

Forfeiture of payment to a delinquent agent

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Abstract

A principal's claim for forfeiture of an agent's commission following the latter's default can be explained from both an equitable and common law perspective. In equity, the threshold for forfeiture is imprecise and reflects the vagaries of fiduciary obligations. At common law, forfeiture can be claimed in proceedings for money had and received. However, the principal's claim may be subject to counter-restitution in respect of the agent's services. It is argued that the common law provides an effective means of reconciling the parties' interests and that an approach based on failure of consideration would provide a more coherent and principled outcome in equity.

Keywords: agent; fiduciary; forfeiture of commission; money had and received; failure of consideration.

1 Introduction

An agent may receive a payment or benefit which is tainted by a breach of duty. This can take the form of a bribe or secret commission from a third party to induce an agent to betray his duty to his principal.¹ Such arrangements are manifestly corrupt and the agent is personally accountable to the principal for the proceeds.² A further consideration is that the agent may receive a commission or emolument from the principal for the performance of agreed services. If the agent dishonestly performs those services, he may be compelled

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1 Unless the context requires otherwise, the term 'agent' denotes an agent or employee and the term 'principal' denotes a principal or an employer.

2 *Fawcett v Whitehouse* (1829) 1 Russ & M 132 (Ch). See further *T Mabesan S/O Thambiab v Malaysia Government Officers' Co-Operative Housing Society Ltd* [1979] AC 374 (PC) 380. It is beyond the scope of this paper to discuss the implications of such accountability. It is generally the case that the agent's liability is both personal and proprietary. This is relatively uncontroversial in most Commonwealth jurisdictions. See, for example, *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6 at [510]; *Attorney General for Hong Kong v Reid* [1994] 1 AC 324 (PC). Historically, the position in England was less certain, but this has now been clarified by the UK Supreme Court in *FHR European Ventures LLC v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250, which overruled the authority of *Lister & Co v Stubbs* (1890) Ch D 1 (CA) and affirmed that proprietary relief can be asserted in respect of the proceeds of bribery in the hands of a fiduciary.

to forfeit any remuneration to the principal. There are obvious distinctions between third-party bribes and commissions received directly from the principal. Notably, receipt of a bribe is a wrong *per se* whereas a commission paid by the principal is not.³ Liability to forfeiture in the latter case arises from the wrongful performance of authorised acts.

This article will consider the elements of the principal's claim for forfeiture of remuneration following an agent's breach of duty. Other remedies can be invoked for breach of an agent's duties, such as rescission, damages, equitable compensation and account of profits. Reference will be made to these forms of relief, but a detailed treatment falls outside the scope of this article. Similarly, this article addresses conduct which constitutes a breach of fiduciary duty. A failure of duty in tort or a breach of contract (in respect of non-fiduciary performance) will not be considered.

The current state of the law is problematic. In this area, the conceptual bounds of equity and law are amorphous and, as a result, principles are often applied interchangeably. In addition, the Court of Appeal's 'spectacularly punitive reasoning'⁴ in *Imageview Management Ltd v Jack*,⁵ has attracted controversy and led to further uncertainty. This article will examine the status of an agent's commission where an agent engages in misconduct which strikes at the core of the principal-agent relationship. It will be asked whether the law in this area is being applied on a principled basis and whether there should be greater emphasis on the taxonomical status of the wrong. The latter will address the jurisdictional classification of an agent's default and the remedial implications which flow from it.

An agent's misconduct is explicable as both a breach of equitable duty and a common law wrong. The former is an obvious corollary of the agent's status as a fiduciary.⁶ The latter is enforced by proceedings for breach of contract or an action for money had and received.⁷ The intersection of law and equity raises intriguing issues as to the nature and taxonomy of the wrong and the remedial regimes that underpin it. From an equitable perspective, an element of dishonesty may be required for forfeiture of the principal's commission. This is not a universal rule and a lower threshold of equitable fraud⁸ may suffice. From a common law perspective, the more egregious the wrong, the more readily the court will conclude that there is a total failure of consideration, rendering any payment liable to forfeiture. The jurisdictional basis of relief may in turn affect the form of the order. Discretionary relief in equity is potentially more nuanced and contrasts with the more absolute nature of forfeiture for money had and received.

3 Another obvious distinction is that by definition a secret commission is not disclosed to the principal.

4 P Watts, 'Forfeiture of Agents' Remuneration' in P Devonshire and R Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart 2019) 203. For the facts of this case, see text at n 32.

