (Hart Publishing 2017) 225 (hereafter "*Equity, Trusts, and Commerce*"), 227.

[11] *Johnson v Firstrand Bank Ltd* [2024] EWCA Civ 1282 [68]. See, eg, *McWilliam v Norton Finance UK Ltd* [2015] EWCA Civ 186; [2015] 1 All ER (Comm) 1026; *Nelmes v NRAM* [2016] EWCA Civ 491; [2016] CTLC 106; *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd* [2019] EWCA Civ 83; [2019] 1 WLR 4481; *Prince Eze v Conway* [2019] EWCA Civ 88.

[12] Derek Whayman, "Liability for bribes and secret commissions at common law: obsolete, unnecessary and probably a fusion fallacy" [2022] Conv 184, 186.

[13] As will be seen in Part III, it is not strictly necessary for the bribee to be an agent of the claimant, although this is common.

[14] *Wood v Commercial First Business Ltd* [2021] EWCA Civ 471; [2021] 2 Lloyd's Rep 644; [2022] Ch 123, [102].

Rescission is said to be "discretionary" in equity,[15] such that courts can refuse to rescind the transaction where this would be "unfair and disproportionate".[16] By contrast, at common law, it is a matter of "right".[17] This makes it crucial whether the rules of rescission engaged are those in equity or at common law. Part IV argues that even if rescission is effected by a court order (as it is in equity for breach of fiduciary duty) it does not follow that courts should have a strong, unstructured, discretion to decide whether to grant rescission or not. In this respect, the common law approach is to be preferred.

The key difference in respect of the liability of the briber is that at common law the briber is liable for the value of the bribe irrespective of any loss caused or profit obtained,[18] whereas in equity they are liable only for losses actually caused or profits personally obtained.[19] This unusual form of liability conflicts with the rules in equity and its justification is less than clear. There are also instances where the rule has led to double recovery. Part IV therefore also argues that the briber should only be liable for losses actually caused or profits personally obtained, albeit that the principal may benefit from a (rebuttable) presumption of loss where a bribe has been paid. Here, the law as it stands in equity is to be preferred.

The issues addressed in this article are important and relevant to legal practice. There are no shortage of judicial statements about the dangers of bribery,[20] and the differing remedies at common law and equity have been addressed by the Court of Appeal on no less than five separate occasions.[21] The defendants in the latest case in that saga, *Johnson v Firstrand Bank Ltd (London Branch) T/A Motonovo Finance*,[22] have recently been given permission to appeal by the Supreme Court. That case, which deals with commissions paid by finance companies to motor car dealers as part of finance agreements entered into with consumers, has had a significant impact on the motor finance market.[23] The consequences for lenders of having been found to have paid a secret commission are serious.[24] It is therefore essential that if there is a divergence between the remedies available at common law and equity, that difference is justified. This article argues that it is not.

2 WHY LIABILITY FOR BRIBERY MATTERS

The law on bribery is complex. This is in part because bribery can give rise to several distinct yet overlapping forms of liability. Before considering why a claimant might wish to frame their claim so as to fall within the common law's rules, it is worth outlining what these forms of liability are.

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[15] *Spence v Crawford* [1939] 3 All ER 271, 288; *Johnson v EBS Pensioner Trustees Ltd* [2002] EWCA Civ 164; [2002] Lloyd's Rep PN 309, [78]–[79]; *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299; [2007] 1 WLR 2351, [47]; *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch); [2008] 1 All ER 1004, [203]; *Conway v Prince Eze* [2018] EWHC 29 (Ch), [148]; *UBS AG (London Branch) v Kommunale Wasserweke Leipzig GmbH* [2017] EWCA Civ 1567; [2017] 2 Lloyd's Rep 621; [2017] 2 CLC 584, [157], [370]–[371].

[16] *Hurstanger* [2007] EWCA Civ 299, [47]–[50]; *UBS v Kommunale Wasserweke Leipzig* [2017] EWCA Civ 1567, [157], [370]–[371].

[17] *Conway v Prinze Eze* [2018] EWHC 29 (Ch), [148]–[149].

[18] See, eg, *Mahesan v Malaysia Government Officers' Co-Operative Housing Society Ltd* [1979] AC 374, 383

[19] *Fyffes Group Ltd v Templeman* [2000] 2 Lloyds Rep 643, 660; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); [2006] F.S.R. 17, [1577], [1600]; *Novoship (UK) Ltd v Mikhaylyuk* [2012] EWHC 3586 (Comm) [99]; *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908; [2015] QB 499, [84].

[20] *Parker v McKenna* (1874) LR 10 Ch App 96, 125; *Attorney General of Hong Kong v Reid* [1994] 1 AC 324, 330; *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45; [2014] 2 Lloyd's Rep 471; [2015] 1 AC 250, [42].

[21] See the authorities referred to in fn 11.

[22] [2024] EWCA Civ 1282.

[23] Letter from Financial Conduct Authority to Registry of the Supreme Court regarding support for application for expedition (2 December 2024).

[24] Geraint Howells, "The Consumer Credit Litigation Explosion" (2010) 126 LQR 617, 636.

Starting with liability in equity, where a bribe or secret commission is paid to a fiduciary—that is, a person owing fiduciary obligations—the payment will amount to an unauthorised profit obtained by the recipient in breach of their obligation of loyalty. The bribe recipient will therefore be required to account for and disgorge the profits obtained in breach of fiduciary duty,[25] which would include the value of the bribe. It is also now clear that the recipient holds the bribe, and its traceable proceeds, on constructive trust.[26]

Furthermore, the bribe recipient would be exposed to the loss-based remedy of equitable compensation for breach of fiduciary duty, provided it can be shown that there is a causal connection between the payment of the bribe and the loss suffered by the principal.[27] The requirement to show a but-for connection between the breach of fiduciary duty and the loss suffered by the principal applies even if the breach of fiduciary duty is dishonest or fraudulent.[28] However, this remedy cannot be combined with the gain-based remedies outlined above.[29] The two remedies are alternative in the sense that "recovering under one remedial head *pro tanto* satisfies the other head".[30] Every penny that is recouped by way of disgorgement of profits diminishes the loss that the principal has suffered by a penny, and vice versa.[31] The principal should only ever be able to claim the greater of the profit made by the fiduciary or the loss obtained; they should not be able to combine the two and claim both. To permit this would be to allow double recovery.

The payor of the bribe may also be liable in equity if it can be shown that they dishonestly assisted in the breach of fiduciary duty. "Dishonesty" in this context is an objective test.[32] While the payor's subjective state of mind is relevant to what they actually knew, whether their conduct was dishonest is judged objectively "according to the standards of ordinary decent people."[33] However, "dishonesty" will not inevitably be shown by the payment of a bribe. As explained in Part III below, the civil law definition of bribery is incredibly expansive and "it is not necessary in order to establish a claim for a claimant to show that the bribe was either paid, or received dishonestly".[34] Assistance on the other hand merely requires that "the defendant's actions have made the fiduciary's breach of duty easier than it would otherwise have been",[35] and this will inevitably have been satisfied by the payment of the bribe.

Where a briber is found liable as a dishonest assistant they will ordinarily be liable to disgorge any profits that they have personally obtained as a result of their assistance in the breach of fiduciary duty[36] and will also be jointly and severally liable (with the fiduciary) for any loss resulting from the breach of fiduciary

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[25] *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *Boardman v Phipps* [1967] 2 AC 46; *Murad v Al-Saraj* [2005] EWCA Civ 959.
[26] *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45. On tracing generally, see Mohammud Jaamae Hafeez-Baig and Jordan English, *The Law of Tracing* (Federation Press 2021).
[27] *Swindle v Harrison* [1997] 4 All ER 705; *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048; [2004] 1 BCLC 131.
[28] *Gwembe Valley* [2003] EWCA Civ 1048, [142]–[147].
[29] *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514.
[30] Matthew Frey and Zihang Liu, "Equitable set off, election and constructive trusts" (2024) 140 LQR 331, 334. See also James Edelman, *Gain-based Damages* (Hart Publishing 2002), 246 ("Each remedy also *incidentally* performs the function of the other remedies. … The highest in quantum of all of these remedies operates to serve the purposes of the others").
[31] I am grateful to my colleague, Professor Robert Stevens, for this point, which he has made for several years in Commercial Remedies seminars on the BCL/MJur.
[32] After a period of some doubt: see the discussion of the authorities in *Group Seven Ltd v Nasir* [2019] EWCA Civ 614; [2020] Ch 129, [33]–[58].
[33] *Ibid*, [58].
[34] *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm), [72], citing *Re a debtor* [1927] 2 Ch 367, 376.
[35] *Group Seven* [2019] EWCA Civ 614, [110], quoting David Hayton, Paul Matthews, and Charles Mitchell, *Underhill & Hayton, Law of Trusts and Trustees* (19th edn, LexisNexis Butterworths 2016) [98.56].
[36] *Fyffes Group Ltd v Templeman* [2000] 2 Lloyds Rep 643, 660; *Ultraframe* [2005] EWHC 1638 (Ch), [1577], [1600]; *Novoship* [2012] EWHC 3586 (Comm), [99]; *Novoship* [2014] EWCA Civ 908, [84]. As explained below (*post*, text to fn 66), at least as against a dishonest assistant, an account of profits is said to be "discretionary": *Novoship* [2014] EWCA Civ 908, [119]–[120].

duty.[37] Again, as against the dishonest assistant, these two remedies cannot be combined—the claimant should only ever get the larger of the two.