5 [2009] EWCA Civ 63, [2009] Bus LR 1035. This judgment is insightfully reviewed in P Watts, 'Restitution and Conflicted Agents' (2009) 125 Law Quarterly Review 369.

6 *Cros Europe BV v Anderson T/A Spectrum Agencies* [2012] EWCA Civ 1400, [24].

7 Restitution may be regarded as operating independently of the 'common law' wrong of breach of contract. From this viewpoint, money had and received is a discrete basis for recovery. See R Grantham and C Rickett, 'On the Subsidiarity of Unjust Enrichment' (2001) 117 Law Quarterly Review 273, where it is argued that the law of unjust enrichment serves to reverse certain transfers of wealth and that unjust enrichment fulfils a supplementary function, operating outside the law of contract and the law of wrongs.

8 'Equitable fraud' does not require actual dishonesty or deliberate wrongdoing. 'Fraud' in this context can be generally equated with unconscionable conduct. In *Nocton v Ashburton* [1914] AC 932 (HL), Viscount Haldane LC explained (at 954): 'In Chancery the term "fraud" thus came to be used to describe what fell short of deceit, but imported breach of a duty to which equity had attached its sanction . . . What it really means . . . is not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a Court that from the very beginning regarded itself as a Court of conscience.'

It is axiomatic that a remedy is a response to an obligation. Equity views an agent's breach primarily as the betrayal of a relationship of trust and secondarily as a failure to observe the duty which underlies that relationship.⁹ Common law proceedings are founded on failure of consideration. The forfeiture of remuneration can be explained on either basis. As a result, the remedial response to an agent's breach vacillates between the normative paradigms of law and equity. This article will explore these issues and propound a modified approach based on common law doctrine.

At the outset, the central term 'forfeiture' should be explained. At issue is the status of an agent's payment, usually expressed as a commission. The term 'forfeiture' has two main applications. In the first, the principal seeks to recover a payment made to a defaulting agent. In the second, commission is unpaid and the principal may be entitled to resist the agent's claim for this sum.¹⁰ In the latter setting, the term 'forfeiture' somewhat inaccurately describes a defence to the enforcement of a debt or other contractually agreed benefit. Both scenarios contemplate that the agent has provided some form of service.¹¹ If, however, no service has been rendered, the obligation to pay has simply not accrued. In the absence of performance there is no basis for an agent's claim to commission and by definition, no requirement to defend such a claim.

This article has five main parts. In 'Breach as an equitable wrong', forfeiture of remuneration is assessed as an equitable response to a breach of fiduciary duty. It is concluded that forfeiture does not fit readily within the remedial scheme of equity and cannot be satisfactorily explained as an account of profits or equitable compensation. The next part, 'Forfeiture and fiduciary doctrine', examines the variable nature of equitable duty and the absence of a unifying principle with respect to the role of forfeiture. This is followed by 'Common law perspective', where the taxonomy of the wrong is seen in broader focus. This introduces the influence of common law principles in defining the status of an agent's commission following default. It is argued that forfeiture should be confined to cases where there is a total failure of consideration. In this regard, the common law provides a coherent response to an agent's breach of duty and the circumstances in which remuneration can be forfeited. This is expanded in 'Equity and failure of consideration', where it is proposed that a common approach to the forfeiture of commission should be adopted in equity and law. A model based on failure of consideration would produce a more principled and consistent outcome in equity. The final substantive section, 'Jurisdictional and doctrinal implications of a unitary standard', examines some fundamental jurisdictional and doctrinal issues and concludes that neither unduly compromises the changes proposed in this article.

2 Breach as an equitable wrong

It is generally held that forfeiture of a commission flows naturally from breach of the agent's fiduciary duty.¹² This strict view draws from the exacting standards traditionally

9 This is aptly captured in Lord Russell's pronouncements on the strictness of the non-profit rule. See *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134n (HL), 144–45.

10 For example, in the leading case of *Imageview* (n 5), an agent in breach of fiduciary duty to his principal lost the right to future agency fees in addition to remuneration that had already been paid.

11 The principles discussed in this paper apply in either situation. See *Andrews v Ramsay & Co* [1903] 2 KB 635 (DC) 638; *Imageview* (n 5) [51].