The actions and remedies described above all arise in equity. But as mentioned, bribery and secret commissions can also give rise to liability at common law. The payor and payee of a bribe both commit what, for want of a better phrase, can be called the "tort of bribery".

The precise nature of the tort of bribery has been "the subject of some debate".[38] In *Mahesan v Malaysia Government Officers' Co-Operative Housing Society Ltd*,[39] Lord Diplock suggested that the wrong was "sui generis and defies classification". It has sometimes been referred to as an action for fraud.[40] But this is both "unhelpful" and "misleading".[41] It is unhelpful insofar as it "suggests that it is an aspect of the law of deceit".[42] This is because usually there will have been no representation made by the briber or bribee to the principal, "let alone reliance" by the principal.[43] And it is misleading because "it suggests that dishonesty is an element of the cause of action".[44] As we have just seen, there is no requirement to prove dishonesty on the part of the briber or bribee.[45] It is better simply to refer to the action as a distinct civil wrong, namely, the "tort of bribery", albeit that even this label disguises the fact that two wrongs are capable of being committed: the payment (or offer of payment) of the bribe by the briber and the acceptance of the bribe by the bribee.[46]

What is important for present purposes is not the classification of the wrong but the fact that it gives rise to distinct remedies at common law that run in parallel with the remedies available for breach of fiduciary duty in equity.[47] In particular, the briber and bribee are jointly and severally liable in damages for any loss that has been suffered by the principal as a consequence of the payment of the bribe or, more specifically, the entry into the transaction in respect of which the bribe was paid.[48] The briber and bribee are also jointly and severally liable for the value of the bribe.[49] This is sometimes referred to as an action for "money had and received".[50] The potential justifications for this remedy are discussed in Part IV below, but it is well established as a matter of positive law. Similar to breach of fiduciary duty and dishonest assistance, at least as against a single defendant, the remedy of compensatory damages for loss and the remedy for the value of the bribe cannot be combined so as to recover both.[51]

Finally, bribery can have an effect on the validity of a transaction entered into by the principal in connection with the bribe. If an agent is contracting on behalf of the principal, then any contract the agent purports

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[37] *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 392; *Ultraframe* [2005] EWHC 1638 (Ch), [1600]; *Group Seven* [2019] EWCA Civ 614, [110].
[38] Nico Leslie and Aaron Taylor, "Civil Claims" in Richard Lissack and Fiona Horlick (eds), *Lissack and Horlick on Bribery and Corruption* (3rd edn, LexisNexis 2020) 664 (hereafter "*Lissack and Horlick*"), 694 [17.111].
[39] [1979] AC 374, 383.
[40] See, eg, *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha, and Telegraph Works Co* (1875) LR 10 Ch App 515, 526; *Salford Corp v Lever* [1891] 1 QB 168; *Mahesan* [1979] AC 374, 382–383; *Petrograde Inc v Smith* [2000] 1 Lloyd's Rep 486, 490.
[41] Thomas Grant and David Mumford (eds), *Civil Fraud* (1st edn, Sweet & Maxwell 2018) (hereafter "*Civil Fraud*"), 207 [7-013].
[42] *Ibid.*
[43] *Petrograde* [2000] 1 Lloyd's Rep 486, 490 [19]. See also Leslie and Taylor, "Civil Claims" in *Lissack and Horlick*, 694 [17.111].
[44] *Civil Fraud*, 207 [7-013].
[45] *Supra*, fn 34.
[46] Leslie and Taylor, "Civil Claims" in *Lissack and Horlick*, 694 [17.111]. See also Paul McGrath, *Commercial Fraud in Civil Practice* (2nd edn, Oxford University Press 2014) (hereafter "*Commercial Fraud in Civil Practice*"), 327–328 [10.23].
[47] *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643, 660.
[48] *Mahesan* [1979] AC 374, 383; *ibid.*
[49] *Mahesan* [1979] AC 374, 383.
[50] See, eg, *ibid.*
[51] *Ibid* ("the principal has these alternative remedies… but he cannot recover both").

to enter into on the principal's behalf is likely to be void (in the sense of no contract ever having been validly made) on the basis that the agent does not have the actual or ostensible authority to enter a contract in these circumstances.[52] But where, as is common, the bribe recipient is merely advising the principal in relation to transactions entered into directly on their own account, then the transaction will be perfectly valid. Instead, the principal is given a power to rescind the agreement at common law or seek rescission in equity.[53]

At common law, the ground of rescission is the bribery itself.[54] For a transaction to be liable to be rescinded for bribery, all that need be shown is that the transaction the principal is seeking to have set aside was entered into while the agent was "tainted by bribery"[55] and that the counterparty to the contract was aware of the payment of the bribe.[56] There is no need to prove that the bribe was a cause of the transaction being entered into or that the agent's mind was influenced in any way.[57]

Bribery is also a ground for rescission in equity,[58] but in equity there is an overlapping (or perhaps subsuming) ground of rescission available where an agent has acted in breach of fiduciary duty in bringing about a transaction, provided that the counter-party to the contract was aware of the agent's breach of fiduciary duty.[59] Again, there is no requirement of causation here.[60]

With all these overlapping forms of liability at common law and in equity, a newcomer could be forgiven for wondering why any of it matters. One way or another, a principal whose agent has been paid a bribe will be entitled to some form of redress whether against the bribe giver or the recipient. But despite the principal's embarrassment of riches, there are significant and important differences between the remedies available at law and in equity and it matters which way a claimant is able to establish their claim.

First, although rescission is available at law and in equity, rescission in equity is said to be "discretionary",[61] such that when rescission in equity alone is engaged the court can refuse to rescind the transaction where this would be "unfair and disproportionate".[62] By contrast, rescission at common law is a matter of right.[63]

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[52] *Hopkins v TL Dallas Group Ltd* [2004] EWHC 1379 (Ch); [2005] 1 BCLC 543, [88]–[89]; *Criterion Properties Plc v Stratford UK Properties LLC* [2004] UKHL 28; [2004] 1 WLR 1846, [31]. See *Commercial Fraud in Civil Practice*, 330–331 [10.31]–[10.35]; Julius Grower, "The tort of bribery bares its teeth" (2022) 138 LQR 15, 16.

[53] *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha, and Telegraph Works Co* (1875) LR 10 Ch App 515, 526; *Logicrose Ltd v Southend United Footbal Club Ltd* [1988] 1 WLR 1256, 1260; *Wood v Commercial First Business Ltd* [2021] EWCA Civ 471, [97]–[100].

[54] *Smith v Sorby* (1875) 3 QBD 552.

[55] *Novoship* [2012] EWHC 3586 (Comm), [109]. See also *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch); [2005] Ch 119, [53]; *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] UKSC 32; [2023] 2 Lloyd's Rep 564; [2024] 1 All ER 763, [86].

[56] *Logicrose* [1988] 1 WLR 1256, 1261–1262. See generally, Dominic O'Sullivan, Steven Elliott, and Rafal Zakrzewski, *The Law of Rescission* (3rd edn, Oxford University Press 2023) (hereafter "*The Law of Rescission*"), 224–227 [8.61]–[8.71].

[57] *Parker v McKenna* (1874) LR 10 Ch App 96, 124–125; *Shipway v Broadwood* [1899] 1 QB 369, 373; *Logicrose* [1988] 1 WLR 1256, 1260–1261. See generally, *Civil Fraud*, 219–220 [7-048]; *The Law of Rescission*, 227–228 [8.72]–[8.73].

[58] *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha, and Telegraph Works Co* (1875) LR 10 Ch App 515, 526; *Mahesan* [1979] AC 374, 380; *Wood v Commercial First Business Ltd* [2021] EWCA Civ 471, [98].

[59] Steven Elliott (ed), *Snell's Equity* (35th edn, Sweet & Maxwell 2025), 199 [7-060]. See, eg, *Hurstanger* [2007] EWCA Civ 299, [34]; *Gwembe Valley* [2003] EWCA Civ 1048, [144]; *UBS v Kommunale Wasserweke Leipzig* [2017] EWCA Civ 1567, [119]; *Johnson v Firstrand Bank Ltd* [2024] EWCA Civ 1282, [57].

[60] *UBS v Kommunale Wasserweke Leipzig* [2017] EWCA Civ 1567, [155].

[61] *Spence v Crawford* [1939] 3 All ER 271, 288; *Johnson v EBS Pensioner Trustees Ltd* [2002] EWCA Civ 164, [78]–[79]; *Hurstanger* [2007] EWCA Civ 299, [47]; *Ross River* [2007] EWHC 2115 (Ch), [203]; *Conway v Prince Eze* [2018] EWHC 29 (Ch), [148]; *UBS v Kommunale Wasserweke Leipzig* [2017] EWCA Civ 1567, [157], [370]–[371].