12 This conclusion is readily drawn where there is an absence of good faith and the breach is not trivial. See *Keppel v Wheeler* [1927] 1 KB 577 (CA), 592; *Andrews v Ramsay* (n 11) 636–38; *Imageview* (n 5) [47]–[50]; *Stevens v Premium Real Estate Ltd* [2009] NZSC 15, [2009] 2 NZLR 384, [89] and [90].

imposed on fiduciaries. The basic obligations of a fiduciary are enshrined in the profit and conflict rules. By the former, the fiduciary is not permitted to profit from her office, save with the informed consent of the principal.¹³ By the latter, the fiduciary must not place herself in a position where personal interest conflicts with duty to the trust.¹⁴ The profit and conflict rules operate regardless of whether the defaulting fiduciary acted in bad faith or consciously committed any wrongdoing. The mere fact of being placed in a position where duties are, or may be compromised, is sufficient.¹⁵ The fiduciary is accountable whether or not the principal has suffered any loss.¹⁶ Nor does it matter that the principal would not or could not obtain the profit.¹⁷

These core principles define equity's expectations of fiduciary duty. It is generally held that results – in this case remedial outcomes – are fashioned by principles and normative objectives. Equity's prescriptions are empowered by a close relationship between principle and remedy. In this regard it is uncontroversial that equitable remedies are 'more elastic'¹⁸ than remedies at law and more adequately reflect the policies they enforce. Speaking of equitable relief for fiduciary wrongs, it has aptly been said that:¹⁹

. . . [equitable] remedies will be fashioned according to the exigencies of the particular case so as to do what is 'practically just' as between the parties.

The unexplored question is the extent to which remedy enforces doctrine and the juristic basis on which this is achieved. There are several permutations. The forfeiture of remuneration following an agent's breach of fiduciary duty²⁰ can be explained as an account of profits, equitable compensation,²¹ or restorative relief. Each will be considered in turn.

An account of profits is perhaps the least satisfactory rationale for forfeiture of commission.²² In claiming an agent's commission, the principal is recovering his own funds as a result of the agent's repudiatory conduct. A commission received by a false fiduciary should be categorised as a wrongful receipt rather than a profit. Semantically, at least, this would suggest that the remedy has more affinity with an action for money had and received than disgorgement. The distinction is apparent through the modern law of unjust enrichment, which would characterise the gain as an unjust enrichment by subtraction.²³ The remedial response is reversal of a transfer of wealth from the principal to the agent.²⁴

13 *Boardman v Phipps* [1967] 2 AC 46 (HL) 105; *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 554; *Gwembe Valley Development Co Ltd v Koshy* [2003] EWCA Civ 1048, [2004] BCLC 131, [43]–[45].

14 *Bray v Ford* [1896] AC 44 (HL) 51.

15 *Regal (Hastings) Ltd* (n 9); *Chan v Zacharia* (1984) 154 CLR 178.

16 *Boardman v Phipps* (n 13).

17 *Howard v Commissioner of Taxation* [2014] HCA 21, (2014) 253 CLR 83.

18 *Nocton v Ashburton* (n 8) 952 per Viscount Haldane LC.

19 *Maguire v Makaronis* [1997] HCA 23, (1997) 188 CLR 449, 496 per Kirby J.

20 As noted above, similar reasoning applies in respect of restoring payments made by the principal and resisting the agent's claim for payment where no payment has been made. See, for example, *Rhodes v Macalister* (1923) 29 Com Cas 19 (CA).

21 *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299, [2007] 1 WLR 2351, [48].

22 An account can also be invoked where the principal seeks to rescind an agent's contract. Here, an account of profits is instrumental in adjusting the parties' rights to achieve *restitutio in integrum*. In addition, an account may operate more expansively to replicate the effect of rescission where restitution *in specie* is not available. See *Maboney v Purnell* [1996] 3 All ER 61 (QB), 88–89; *Halpern v Halpern* [2007] EWCA Civ 291, [2008] QB 195, [60].