[62] *Hurstanger* [2007] EWCA Civ 299, [47]–[50]; *UBS v Kommunale Wasserweke Leipzig* [2017] EWCA Civ 1567, [157], [370]–[371].

[63] See, eg, *Conway v Prinze Eze* [2018] EWHC 29 (Ch), [148]–[149].

Secondly, although damages for consequential loss and disgorgement of the bribe are available both at common law and in equity against the *recipient* of the bribe, the position is not the same in respect of the bribe *giver*. At common law, the briber is liable, without more, for consequential loss *and* for the value of the bribe.[64] But in equity, the assister is only liable if "dishonest" (which is not required at common law) and insofar as an account of profits is concerned, only liable for their own profits,[65] which would usually not include the payment of the bribe that they themselves have paid, not received. Moreover, an account of profits, at least as against a dishonest assistant, is also said to be "discretionary".[66]

Finally, in part because of confusion about the precise justification for making the briber liable at common law for the value of the bribe, a number of cases have held that, as against the briber, the principal is able to "claim for the disgorging of the secret commission and for rescission of the transaction as of right".[67] As explained in Part IV below, the outcome is double recovery in the common circumstance where secret commissions are paid by finance companies to brokers and the borrower "[i]n effect… pays for the commissions through the enhanced interest rate charged on the loan."[68] Yet in two recent cases, this is precisely what has happened.[69] There is little doubt that this would not be possible in equity.

These differences mean that claimants have a particular incentive to bring their case within the common law rules for bribery, as opposed to the overlapping rules in equity. If they can succeed in doing so then in contrast to what would be the position in equity, (i) rescission is available as a matter of right, (ii) both the briber and bribee are liable for consequential loss and for the value of the bribe without having to show that the briber was dishonest, and (iii) the potential claimant could get both rescission and the value of the commission as against the briber. These are potent weapons in favour of the victim of a bribe but the question that needs to be answered is whether these substantive differences are justified.

3 WHAT IS REQUIRED TO TRIGGER THE COMMON LAW REMEDIES FOR BRIBERY?

This part considers what is required to trigger the common law's remedies for bribery. The diverging rules and remedial responses at common law and in equity are only problematic *if* "the duty not to take a bribe arises from a common reason".[70] As will be seen, all aspects of the law of bribery—including what constitutes a bribe and the relationship between the bribee and the claimant that is necessary to trigger the common law's remedial response—reflect the common law's concern to ensure that the "agent" acts free from any conflict of interest in performing their duties to the "principal". This is the same substantive concern that is addressed by the equitable rules on breach of fiduciary duty. And while the case law has drawn a distinction, defensible on its own terms, between undisclosed (secret) commissions (which amount to bribes), and partially disclosed commissions (which do not), the distinction only matters because the remedies at common law differ from those available in equity. The next part (Part IV) shows that they should not.

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[64] *Mahesan* [1979] AC 374, 383.
[65] *Fyffes Group Ltd v Templeman* [2000] 2 Lloyds Rep 643; *Ultraframe* [2005] EWHC 1638 (Ch), [1577], [1600]; *Novoship* [2012] EWHC 3586 (Comm), [99]; *Novoship* [2014] EWCA Civ 908, [84].
[66] *Novoship* [2014] EWCA Civ 908, [119]–[120].
[67] *Johnson v Firstrand Bank Ltd* [2024] EWCA Civ 1282, [77].
[68] *Kasperczak v Firstrand Bank Ltd (London Branch) T/A Motonovo Finance* [2024] EWCC 22, [42].
[69] See *Wood v Commercial First Business Ltd (in liq)* [2019] EWHC 2205 (Ch), [150]–[153], [186] (affirmed on appeal: *Wood v Commercial First Business Ltd* [2021] EWCA Civ 471) and *Johnson v Firstrand Bank Ltd* [2024] EWCA Civ 1282 (specifically, the order in *Hopcraft v Close Brothers Ltd* CA-2024-000482 [4]–[5]).
[70] Whayman [2022] Conv 184, 186.

What is a "bribe"?

English law takes "a broad view of what constitutes a bribe for the purposes of civil claims".[71] Broadly speaking, a bribe "consists of a promise or payment of commission or other inducement, which is given by a third party to an agent as such, and which is secret from his principal."[72] In *Novoship (UK) Ltd v Mikhaylyuk*,[73] Christopher Clarke J said: "The essential character of a bribe is, thus, that it is a secret payment or inducement that gives rise to a realistic prospect of a conflict between the agent's personal interest and that of his principal."

One of the oddities about civil liability for bribery is that many of the features which make bribery "evil" are deemed to exist and therefore do not need to be proven.[74] There is no need to show the briber acted with corrupt motive or that the briber or bribee were dishonest.[75] Nor is it necessary to show that the briber intended to influence the bribee or that the bribee was, in fact, influenced by the payment of the bribe.[76] All that needs to be shown is that the alleged briber knew of the agent's personal interest, i.e. that the agent was put in a position where their private interest would conflict with the duties owed to their principal.[77]

The basis for the strict approach taken in the cases is often said to be the agent's obligation not to let their interests conflict with the duties owed to their principal. So in *Novoship*,[78] Christopher Clarke J said: "The underlying rationale for the strict approach taken by the cases is that a principal is entitled to be confident that an agent will act wholly in his interests". And similarly, in *Fiona Trust v Privalov*,[79] Mr Justice Andrew Smith said:

> "The reason that the law so protects a principal if his agent receives a bribe is that he is entitled to be confident that the agent will act wholly in his interests, and the test for whether a payment or other benefit or promise amounts to a bribe depends upon whether it puts the agent in a position in which his duties to his principal and his interest might conflict."

There are numerous judicial statements to this effect.[80] Where an agent places themselves in a position of conflict by accepting a bribe, "the principal is deprived of the disinterested advice of the agent, to which the principal is entitled."[81] That is said to be sufficient to engage the common law's remedies for bribery. It can be seen that the common law's concern here is the same as in equity: that the agent avoid any conflict of interest.

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[71] *Fiona Trust v Privalov* [2010] EWHC 3199 (Comm), [70]. See generally, *Civil Fraud*, 204–206 [7-009]–[7-012]; *Commercial Fraud in Civil Practice*, 324–326 [10.10]–[10.12].
[72] *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd* [1990] 1 Lloyd's Rep 167, 171; cited with approval in *Mozambique v Privinvest Shipbuilding* [2023] UKSC 32, [86]. The longer, classic, definition of a bribe is from *Industries & General Mortgage Co Ltd v Lewis* [1949] 2 All ER 573, 575.
[73] [2012] EWHC 3586 (Comm), [106].
[74] *Commercial Fraud in Civil Practice*, 322 [10.06]. See also *Civil Fraud*, 208–210 [7-016]–[7-022].
[75] *Re a debtor* [1927] 2 Ch 367, 376; *Daraydan* [2004] EWHC 622 (Ch), [53]; *Fiona Trust v Privalov* [2010] EWHC 3199 (Comm), [72].
[76] *Shipway v Broadwood* [1899] 1 QB 369, 373; *Hovenden & Sons v Millhoff* (1900) 83 LT 41, 43; *Logicrose* [1988] 1 WLR 1256, 1260; *Daraydan* [2004] EWHC 622 (Ch), [53]; *Fiona Trust v Privalov* [2010] EWHC 3199 (Comm), [72]; *Novoship* [2012] EWHC 3586 (Comm), [108].
[77] *Logicrose* [1988] 1 WLR 1256, 1261 (although see the exception at 1262). See generally, Thomas Grant and David Mumford (eds), *Civil Fraud*, 213–214 [7-033]–[7-036].
[78] [2012] EWHC 3586 (Comm), [110].
[79] [2010] EWHC 3199 (Comm), [73]
[80] In addition to the above, see *Parker v McKenna* (1874) LR 10 Ch App 96, 118; *Shipway v Broadwood* [1899] 1 QB 369, 373; *Logicrose* [1988] 1 WLR 1256, 1260; *Daraydan* [2004] EWHC 622 (Ch), [52].
[81] *Daraydan* [2004] EWHC 622 (Ch), [52]. See also *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha, and Telegraph Works Co* (1875) LR 10 Ch App 515, 520.

The requisite relationship: agency, fiduciary obligations, or "disinterested duty"?

The next question that needs to be considered in this part is what sort of relationship between the bribee and the claimant is necessary to trigger the common law's remedial response. The position in equity is clear: the bribee must owe the claimant a fiduciary obligation of loyalty before either the briber or bribee can be liable. If equity and the common law are responding to the same concern then we would expect that the requisite relationship to trigger each's remedial response would be the same, or the very least similar. This section shows that they are.