23 P Birks, *An Introduction to the Law of Restitution* (Clarendon 1989) ch 1.

24 A Burrows, *Remedies for Torts and Breach of Contract* (2nd edn, Oxford University Press 1994) 287.

Equitable compensation does not strictly reflect the elements of forfeiture. By definition, the purpose of equitable compensation is to compensate for loss. This is problematic in the present context because equitable compensation or damages will usually place the injured party in the position he would have been in if the agent's services had been faithfully performed.²⁵ If loss has been fully compensated, the claim to any additional sum must be understood on a different basis. Forfeiture of commission has been explained as restorative relief. As such it is distinct from an account of profits, equitable compensation and damages. Thus, it has been held that compensatory and restorative awards are cumulative and the principal is not required to exercise an election.²⁶ Both remedies may therefore be claimed in respect of the same wrong.²⁷

This is aptly demonstrated in *Stevens v Premium Real Estate Ltd*,²⁸ where the vendors were induced to sell their property for a reduced sum as a result of false representations by the purchaser. The vendors' estate agent was complicit in the deception and actively misled his clients, the vendors. Not surprisingly it was held that the estate agent was in breach of fiduciary duty. The estate agent was ordered to refund the commission as well as compensating the vendors for their loss. The Supreme Court of New Zealand elaborated:²⁹

They [the plaintiffs] paid the commission on the premise that Premium [the defendant] had faithfully performed its contractual and fiduciary duties. Premium had not done so. Whether the commission should be refunded as restorative damages in addition to compensatory damages does not . . . involve any question of election . . . The policy which lies behind compensatory damages is simple. It is to compensate for loss caused by civil wrongs. The policy behind restorative damages [includes] . . . reinforcing fiduciary obligations by removing from the defaulting fiduciary a sum paid pursuant to a contract which has not been faithfully performed.

If equitable compensation and restorative awards are cumulative, it follows that, unless the latter is duplicative, it does not fulfil a compensatory function. It is somewhat strained to characterise a commission as a loss to the principal. The agent's breach of duty does not necessarily denote that the principal's contract was not performed or that losses flowing from the breach cannot be fully recovered through equitable compensation.

For example, in *Stevens v Premium Real Estate Ltd*, the Supreme Court awarded damages representing the difference between the actual sale price and the market value of the plaintiffs' property. In addition, the agent's commission was forfeited because it had not been earned by good faith performance of its services.³⁰ In the result, the plaintiffs were made whole by the award of compensation and did not sustain any further financial loss. In monetary terms the consequences of the wrong were expunged. The additional forfeiture of commission was not compensatory and must be rationalised on a different basis.

25 See discussion in this section, below, and section 4 'Common law perspective'.

26 However, it is clearly established that an account of profits and equitable compensation are alternative remedies and the claimant will be put to an election. See *Tang Man Sit v Capacious Investments Ltd* [1996] 1 AC 514 (PC).

27 G Virgo, *Principles of the Law of Restitution* (2nd edn, Oxford University Press 2006) 461–63.

28 *Stevens* (n 12).

29 Ibid [107] per Tipping J. See also [12], [30]–[31] per Elias CJ and [89]–[90] per Blanchard, McGrath and Gault JJ. See further *Andrews v Ramsay* (n 11) 637–38; *Imageview* (n 5) [49]–[51].

30 The Supreme Court considered that the agent's conduct had fundamentally undermined the parties' relationship (*Stevens* (n 12) [31], [89], [90], [94] and [109]).

It can be argued that restorative awards reflect the view that an agent's remuneration is a contractual benefit for a service that has not been performed. Put compendiously, a service performed corruptly is no service at all. In a narrow and somewhat artificial sense, in paying for that service, the principal has sustained a loss. Despite its theoretical allure, this is unconvincing. For example, in *Stevens v Premium Real Estate* the plaintiffs were restored to the economic position they would have enjoyed if the wrong had not occurred. Adjusted by damages, the plaintiffs' property had been sold at market value.³¹ In fact the forfeiture of commission placed the plaintiffs in a superior position as a result of the breach because the defendant's services in effecting the sale were unremunerated.

A similar result can be seen in the influential decision of *Imageview Management Ltd v Jack*.³² The plaintiff was retained by the defendant, a professional footballer, to act as his agent for an agreed commission, to obtain employment with a UK football club. The plaintiff negotiated a contract for the defendant to play for a Scottish football club. As the defendant was a national of Trinidad and Tobago, he required a work permit. The football club offered to pay the plaintiff £3000 for obtaining a work permit. The plaintiff did not disclose this agreement to the defendant. Subsequently the defendant discovered these arrangements and stopped paying the commission under the agency agreement. The plaintiff commenced proceedings to recover the unpaid commission and the defendant counterclaimed for the return of commission that had already been paid as well as the £3000 fee the plaintiff had received from the club.

It was held at first instance and on appeal that the plaintiff had a conflict of interest with respect to the payment from the club and had acted in breach of fiduciary duty. The defendant was therefore relieved of liability with respect to future commissions and was entitled to recover commission already paid as well as the defendant's £3000 fee. As in *Stevens v Premium Real Estate*, the agent forfeited any contractual entitlement to payment under the agency agreement. The forfeiture of commission in *Imageview* meant that the defendant had benefited from the agent's services in obtaining a work permit and the latter was unpaid for this service.

In sum, restorative awards do not necessarily serve to redress the consequences of an unperformed contract.³³ Moreover, there are conceptual difficulties in classifying a restorative order as either gain-based or compensatory. At the same time, despite concerns as to the provenance of the wrong and the nature of the order, it seems counterintuitive to disclaim equitable jurisdiction in respect of forfeiture.³⁴ As noted, in *Stevens* and *Imageview*, the outcome was advantageous to the plaintiff who was fully compensated for loss and also relieved of financial obligation in respect of the defendant's services. This is not inconsistent with the broad objectives of equity. It is trite that the deterrent principle animates equity's governance of fiduciary relationships. As a simple dogma, the forfeiture of commission gives expression to this principle by ensuring that an errant fiduciary is stripped of the benefits of that relationship and the temptation to abuse the trust reposed in him.

31 In addition, the plaintiffs were treated favourably in that there was evidence that in negotiating the terms of sale the plaintiffs were prepared to accept less than market value.

32 *Imageview* (n 5). This judgment is insightfully reviewed in Watts, 'Restitution and Conflicted Agents' (n 5).

33 See below, section 4 'Common law perspective', which proposes that remuneration can be restored to the principal if there is a total failure of consideration.

34 *Stevens v Premium Real Estate* and *Imageview* were determined by reference to an agent's breach of fiduciary duty. In both cases the remedies were a response to an equitable wrong. See *Imageview* (n 5) [50]; *Stevens* (n 12) [30] (Elias CJ), [90] (Blanchard, McGrath and Gault JJ) and [109] (Tipping J).

The scope of the deterrent principle is not without controversy but its application remains true in the present context. While some academic commentators question the status of deterrence, the forfeiture of commissions is usually not directly in issue, or at best, on the margin of such debate. Notably, Lionel Smith argues that the profit rule does not have any prophylactic or deterrent function and that a fiduciary's accountability for illicit gains is more appropriately explained as a primary rule of attribution.³⁵ While the fiduciary's misconduct can invariably be classed as a wrong, accountability to the principal for such gains is merely a vindication of the latter's primary right to such receipts.³⁶ Effectively, the errant fiduciary lacks capacity to acquire beneficial receipt. Such reasoning is applicable to unauthorised gains from third-party sources, but less obviously so in respect of agreed commission payments from the beneficiary. Such payments are not an unauthorised receipt in the hands of the fiduciary. Nor can it be said that the fiduciary lacked capacity to obtain such receipts.

It may be countered that deterrence does not capture the true dynamics and that forfeiture is more obviously categorised as punitive. Orthodox reasoning suggests that equity embraces the former and eschews the latter. While equity has historically struck down penalties,³⁷ the objective of deterrence has long informed equity's remedial regime. Notwithstanding the traditional disavowal of penal jurisdiction,³⁸ it may be questioned whether such reasoning is more semantic than substantive. Although conceptual distinctions can be drawn between punishment and deterrence, the distinctions are less apparent in their application.³⁹ At a basic level, sanctions reflecting deterrence will have prejudicial consequences to the wrongdoer. It is but a slight step to suggest that in practical terms at least, some deterrent-inspired remedies have a punitive effect.⁴⁰ However, a more precise distinction can be drawn in relation to the forfeiture of payment to a delinquent agent. It is submitted that forfeiture is clearly penal if the defendant is stripped of a commission when the principal has received the benefit of the agent's services and been fully compensated for any loss.⁴¹ In such cases, equitable relief appears to exceed the bounds of compensation or disgorgement of gains, and it is preferable to openly recognise that the objective is punitive. Conversely, forfeiture is not so obviously penal if the agent has failed to perform the agreed service or acted so corruptly that the principal has not derived any benefit from those services. In this setting, restoring to the principal the value of an unearned commission is little more than a rebalancing of the economic realities of the transaction.