A large number of cases have used the language of "agency" to describe the requisite relationship at common law.[82] In *Industries & General Mortgage Co Ltd v Lewis*,[83] for example, Slade J referred to a bribe consisting simply of the making of a payment "to the *agent* of the other person with whom he is dealing", while knowing that that person "is acting as the *agent* of the other person" and failing to disclose that the payment was made "to the person whom he knows to be the other person's *agent*". A leading practitioner text similarly states that a bribe "consists of no more and no less than the payment of, or a promise to make a payment of, a secret commission *to an agent*."[84]

But, as recent cases have recognised, although the bribee often will be an agent of the claimant, it would not be appropriate to restrict the remedies for bribery to someone who was an agent strictly so-called.[85] As we have seen, the concern to which the common law remedies on bribery respond is the risk that the bribee will, in breach of duty, let their interests conflict with the duties owed to the "principal". And there is no reason why no-conflict duties should be confined to true agency relationships. As the Court of Appeal observed in *Conway v Prince Eze*:

> "It is clear from the authorities that in order for the law of bribery and secret commissions to be engaged there must be a relationship of trust and confidence between the recipient of the benefit or the promise of a benefit and his principal (used in the loosest of senses) which puts the recipient in a real position of potential conflict between his interest and his duty. Not all agents will be in such a position and the relationship may arise where there is no agency at all."[86]

The Court went on to note that "[d]espite the use of the term 'agent' in the older cases, merely to characterise a relationship as one of agency, is not necessarily enough to engage the law of bribes."[87]

An alternative view is that what is required to trigger the common law's remedies for bribery is the existence of a fiduciary obligation of loyalty owed by the bribee to the claimant.[88] On this view, the reason why the law of bribery is concerned with whether the payment "gives rise to a realistic prospect of a conflict between the agent's personal interest and that of his principal"[89] is that the law of bribery is itself a

[82] *Industries & General Mortgage Co Ltd v Lewis* [1949] 2 All ER 573, 575; *Petrotrade Inc v Smith* [2000] 1 Lloyd's Rep 486, 489–490 [16]; *Fiona Trust v Privalov* [2010] EWHC 3199 (Comm), [73]; *Novoship* [2012] EWHC 3586 (Comm), [106].
[83] [1949] 2 All ER 573, 575 (emphasis added).
[84] *Commercial Fraud in Civil Practice*, 324 [10.10] (emphasis added).
[85] *Wood v Commercial First Business Ltd* [2021] EWCA Civ 471, [51]; *Conway v Prince Eze* [2019] EWCA Civ 88, [39].
[86] *Conway v Prince Eze* [2019] EWCA Civ 88, [39].
[87] *Ibid*, [40].
[88] *Ibid*, [39]–[43].
[89] *Novoship* [2012] EWHC 3586 (Comm), [106].

manifestation of the law on fiduciary duties.[90] The only oddity is that it is the common law, as opposed to equity, responding to a breach of fiduciary duty. As a matter of history, this is unusual.[91]

Despite this oddity, there is no doubt that the bribee has been "traditionally described as a fiduciary, and the receipt of a bribe of secret commission as a breach of fiduciary duty".[92] It is also not in doubt that in most of the authorities "it has been assumed that the plaintiff, in order to succeed, must prove that a "fiduciary relation" existed between himself and the [bribee] and that the [bribee] acted in breach of this relation."[93] But it must also be admitted that there were statements suggesting that the term "fiduciary relationship" was being used "in a very loose, or at all events a very comprehensive, sense".[94] This in turn led to a criticism. As Aaron Taylor put it, "[a]lthough this analysis allowed the courts to grant relief in the relevant cases, it was unsatisfactory as a matter of principle, because it stretched the notion of a fiduciary beyond recognisable bounds."[95]

The response to this criticism came in the form of *Wood v Commercial First Business Ltd.*[96] In that case, the Court of Appeal (David Richards LJ, with whom Males and Elisabeth Laing LJJ agreed) held that there was no need to prove a fiduciary *relationship*. In David Richards LJ's view, "[t]he suggested requirement for a fiduciary relationship is no more than saying that, in the type of case with which we are concerned, the payee of the bribe or secret commission must owe a duty to provide disinterested advice or recommendations or information."[97] He later added:

> "In cases such as the present where an 'agent' providing advice, information or recommendations has received or been offered a bribe or secret commission, the question that the court should ask and focus on is: did the 'agent' owe a duty to be impartial and to give disinterested advice, information or recommendations? … Courts have, principally in recent cases, characterised this as a fiduciary duty of loyalty. While this may be accurate, it does not mean that in such cases courts need involve themselves in complex analyses of the nature of a fiduciary relationship or the duties which may be associated with a fiduciary relationship. It would be better to avoid doing so. It is enough just to ask the straightforward question stated above."[98]

Although the decision in *Wood* has been interpreted as rejecting the "fiduciary" requirement,[99] it is submitted that it is better understood simply as rejecting the confusing and misleading task of seeking to establish a fiduciary *relationship* (as opposed to a fiduciary obligation) as a prerequisite to the common law's remedies for bribery.[100] Asking whether a person is in a fiduciary relationship is meaningless. It is a conclusion used to describe the fact that a person owes fiduciary obligations. As Professor Paul Finn has observed, a person "is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."[101] Understood in this way, all the judgment in *Wood* did was suggest that courts should focus on identifying the obligation rather than concluding what kind of relationship exists

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[90] *Civil Fraud*, 203 [7-006].
[91] One possible explanation for this is that, although the actions for bribery are undoubtedly common law actions, they trace their origins to equity: *Wood v Commercial First Business Ltd* [2021] EWCA Civ 471, [96], referring to *Mahesan* [1979] AC 374, 380. See also Whayman [2022] Conv 184.
[92] Aaron Taylor, "Civil claims for secret commissions" (2021) 80 CLJ 452, 453.
[93] *Reading v The King* [1949] 2 KB 232, 236.
[94] *Ibid*, affirmed in *Reading v Attorney General* [1951] AC 507, 516. See also *Conway v Prinze Eze* [2019] EWCA Civ 88, [39].
[95] Taylor (2021) 80 CLJ 452, 453.
[96] [2021] EWCA Civ 471.
[97] *Ibid*, [92].
[98] *Ibid,* [102].
[99] Taylor (2021) 80 CLJ 452.
[100] See eg, *Wood v Commercial First Business Ltd* [2021] EWCA Civ 471, [36]–[37].
[101] *Bristol & West Building Society v Mothew* [1998] Ch 1, 18, citing Paul Finn, *Fiduciary Obligations* (Law Book Co 1977), 2.

between the parties. As Dr Julius Grower has observed in his note on the case, "[i]n most of the judgments cited… the 'impartial advice' each principal was 'entitled' to was information provided free from any conflict of interest, viz breach of fiduciary duty".[102] The careful reader will note that David Richards LJ did not say in the quoted passage above that it is inaccurate—indeed he said it "may be accurate"—to describe the "disinterested duty" as a fiduciary obligation of loyalty (after all, it is difficult to see what else it could be); he simply stressed that this did not require courts to embark on "complex analyses of the nature of a fiduciary relationship".[103]

Whether phrased as a fiduciary obligation of loyalty or a disinterested duty, it is clear that the common law and equity are responding to the same concern: they are both concerned with ensuring that the agent does not place himself "in a position in which his duties to his principal and his interest might conflict."[104] As the Court of Appeal said in *Wood*, "[t]he vice involved in the payment of a bribe, for the purpose of the civil remedies, is that it may induce the payee to depart, consciously or otherwise, from the duties he owes to another person."[105] In this respect, both the common law and equity are answering the same question.

Undisclosed (secret) and partially disclosed commissions

Despite the common law and equity answering the same question, there is one justified difference between the rules, which may explain why a number of matters are deemed in relation to bribes that are not necessarily deemed for all breaches of fiduciary duty (such as dishonesty). In particular, a payment will not constitute a bribe unless it is kept secret from the principal. As Chitty LJ said, in an oft-quoted statement from *Shipway v Broadwood*,[106] "the real evil is not the payment of the money but the secrecy attending it." If the payment is not kept secret, then there is no bribe. By contrast, insofar as the liability of a fiduciary in equity is concerned, it is generally considered not enough to escape liability for an unauthorised profit that the payment has been disclosed to some degree. To escape liability the fiduciary must obtain the fully informed consent of their principal.

It was for this reason that in *Hurstanger Ltd v Wilson*,[107] the Court of Appeal drew a distinction between (i) cases where there has been no disclosure (bribery and breach of fiduciary duty), (ii) cases where there has been some disclosure sufficient to negate secrecy but not so as to amount to the obtainment of fully informed consent to the payment (breach of fiduciary duty only), and (iii) cases where the disclosure made has been sufficient both to negate secrecy and to amount to the obtainment of fully informed consent (neither bribery nor breach of fiduciary duty).[108] In *Hurstanger*, a commission was paid by the claimant lender to the broker of the defendant borrowers. A document signed by the borrowers said, in essence, that a commission "might" be paid to the broker. Tuckey LJ (with whom Jacob and Waller LJJ agreed) said:

[102] Grower (2022) 138 LQR 15, 20.
[103] *Wood v Commercial First Business Ltd* [2021] EWCA Civ 471, [102].
[104] *Fiona Trust v Privalov* [2010] EWHC 3199 (Comm), [73].
[105] *Wood v Commercial First Business Ltd* [2021] EWCA Civ 471, [44].
[106] [1899] 1 QB 369, 373.
[107] [2007] EWCA Civ 299.
[108] In the cases, the first two categories of case have sometimes been referred to as "fully secret" and "half-secret" commissions: see, eg, *Wood v Commercial First Business Ltd* [2021] EWCA Civ 471, [8]. In *Johnson v Firstrand Bank Ltd* [2024] EWCA Civ 1282, [11], the Court of Appeal suggested that this language was "imperfect and potentially misleading: something is either secret or it is not." The Court therefore preferred to describe the second category as one of partial disclosure.

> "Did it negate secrecy? I think it did. If you tell someone that something may happen, and it does, I do not think that the person you told can claim that what happened was a secret. The secret was out when he was told that it might happen."[109]

However, dealing with the liability of the lender in equity, he then said:

> "Was the defendants' informed consent obtained? I do not think it was. … This is a half-way house case. The claimant did not pay the broker a secret commission but procured the broker's breach of fiduciary duty by failing to obtain the defendants' informed consent to the broker acting in the way he did."[110]

The effect of this was that "the defendants [were] not entitled to deploy the full armoury of remedies which would have been available if [it] had been a true secret commission case".[111] In particular, it meant that the defendant borrowers had to seek rescission in equity which, according to the Court of Appeal, was a remedy entirely in the court's discretion.[112] While the borrowers were entitled to claim equitable compensation against the lender for the value of the commission, on the facts Tuckey LJ considered that because the substantive agreement was otherwise fair "[t]o rescind the transaction altogether would be unfair and disproportionate."[113] The Court therefore declined to order rescission.

The decision in *Hurstanger*, and in particular the distinction between undisclosed and partially disclosed commissions, has been followed in subsequent cases.[114] On its own terms, the distinction is unobjectionable. But the only reason the distinction matters, as *Hurstanger* illustrates, is because the remedies at common law differ from those available in equity. Given that both common law and equity are answering the same substantive question, the next part argues that the remedies should not differ between common law and equity.

4 SHOULD THE REMEDIES BE DIFFERENT?

The previous part established that common law and equity are responding to the same concern. The duty not to take a bribe arises because it creates a conflict of interest between the bribee's duty to their principal (viz. to provide "disinterested advice" or to act "loyally") and their own interests or perceived duties owed to third parties. Given that common law and equity are both seeking to achieve the same end, there is no reason in principle why the remedies should be different.

This part therefore considers two areas in the law of bribery in respect of which there has been the greatest divergence between common law and equity: (i) rescission, which is said to be discretionary in equity but a matter of right at common law, and (ii) the liability of the briber, who at common law is liable for the value of the bribe irrespective of any loss caused or profit obtained,[115] yet in equity liable only for losses actually caused or profits personally obtained.[116] These are both areas in which the differences between common law and equity should be eliminated. To put the conclusions upfront: (i) courts should not have a strong

[109] *Hurstanger* [2007] EWCA Civ 299, [43].
[110] *Ibid*, [44]–[45].
[111] *Ibid*, [46].
[112] *Ibid*, [47]–[48].
[113] *Ibid*, [49].
[114] *McWilliam v Norton Finance UK Ltd* [2015] EWCA Civ 186; *Nelmes v NRAM* [2016] EWCA Civ 491; *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd* [2019] EWCA Civ 83; *Prince Eze v Conway* [2019] EWCA Civ 88; *Johnson v Firstrand Bank Ltd* [2024] EWCA Civ 1282.
[115] See, eg, *Mahesan* [1979] AC 374, 383.
[116] *Fyffes Group Ltd v Templeman* [2000] 2 Lloyds Rep 643; *Ultraframe* [2005] EWHC 1638 (Ch), [1577], [1600]; *Novoship* [2012] EWHC 3586 (Comm), [99]; *Novoship* [2014] EWCA Civ 908, [84].

discretion whether to order rescission, even when rescission occurs in equity—here, the common law rule should be followed; and (ii) the briber should only be liable for losses actually caused or profits personally obtained, albeit that the principal may benefit from a (rebuttable) presumption of loss where a bribe has been paid—here, the equitable rule should be followed. This would also avoid the risk of double recovery that has arisen in recent cases.

Rescission

One of the most significant differences in this area between common law and equity arises in relation to the doctrine of rescission. Rescission at common law is said to be "available as of right, subject to making counter-restitution".[117] Rescission in equity, by contrast, is said to be a matter of the court's discretion.[118] This is one of the reasons the distinction between undisclosed (secret) and partially disclosed commissions is so important. If a commission is undisclosed, then its payment (or offer of payment) will constitute a bribe, entitling the principal to rescind at common law for bribery, whereas if a commission is partially disclosed (so as to negate secrecy but not so as to amount to the obtainment of fully informed consent) then the principal will only be entitled to seek rescission in equity for breach of fiduciary duty. And as *Hurstanger* illustrates, in such a case the court may decline to make an order for rescission if it considers that "[t]o rescind the transaction altogether would be unfair and disproportionate."[119]

Part of the reason for the distinction—but not for its continued existence—is that, as a matter of history, common law courts and courts of equity approached rescission in very different ways.[120] At common law, rescission (on the grounds of fraud, duress, or bribery) was, and still is, always an act of the aggrieved party: "the role of the common law court was to adjudicate, in the context of a claim for consequential relief, a contention that the contract had already been extinguished by the aggrieved party's election".[121] Provided that precise restitutio in integrum was possible, common law courts would hold that the rescinding party's election was valid and make such consequential orders as were necessary.[122]

Equity also recognised that rescission could sometimes be effected by an act of the party. Where a vitiating factor was recognised at common law but precise restitutio in integrum was not possible, equity, acting in its concurrent jurisdiction, and due to its ability to take an account of profits and make allowances for deterioration, was willing to do what was "practically just"[123] to achieve substantial restitutio in integrum. Equity therefore recognised as valid acts of rescission that would not have been valid at common law.[124]

But where the ground of rescission was innocent misrepresentation, undue influence, or (relevantly) breach of fiduciary duty, the common law did not recognise a power to rescind and equity acted in its exclusive jurisdiction.[125] In such cases, rescission was effected by an order of the court rather than by an election of

[117] *Wood v Commercial First Business Ltd* [2021] EWCA Civ 471, [101].
[118] *Spence v Crawford* [1939] 3 All ER 271, 288; *Johnson v EBS Pensioner Trustees Ltd* [2002] EWCA Civ 164, [78]–[79]; *Hurstanger* [2007] EWCA Civ 299, [47]; *Ross River* [2007] EWHC 2115 (Ch), [203]; *Conway v Prince Eze* [2018] EWHC 29 (Ch), [148]; *UBS v Kommunale Wasserweke Leipzig* [2017] EWCA Civ 1567, [157], [370]–[371].
[119] *Hurstanger* [2007] EWCA Civ 299, [49].
[120] For a general account, see Janet O'Sullivan, "Rescission as a Self-Help Remedy: A Critical Analysis" [2000] 59 CLJ 509, 516–520; Steven Elliott, "The Basic Structure of Rescission" in *Equity Today*, 169–173.
[121] Elliott, "The Basic Structure of Rescission" in *Equity Today*, 169.
[122] O'Sullivan [2000] 59 CLJ 509, 517.
[123] *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, 1278–1279.
[124] O'Sullivan [2000] 59 CLJ 509, 517–518.
[125] *Ibid*, 518.

the aggrieved party.[126] While there is some confusion on the issue, principally in relation to misrepresentation,[127] this is the position that broadly still obtains today.

However, particularly in the recent cases on bribery and secret commissions, courts have gone even further than this and held that because rescission in equity on the ground of breach of fiduciary duty is effected by a court order, the court enjoys a broad discretion as to whether to grant any relief at all. In *Johnson v EBS Pensioner Trustees Ltd*,[128] for example, Dyson LJ said that rescission for breach of fiduciary duty "depends on the exercise of the discretion by the court to intervene in the enforcement of legal rights". He also said that "[w]hen exercising its equitable jurisdiction, the court considers what fairness requires not only when addressing the question of the precise form of relief, but also when considering whether the remedy should be granted at all."[129] Similarly, in *Hurstanger*, Tuckey LJ said "there is no doubt that the court has a discretion as to whether or not to grant rescission."[130]

If all that were meant by these statements was that courts had to exercise judgment when, for example, ordering consequential relief or deciding whether substantial restitutio in integrum was possible, then these statements would be unobjectionable.[131] It would simply be stating the obvious point that judges enjoy a "weak discretion"[132] in the application of legal rules and principles. As Professor Peter Birks put it in the context of two other equitable remedies, specific performance and injunctions:

> "Many judicial orders are weakly discretionary. Orders for specific performance and injunctions and all others rooted in the Court of Chancery are weakly discretionary. The discretion has been settled over the centuries. … We know on what facts a person is entitled to such orders."[133]

But the statements and their application in the context of rescission seem to go further and suggest that the court, at least when granting rescission in equity, enjoys a "strong discretion" to refuse relief. On this view, the court can simply give or withhold relief depending on whether it considers it appropriate in the specific case, even if a claimant has otherwise brought themselves within the conditions for the grant of the remedy.