35 Lionel Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' (2013) 7 *Journal of Equity* 87; Lionel Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on behalf of Another' (2014) 130 *Law Quarterly Review* 608.

36 Smith, 'Deterrence, Prophylaxis and Punishment' (n 35) 100; Smith, 'Fiduciary Relationships' (n 35) 628–29.

37 In Somers J's concise utterance: '[E]quity and penalty are strangers' (*Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 (CA), 302). See also *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10, (2003) 56 NSWLR 298, [338] per Heydon JA.

38 *Vyse v Foster* (1872) LR 8 Ch App 309, 333. See also *Dart Industries Inc v Décor Corporation Pty Ltd* (1993) 179 CLR 101, 111 and 114.

39 Indeed, the terms 'deterrence' and 'punishment' are often used interchangeably. See, for example, *Gray v Motor Accident Commission* (1998) 196 CLR 1, [15].

40 Whether this is characterised as a slight step or a major step epitomises the doctrinal rift between Mason P and Heydon JA in *Harris v Digital Pulse* (n 37). See further P Devonshire, 'Account of Profits for Breach of Fiduciary Duty' (2010) 32 *Sydney Law Review* 389.

41 See discussion above regarding *Stevens* (n 12).

The next section will examine the variable nature of equitable duty, the absence of unifying principle with respect to the role of forfeiture and the uncertain status of an agent's commission following default.

3 Forfeiture and fiduciary doctrine

If forfeiture claims are governed by fiduciary doctrine, then, except in trivial cases,⁴² it might be expected that a conflict of interest or breach of the profit rule will be sufficient for an agent to forfeit all remuneration. In *Keppel v Wheeler*⁴³ the Court of Appeal was uncompromising on the point:⁴⁴

Now I am quite clear that if an agent in the course of his employment has been proved to be guilty of some breach of fiduciary duty, in practically every case he would forfeit any right to remuneration at all.

The vigour of this principle was undiminished in the later case of *Imageview Management Ltd v Jack*,⁴⁵ where Jacob LJ proclaimed:⁴⁶

The law imposes on agents high standards . . . An agent's own personal interests come entirely second to the interest of his client. If you undertake to act for a man you must act 100%, body and soul, for him. You must act as if you were him. You must not allow your interest to get in the way without telling him.

Following a review of the leading authorities, his Lordship concluded that: 'Once a conflict of interest is shown . . . the right to remuneration goes.'⁴⁷ Such views suggest that forfeiture is a natural consequence of transgressing fiduciary duty and that once the duty is breached, the remedy applies.⁴⁸ By invoking the strict standards by which fiduciaries are governed,⁴⁹ it can be inferred that a low threshold of equitable fraud will suffice for forfeiture of a commission. However, this is deceptive. Equitable duty is not absolute.⁵⁰ The fiduciary principle embraces many forms of relationship and the nature of fiduciary duty will be driven by the particular facts. For example, whilst estate agents owe fiduciary duties to their principal, the obligations are fashioned by the terms of their engagement and the commercial context in which the parties operate. Thus, it is recognised that conflict between duty and duty is an unavoidable and permissible aspect of an estate agent's business.⁵¹ Estate agents can act for a number of principals, some of whom may be competing with each other in the same market. By definition, the interests of these parties conflict and a common agent will in turn be conflicted in his duty to each.⁵²

Moreover, forfeiture of a commission is but one of a number of remedial responses to an agent's breach of duty. Despite emphasising the strict nature of equitable

42 *Imageview* (n 5) [44].

43 *Keppel v Wheeler* (n 12).

44 *Ibid* 592 per Atkin LJ. But cf text below, where on the facts it was held that the agent was entitled to retain an earned commission.

45 *Imageview* (n 5).

46 *Ibid* [6] per Jacob LJ.

47 *Ibid* [44].

48 *Stupples v Stupples & Co (High Wycombe) Ltd* [2012] EWHC 1226 (Ch), [25].

49 *Boardman v Phipps* (n 13); *Regal (Hastings) Ltd* (n 9).

50 As the High Court of Australia stated in *Howard v Commissioner of Taxation* (n 17) (at [34] per French CJ and Keane J): 'Despite their broad judicial formulations fiduciary duties are not infinitely extensible.'