Before outlining the problems with giving judges a strong discretion as to whether to order rescission, it should be noted that there is a debate as to whether the law should, for all grounds of rescission (whether at common law or in equity), adopt the "election" model or the "court-order" model or whether some hybrid model should prevail.[134] There is, however, no need to resolve that debate here. That is because the contention being made in this section is narrower. It is that courts should not "enjoy a strong discretion whether to grant relief at all",[135] even if rescission is effected by a court order. There should be no difference in this respect between common law and equity.

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[126] *Ibid*, 518–520; Elliott, "The Basic Structure of Rescission" in *Equity Today*, 170.
[127] See, eg, *Abram Steamship Co Ltd v Westville Shipping Co Ltd* [1923] AC 773, 781; *Alati v Kruger* (1955) 94 CLR 216, 233–224; *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, 457 (undue influence); *SK Shipping Europe Ltd v Capital VLCC 3 Corp (The C Challenger)* [2020] EWHC 3448 (Comm); [2021] 2 Lloyd's Rep 109, [240]–[241]. See the discussion in O'Sullivan [2000] 59 CLJ 509, 521–525.
[128] [2002] EWCA Civ 164, [78].
[129] *Ibid*, [79].
[130] *Hurstanger* [2007] EWCA Civ 299, [47].
[131] See, eg, Elliott, "The Basic Structure of Rescission" in *Equity Today*, 177–178.
[132] Peter Birks, "Rights, Wrongs, and Remedies" (2000) 20 OJLS 1, 16–17; Burrows (2002) 22 OJLS 1, 2.
[133] Birks (2000) 20 OJLS 1, 16.
[134] See O'Sullivan [2000] 59 CLJ 509; Elliott, "The Basic Structure of Rescission" in *Equity Today*.
[135] Elliott, "The Basic Structure of Rescission" in *Equity Today*, 169.

Returning to that contention, there are at least four problems with granting judges a strong discretion as to whether to order rescission. First, a strong discretion whether to order rescission offends against the "fundamental principle… that the law should be as clear and certain as possible."[136] As Deane J observed in the decision of the High Court of Australia in *Muschinski v Dodds*,[137] equitable remedies do not represent "a medium for the indulgence of idiosyncratic notions of fairness and justice". To hold otherwise, would be to give each judge a "portable palm tree".[138] As Professor Steven Elliott KC has observed in relation to this issue:

> "As cases have come before the courts, as well as through the work of commentators, it has over the past century been possible to gradually define and refine the circumstances in which rescission is possible, and with what consequences, so that well advised parties can know with reasonable confidence where they stand. There are of course novel and complex cases in which care may be needed in applying recognised rules and principles. But the courts should not cloud analytic progress in this area by encouraging a concept of justice unmediated by principle."[139]

Secondly, Parliament has already legislated to give courts a discretion to refuse rescission but importantly "it only created that power in cases of innocent misrepresentation".[140] Section 2(2) of the Misrepresentation Act 1967, in particular, provides the court with the power to refuse rescission and award damages in lieu if the court considers "it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party." Not only does Parliament intervening in this area suggest that it did not think courts otherwise had a strong discretion to refuse rescission (particularly because innocent misrepresentation is a ground of rescission in equity), but the fact that it only did so for innocent misrepresentations is a strong indication that courts should not be in the business of creating that discretion for other grounds of rescission. As Elliott has noted, "[t]he decision in *Hurstanger v Wilson* effectively extends that statutory power to other grounds recognised in equity in respect of which Parliament did not act. This judicial innovation seems to go further than our constitution allows."[141]

Thirdly, such a strong discretion is unnecessary. Proponents argue that it is necessary to ensure that justice is achieved in individual cases.[142] But as Professor Charlie Webb has pointed out, it is a mistake to think that a "rules-based" approach cannot achieve these same results.[143] Importantly, opting for a rules-based approach "does not presume that these rules would not need to be revised or refined, nor does it foreclose their revision or refinement."[144] Whenever justice would require that rescission be denied or ordered, "appropriately framed rules… can bring about that result".[145] A rules-based approach does not deny courts "discretion"; "[a]ll it requires it that this discretion is always in the service of devising or developing such

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[136] Lord Neuberger, "The Remedial Constructive Trust – Fact or Fiction" (Speech at the Banking Services and Finance Law Association Conference, Queenstown, 10 August 2014), [28] <https://supremecourt.uk/speeches/lord-neuberger-at-the-banking-services-and-finance-law-association-conference-queenstown> accessed 1 January 2025. See also Elliott, "The Basic Structure of Rescission" in *Equity Today*, 178.
[137] *Muschinski v Dodds* (1985) 160 CLR 583, 615.
[138] *Taylor v Dickens* [1998] 1 FLR 806, 820; *Guest v Guest* [2022] UKSC 27; [2024] AC 833, [163].
[139] Elliott, "The Basic Structure of Rescission" in *Equity Today*, 178.
[140] *Ibid*, 180.
[141] *Ibid*.
[142] Neuberger, "The Remedial Constructive Trust – Fact or Fiction", [39].
[143] Charlie Webb, "The Myth of the Remedial Constructive Trust" (2016) 69 CLP 353, 372.
[144] *Ibid*, 371.
[145] *Ibid*, 372.

rules".[146] Indeed, as Lord Neuberger has observed: "Judges have a duty to develop the common law and equity, particularly in the present fast changing world. And we are not afraid to do so."[147]

It might be argued against this that the multitudes of different kinds of transactions and the complexity of commercial relationships and circumstances are such that it is just impossible to devise rules that can apply appropriately in all cases. Accordingly, "comparatively unstructured judicial powers are needed to effectively regulate the consequences of misconduct."[148]

But this only exposes the true problem with giving courts a strong discretion as to whether to order rescission. If rescission in equity is truly to be "discretionary" in this sense then, even if the range of choices is circumscribed by equitable rules and principles, there must nonetheless be an area within which the judge is completely free to order or not order rescission. And in such cases, no decision made by a judge would be binding authority on another judge dealing with the exact same scenario. As Millett LJ observed of true discretions in *Jaggard v Sawyer*: "The most that any [reported case] can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. But it does not follow that it would be wrong to exercise it differently."[149] In other words, the fourth and final problem with judges having a strong discretion as to whether to order rescission is that, for it to be a true discretion, it must give the judge the option to treat like cases *differently*. This is an anathema to justice and an option no judge should take.[150]

In sum, there is no good reason why judges should have a strong discretion as to whether to order rescission when rescission is sought in equity. Irrespective of one's views as to whether rescission should always be effected by an act of the party (the common law approach) or an order of the court (equity's approach), the mere fact that a rescission is effected by an order of the court should not entail that the court has a strong discretion to refuse relief. In this respect, the common law approach is to be preferred.

Liability of the briber

The most significant difference between common law and equity in relation to the remedies for bribery and secret commissions, and ostensibly the cause of recent litigation against financial lenders,[151] is the liability of the briber. At common law, the briber is liable to pay to the principal the value of the bribe, regardless of whether the briber has personally profited or the principal has suffered any loss.[152] By contrast, in equity no such exceptional liability exists. A person who dishonestly assists in a breach of fiduciary duty is only liable for the profits they have personally obtained or losses actually caused.[153]

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[146] *Ibid*, 371.
[147] Neuberger, "The Remedial Constructive Trust – Fact or Fiction", [40].
[148] Elliott, "The Basic Structure of Rescission" in *Equity Today*, 177. Importantly, Elliott was not advocating for this position (to the contrary), just identifying the argument.
[149] [1995] 1 WLR 269, 288. See also *Coventry v Lawrence* [2014] UKSC 13; [2014] AC 822, 855 [120].
[150] Webb (2016) 69 CLP 353, 372–373.
[151] See, eg, *Johnson v Firstrand Bank Ltd* [2024] EWCA Civ 1282.
[152] *Mahesan* [1979] AC 374, 383.
[153] *Fyffes Group Ltd v Templeman* [2000] 2 Lloyds Rep 643; *Ultraframe* [2005] EWHC 1638 (Ch), [1577], [1600]; *Novoship* [2012] EWHC 3586 (Comm), [99]; *Novoship* [2014] EWCA Civ 908, [84].

The liability of the briber to pay the value of the bribe at common law is well established.[154] What is less clear is the actual justification for holding the briber so liable.[155] In *Mahesan*,[156] Lord Diplock, delivering the advice of the Privy Council, said: the "extension to the briber of liability to account to the principal for the amount of the bribe… whatever conceptual difficulties it may raise, is now … too well established in English law to be questioned." But if the common law is to operate in this area in a way different to equity, the conceptual basis for the liability of the briber must be established. There are, broadly speaking, two possibilities.

First, it could be argued that the liability of the briber is some form of gain-based award. For example, it has sometimes been referred to as an action for "money had and received",[157] which might suggest that it is an action for restitution of unjust enrichment. The unjust enrichment explanation, however, is usually dismissed for the reason, among others,[158] that the briber cannot be enriched by the value of the bribe when they themselves have paid it out.[159]

In fairness to the earlier cases, on closer examination it appears that the language of "money had and received" was used not to refer to recovery of the "bribe" as such, but rather the excess purchase money that had been paid by the principal to the briber—the purchase price being inflated to cover the cost of the bribe. This is because the earlier cases all happened to involve *vendors* paying bribes to agents of *purchasers*.[160] In *Salford Corp v Lever*,[161] for example, the agent, in exchange for being paid a commission of 1s per ton of coal by the defendant coal merchant, increased the tender prices offered by his principals—the plaintiff purchasers of the coal—by 1s per ton. Lord Esher MR referred to the briber as being "bound to pay back the extra price which he had received"[162] while Lopes LJ said that the principal had a right "to recover the excess of price which [the briber] obtained through his fraud."[163]

However, even with this refinement, the liability of the briber cannot easily be explained in unjust enrichment terms. For instance, it cannot explain cases where the briber is the *purchaser* rather than vendor. Even if the briber ultimately pays a lower price (i.e. pays less) to compensate themselves for the cost of the bribe, there is no "transfer of value" in the other direction from the principal to the bribee equivalent to the value of the bribe that could ground an action in restitution.[164] Nor could it be argued in either case that the briber is factually better off, for example, because they have saved a "necessary expense". Even accepting that the purchase price has been artificially inflated (where the briber is the vendor) or deflated (where the briber is the purchaser), the briber is no better off in cases where they have in fact paid the bribe. These difficulties lead to the conclusion that most commentators have reached, namely, that "[i]t

[154] *Salford Corp v Lever* [1891] 1 QB 168; *Grant v Gold Exploration and Development Syndicate Ltd* [1900] QB 233; *Hovenden* (1900) 83 LT 41; *Mahesan* [1979] AC 374;
Armagas Ltd v Mundogas SA (The Ocean Frost) [1986] 1 AC 717, 743; [1986] 2 Lloyd's Rep 109; *Logicrose* [1988] 1 WLR 1256, 1263.
[155] *Commercial Fraud in Civil Practice*, 332 [10.46].
[156] [1979] AC 374, 383.
[157] See, eg, *Salford Corp v Lever* [1891] 1 QB 168, 176; *Grant v Gold Exploration and Development Syndicate Ltd* [1900] QB 233, 244–245, 248–249, 256; *Hovenden* (1900) 83 LT 41, 42; *Mahesan* [1979] AC 374, 383; *Logicrose* [1988] 1 WLR 1256, 1263.
[158] Leslie and Taylor, "Civil Claims" in *Lissack and Horlick*, 701 [17.133]–[17.134]; *Commercial Fraud in Civil Practice*, 332 [10.46].
[159] *Commercial Fraud in Civil Practice*, 332 [10.46].
[160] *Salford Corp v Lever* [1891] 1 QB 168; *Grant v Gold Exploration and Development Syndicate Ltd* [1900] QB 233; *Hovenden* (1900) 83 LT 41.
[161] [1891] 1 QB 168.
[162] *Ibid*, 177.
[163] *Ibid*, 181. See also *Hovenden* (1900) 83 LT 41, 42–43; *Grant v Gold Exploration and Development Syndicate Ltd* [1900] QB 233, 251.
[164] *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29; [2018] AC 275.

would be preferrable to abandon all notion of a claim in unjust enrichment as against the briber so as to avoid such a cause of action being stretched to fit the particular circumstances of this claim."[165]

The second, more plausible, explanation for the liability of the briber is that it is a measure of loss in response to the tort of bribery. In *Salford*, for example, Lord Esher MR said "[t]he damage to the corporation is clearly the 1s per ton out of which they have been cheated".[166] And in *Grant v Gold Exploration and Development Syndicate Ltd*,[167] A L Smith LJ and Vaughan Williams LJ both explained the liability of the briber in terms of damages for fraud.[168] In cases where the transaction entered into by the principal has resulted in the principal, in essence, paying for the cost of the bribe, the principal has been "cheated" out of the value of the bribe and suffered loss accordingly.

But what of the case where the goods have been bought or sold at market value? This was what happened in *Hovenden and Sons v Millhoff*.[169] The defendant, a wholesaler of tobacco products, supplied the plaintiffs with large quantities of cigars and cigarettes. It turned out the defendant had been paying the plaintiffs' purchasing agents a secret commission that amounted to £710 (approximately 2.5% of the invoice price of the goods). At trial, the jury found that neither the defendant or the purchasing agents had conspired to charge the plaintiffs higher prices and the prices paid were not excessive. They assessed damages as being nominal only. In an action for a new trial or judgment, Smith, Vaughan Williams, and Romer LJJ held that the plaintiffs were entitled to recover the £710.[170] Insofar as Vaughan Williams and Romer LJJ dealt with the issue as one of damages, Williams LJ held that the payment of the bribe in fact showed that "the vendor was willing to part with this goods for a price less by [the amount of the bribe] than the price at which he actually did part with them".[171] Romer LJ, in a passage that would later take on some importance, invoked the idea of a presumption or assumption. He said:

> "[I]f the agent be a confidential buyer of goods for his principal from the briber, the court will assume as against the briber that the true price of the goods as between him and the purchaser must be taken to be less than the price paid to, or charged by, the vendor by, at any rate, the amount or value of the bribe. If the purchaser alleges loss or damage beyond this, he must prove it."[172]

On the facts, Romer LJ held that there was nothing to rebut the presumption. But in statements that were clearly obiter, he considered whether the presumption should be irrebuttable so as to amount to a deeming rule. He said: "As at present advised, I think in the interests of morality, the assumption should be held an irrebuttable one; but we need not finally decide this".[173]

If the law had stopped there, the liability of the briber would rest on an intelligible footing. Where a bribe or secret commission was paid to an agent and a transaction was subsequently entered into by the principal, the principal would get the benefit of a presumption that the value of the transaction had been inflated or deflated to cover the cost of the bribe. The onus of proving any loss beyond that would be on the principal. However, contra Romer LJ's obiter, and for reasons explained further below, the presumption—like all true

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[165] *Commercial Fraud in Civil Practice*, 333 [10.49].
[166] *Salford Corp v Lever* [1891] 1 QB 168, 175.
[167] [1900] QB 233.
[168] *Ibid*, 244–245, 256, although cf 249 and see *Hovenden* (1900) 83 LT 41, 43 (Williams LJ).
[169] (1900) 83 LT 41.
[170] Although to avoid it going to trial, the parties agreed that the amount recoverable should be only £400: *ibid*, 42.
[171] *Ibid*, 43.
[172] *Ibid.*
[173] *Ibid.*

presumptions—should have been capable of being rebutted. On this account of the law, the principal was recovering damages for actual losses suffered.

But in *Mahesan*,[174] Lord Diplock incorrectly interpreted *Hovenden* as deciding that "there is an irrebuttable presumption of loss or damage to the amount of the value of the bribe", which led him to conclude that "unlike in the tort of fraud, actual loss or damage is *not* the gist of the action." And in a statement that has been assumed to state the law ever since, he said:

> "Upon analysis, what these rules really describe is the right of a plaintiff who has alternative remedies against the briber (1) to recover from him the amount of the bribe as money had and received, or (2) to recover, as damages for tort, the actual loss which he has sustained as a result of entering into the transaction in respect of which the bribe was given…"[175]

Lord Diplock thus used the language of the first explanation ("money had and received") to describe a modified version of the second explanation (a deemed loss).

The liability of the briber post-*Mahesan* creates a conflict with the rules in equity applicable to dishonest assistants. To repeat, a dishonest assistant is only liable for actual losses which have been suffered by the principal or gains which the assistant has personally made. Yet following *Mahesan*, the briber is liable for the value of the bribe even if no loss has been suffered and no profit has been made by them. In the absence of a good reason for the difference, there is no reason why the common law should be more generous to claimants and harsh on defendants in this respect.

It might be argued that the "evils" of bribery justify the courts taking a stringent approach to bribes and secret commissions and deeming losses to have been suffered.[176] But the strength of this argument loses its force when it is recalled that many of the features which make bribery "evil" are themselves deemed to exist for the purpose of civil claims.[177] The briber may have acted completely honestly and caused the principal no loss, yet because corruption and loss are deemed to exist they are liable to pay the value of the bribe to the principal—it is fiction upon fiction. Moreover, neither the common law nor equity ordinarily take this approach when actual fraud *is* involved. In *Mahesan*, Lord Diplock noted that at common law "fraud is a tort for which the damages are limited to the actual loss sustained".[178] And in *Gwembe Valley Development Co Ltd v Koshy (No 3)*,[179] the Court of Appeal held that a director of a joint venture company, who deliberately and dishonestly, in breach of fiduciary duty, failed to disclose his personal interests in transactions entered into by the company, was not liable to pay equitable compensation for losses suffered by the company in the joint venture because his non-disclosure was not causative of any loss. Instead, he was held liable only to account for the profits he made. Mummery LJ (delivering the judgment of the Court) said: "If the commission of the wrong has not caused loss to the company, why should the company be entitled to elect to recover compensation, as distinct from rescinding the transaction and stripping the director of the unauthorised profits made by him?"[180]

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[174] [1979] AC 374, 383.
[175] *Ibid.*
[176] Or the "the interests of morality", to use Romer LJ's words: *Hovenden* (1900) 83 LT 41, 43.
[177] *Commercial Fraud in Civil Practice*, 322 [10.06]. See also *Civil Fraud*, 208–210 [7-016]–[7-022].
[178] *Mahesan* [1979] AC 374, 381.
[179] [2003] EWCA Civ 1048.
[180] *Ibid*, [147].