51 *Kelly v Cooper* [1993] AC 205 (PC). A corollary is that an agent is not required to share confidential information between principals whose interests may conflict (214–15).

52 In most settings this will constitute a breach of fiduciary duty. See further Millett LJ in *Bristol & West Building Society v Mothew* [1998] Ch 1 (CA), 18.

obligations, courts have equivocated as to the extent of relief where the breach is only incidental to the fiduciary's duties or, in Jacob LJ's memorable epithet, an instance of 'harmless collateralty'.⁵³ It is here that the taxonomy of the wrong is seen in broader focus. Thus far, forfeiture has been characterised as a response to an equitable wrong. This is a logical point of departure given that the relationship of principal and agent is fiduciary. However, agency relationships are usually contractual and accordingly common law principles may have a bearing on liability and remedies for breach.⁵⁴ This is particularly evident in the commercial sphere where the more sophisticated the transaction, the less compelling the case for equitable intervention.

From this perspective, breach of a duty of loyalty does not automatically confer a right of forfeiture.⁵⁵ Loyalty is a cornerstone of fiduciary duty⁵⁶ and – from an equitable standpoint at least – it seems unduly diffident to deny a full range of sanctions for breach of a fundamental duty. However, viewed in its contractual matrix, disloyalty may not necessarily go to the heart of the relationship. While this may be untenable with respect to an express trustee,⁵⁷ it has considerable force in other settings, where fiduciary duty is malleable in content and emphasis.⁵⁸ Here, the breach and the remedial consequences are a question of degree. In some circumstances liability may be avoided altogether or misconduct may be sufficiently redressed by a compensatory award. Moreover, if the court orders rescission on terms, the status of an agent's remuneration may be less bound up with unitary factors such as failure of consideration and more directed to a general adjustment of the parties' interests.

In determining a claim for forfeiture of an agent's commission, the question is not whether an agent has been disloyal, but whether an agent has been disloyal fundamentally. A key factor is whether the agent has acted dishonestly.⁵⁹ If the breach of duty falls short of dishonesty, the agent may be allowed to retain payment for services. In *Keppel v Wheeler*,⁶⁰ the plaintiff engaged the defendant estate agents to sell a property. The property was listed at £6500, but the plaintiff indicated that he would accept £6000. The defendants introduced a purchaser who offered £6150. The plaintiff accepted this offer subject to contract. Before the contracts were exchanged, the defendants received a higher offer of £6750. At that point the plaintiff was in a position to reject the first offer and accept the second. However, instead of communicating the second offer to the plaintiff, the defendants approached the original purchaser with the suggestion that he acquire the subject property and onsell it for a profit to the second offeror. The

53 *Imageview* (n 5) [44].

54 It is widely accepted that equitable relief may be marginalised or excluded entirely by the terms of the parties' agreement: *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 97. See also *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* [2010] HCA 19, (2010) 241 CLR 1, [91]; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL), 206.

55 *Wright Hassall LLP v Horton Jr* [2015] EWHC 3716 (QB), [59].

56 *Bristol & West v Mothew* (n 52) 18; *Beach Petroleum NL v Kennedy* [1999] NSWCA 408, (1999) 48 NSWLR 1, [196]–[202]; *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594 (PC), 598–600; *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433, [15] and [78].

57 It has been forcefully argued that in respect of trustees there is an irreducible core of fiduciary obligations which cannot be abrogated (*Armitage v Nurse* [1998] Ch 241 (CA), 253–54).

58 The point can be pressed further. Not every relationship of trust and dependence is necessarily fiduciary. The status of commercial joint ventures, for example, hovers between law and equity. See *Gibson Motorsport Merchandise Pty Ltd v Forbes* [2006] FCAFC 44, (2006) 149 FCR 569, [13], and *Arklow Investments v Maclean* (n 56).

59 This contrasts with the more rigorous treatment of an 'innocent' breach by a trustee or a fiduciary in service of a trust. See *Boardman v Phipps* (n 13).

60 *Keppel v Wheeler* (n 12).

defendants acted in the mistaken belief that their duty to the plaintiff had been discharged when the purchaser accepted the first offer, subject to contract. In fact the defendants' duty subsisted until contracts had been formally exchanged.