In its present form, therefore, the liability of the briber at common law cannot be justified. Not only does it conflict with the rules in equity applicable to dishonest assistants, it is also inconsistent with the approach the law takes generally to recovery of compensation for actual fraud. A presumption that the payment of the bribe has caused loss is perfectly justifiable. But in the rare case, where it can be shown that no loss has been suffered by the principal, that presumption should be capable of being rebutted.

There is one further problem with the liability of the briber at common law as it presently stands, namely, that because courts have lost sight of the theoretical basis of the rule post-*Mahesan*, there have been instances where the combination of remedies has led to double recovery as against the briber.[181] In particular, recent cases have held that where a bribe or secret commission is paid, the principal is able to "claim for the disgorging of the secret commission and for rescission of the transaction as of right".[182] But if the basis of the liability of the briber is either that they have been paid an inflated amount by way of the purchase price (or even saved that amount) reflecting the value of the bribe—or that the principal has suffered loss equivalent to that amount—then upon rescission any loss or gain is eliminated. Every penny the principal gets back by way of rescission reduces the losses they have suffered and eliminates respectively any gain the briber could possibly have made.

There is no doubt that the earlier cases saw rescission and the action for the value of the bribe as alternative remedies in this respect when the value of the bribe was sought from the briber (as opposed to the agent). In *Grant v Gold Exploration and Development Syndicate*,[183] Collins LJ said:

> "[W]here the buyer elects not to rescind the sale, but can nevertheless point to a specific sum over and above what must be taken as between the parties to be the real price, which has found its way into the vendor"s pocket as a result of a sale so effected, he is entitled to recover it back."

The proposition was put even more clearly by Millett J in *Logicrose Ltd v Southend United Football Club Ltd.*[184] Contrasting recovery of the bribe from the agent with recovery from the briber, he said:

> "The principal whose agent has received a bribe from the other party to the transaction is entitled to recover the amount of the bribe *from the agent, whether he affirms or repudiates the transaction itself*. As against the other party to the transaction, he is entitled to treat the benefit obtained by or promised to the agent as part of the consideration which should have been received by the principal (if he is a vendor) or as excess consideration provided by the principal (if he is a purchaser). In either case, *if he elects to affirm the transaction, he is entitled to recover the amount of the benefit from the other party* as money had and received to his use, but must give credit for anything already recovered from the agent."[185]

The position in these earlier cases was clear: where recovery of the bribe is sought from the briber, the principal cannot have both rescission and the value of the bribe.

Yet in two recent cases, it appears that is precisely what has happened. In *Wood v Commercial First Business Ltd (in liq)*,[186] Mrs Wood borrowed various amounts from Commercial First Business Ltd secured by

[181] Difficult issues of election and double recovery are raised in cases where remedies are sought against different defendants. See, eg, *FM Capital Partners Ltd v Marino* [2018] EWHC 2905 (Comm), [74]–[92]; Leslie and Taylor, "Civil Claims" in *Lissack and Horlick*, 702 [17.138]; Davies, "Bribery" in *Equity, Trusts, and Commerce*, 247–252.
[182] *Johnson v Firstrand Bank Ltd* [2024] EWCA Civ 1282, [77].
[183] [1900] 1 QB 233, 249, cited with approval in Cited with approval in *Hovenden* (1900) 83 LT 41, 43.
[184] [1988] 1 WLR 1256.
[185] *Ibid*, 1263.
[186] [2019] EWHC 2205 (Ch).

mortgages over two farms she owned. The loans were arranged by a broker, whom, unbeknownst to Mrs Wood, had been paid substantial commissions by Commercial First. The primary judge, relying upon *Mahesan*, held that as against Commercial First, Mrs Wood was entitled to both rescission and recovery of the commissions paid.[187] The judgment was affirmed on appeal to the Court of Appeal.[188] As Dr Derek Whayman has observed about the case, Mrs Wood "disgorged the secret commission and also secured rescission of the loan agreement… This outcome is double recovery."[189]

Another example is *Johnson v Firstrand Bank Ltd (London Branch) T/A Motonovo Finance*.[190] In that case, the Court of Appeal dealt with three appeals in which consumers had entered into hire-purchase agreements with finance companies. In each case, commissions were paid by the finance companies to the car dealers who, on behalf of the consumers, arranged the finance. The Court of Appeal found that in two of those appeals—the *Hopcraft* and *Wrench* appeal—there was either no or insufficient disclosure to negate secrecy and therefore the payments were secret commissions. In the third appeal—the *Johnson* case—it had been conceded that there had been partial disclosure to negate secrecy but the Court of Appeal nevertheless found that the lenders were liable as dishonest assistants in the car dealer's breach of fiduciary duty. The result was that in the *Johnson* case, the consumer was entitled to equitable compensation from the lender representing the value of the commission. Rescission was not ordered because the car had long since been sold.[191] In the *Wrench* appeal, the issues of remedies was remitted to the courts below.

But in the *Hopcraft* appeal, the Court of Appeal ordered both rescission of the agreement and payment of the commission.[192] The outcome is, again, double recovery. The reason it is double recovery is that "the consumer in a case of this kind pays for the commission through the enhanced interest rate charged on the loan."[193] As has been recognised in a County Court decision dealing with secret commissions and hire-purchase agreements post-*Johnson*:

> "If the Appellant in this case receives back all of the instalments paid [i.e. including the enhanced interest rate], then in practice he has already had satisfaction for the commission paid by the Respondent. To go on and order repayment of the commission to the Appellant would in these circumstances amount in my judgment to double recovery. In the context of rescission, it would further substantially and unjustifiably tip the scales of practical justice in his favour."[194]

The risk of double recovery has arisen because courts have stopped searching for a justifiable theoretical basis for the liability of the briber post-*Mahesan*. Courts have been content to say "we do this at common law but that in equity".[195] But where common law and equity are operating in such different ways when responding to the same concern, it is not sufficient to state that the liability of the briber at common law is simply "too well established in English law to be questioned."[196] Needless differences should be eradicated. As in equity, the liability of a briber to pay the value of the bribe at common law should depend upon loss being established. While the principal may get the benefit of a presumption, in a rare case that presumption should be capable of being rebutted. And courts should not be permitting both rescission

[187] *Ibid*, [150]–[153], [186].
[188] *Wood v Commercial First Business Ltd* [2021] EWCA Civ 471.
[189] Whayman [2022] Conv 184, 193–194.
[190] [2024] EWCA Civ 1282.
[191] *Ibid*, [142].
[192] *Hopcraft v Close Brothers Ltd* CA-2024-000482 [4]–[5].
[193] *Kasperczak v Firstrand Bank Ltd (London Branch) T/A Motonovo Finance* [2024] EWCC 22 [42].
[194] *Ibid*.
[195] Cf the whole point of Burrows (2002) 22 OJLS 1.
[196] *Mahesan* [1979] AC 374, 383.

and recovery of the value of the bribe. To do so is so lose sight of the theoretical basis for holding the briber liable and to allow double recovery. There should be no meaningful difference between common law and equity in this area.

6 CONCLUSION

This article sought to show that differences between common law and equity in relation to the remedies for bribery and secret commissions are unjustified. In this area, the common law and equity are responding to the same concern: that is, they are concerned to ensure that an "agent" acts free from any conflict of interest in performing their duties to the "principal". Given that common law and equity are answering the same question, their responses should not, without more, be different. Yet, as has been seen, rescission in equity (as opposed to at common law) is said to permit the court to exercise a strong discretion. And at common law (but not in equity), the briber is liable to pay the value of the bribe irrespective of any loss actually suffered or profit personally obtained. Both of these differences are unjustified and both should be eliminated. Even if rescission is effected by a court order, courts should not enjoy a strong discretion to refuse relief. The common law approach, in this respect, is preferable. As for the liability of the briber, here the equitable rules should prevail—the briber should only be liable for losses actually caused or profits personally obtained, although where a bribe is paid the principal should get the benefit of a (rebuttable) presumption of loss. And certainly, courts should not be ordering both rescission and recovery of the value of the bribe as against the briber.

The remedies for bribery and secret commission both fall within a category of case in which the common law and equity are seeking to answer the same question. As Lord Burrows said over 20 years ago, this is a category for which we should be able to say: "We do this at common law and we do the same in equity".[197]

[197] Burrows (2002) 22 OJLS 1, 16.