The Court of Appeal held that the defendants were in breach of duty and awarded damages for the difference between the two offers. However, the defendants' counterclaim for commission on the sale was upheld. In contrast to proceedings for breach of trust, the court took account of the nature of the wrong and the defendants' subjective understanding of their obligations to the plaintiff. Whilst acknowledging the general principle that an agent is liable to forfeit remuneration for a breach of fiduciary duty, Atkin LJ conceded that:⁶¹

[T]here may well be breaches of duty which do not go to the whole contract, and which would not prevent the agent from recovering his remuneration.

In finding for the defendants, his Lordship was mindful that the agents had acted in good faith and that the principal had received the benefit of the completed transaction.⁶² A similar approach is evident in *Robinson Scammell & Co v Ansell*,⁶³ where an agent disclosed information regarding his client (the plaintiff) to a potential purchaser. Although this did not cause the purchaser to withdraw from the transaction, the agent was in breach of duty to the principal. Nevertheless, the agent was entitled to retain its commission as it had not acted dishonestly or in bad faith.⁶⁴

What emerges from this line of authority is that the finding of a breach of duty does not conclusively determine the status of a commission. The courts press further. Attention turns to performance, focusing on the nature of the wrong and the agent's motives in pursuing a particular course of action. Forfeiture is triggered by an agent's failure to meet certain proscriptive duties,⁶⁵ which are principally expressed in terms of prohibition against receiving secret commissions⁶⁶ and procuring a sale to oneself or a company in which one is interested.⁶⁷ Again, fraud in its different manifestations, such as deceit, bribery and misappropriation, fall in this category.

4 Common law perspective

The previous section has identified different equitable perspectives to forfeiture of commission. Not uncommonly, however, concepts are applied interchangeably without regard to their jurisdictional origins. Important implications flow from the distinct focuses of law and equity. Attention now turns to the common law.

As noted, the primary equitable remedies for breach of fiduciary duty are an account of profits, equitable compensation and rescission. Where an agent betrays the interests of

61 Ibid 592 per Atkin LJ.

62 Ibid. In similar vein, Bankes LJ commented (at 588): 'an agent might quite properly claim his commission, and yet have to pay damages for committing a bona fide mistake which amounts to a breach of duty'.

63 *Robinson Scammell* [1985] 2 EGLR 41 (CA).

64 This approach was approved, obiter, in *Kelly v Cooper* (n 51), where the Privy Council opined that, even if a breach of fiduciary duty is established, the defendants would not lose their right to commission unless they had acted dishonestly.

65 From a contractual perspective, an agent's breach may relieve the principal of an obligation to pay commission. Here, the language of forfeiture is less appropriate and the dynamics are better expressed in terms of the non-accrual of the principal's obligation to pay an agreed sum to the agent.

66 *Stupples v Stupples* (n 48) [21].

67 *Robinson Scammell* (n 63).

his principal, he is personally accountable for any gain.⁶⁸ If the breach occasions loss to the principal, this may be recovered as equitable compensation. As cases like *Stevens v Premium Real Estate* demonstrate: (i) the contract may have been performed notwithstanding the agent's breach of duty, and (ii) any losses flowing from the breach may be fully recovered through equitable compensation. If the principal has not suffered any further economic harm, the additional sanction of forfeiture is unwarranted. It is submitted that forfeiture should be limited to cases where there is a total failure of consideration. In this regard, equity should follow the law by vindicating the principal's performance interest in the agent's services.

This must be placed in context. Forfeiture of an agent's remuneration can be explained on a different basis from disgorgement and compensation.⁶⁹ Failure of consideration involves a factual determination, which in one respect at least, stands outside the normative expectations of fiduciary duty. The general threshold for fiduciary liability is satisfied if there is a perceived risk of disloyalty.⁷⁰ It is sufficient if there is a 'significant'⁷¹ or 'real sensible possibility'⁷² of conflict. The strictness of this rule is reinforced by the court's reluctance to engage in speculation as to what might or might not have happened in different circumstances or in the absence of a breach of duty.⁷³ With respect to forfeiture, common law is only concerned with the fact, not the risk, of a breach of duty. A total failure of consideration denotes the required quality of the breach, hence insistence on a fundamental failure that effectively negates performance. On the approach argued in this article, equity's traditional sanctions in respect of the profit and conflict rules⁷⁴ are unaffected, but forfeiture should be aligned with the common law's insistence on a failure of consideration.⁷⁵

This is thrown into focus when an agent's misconduct is assessed from a contractual perspective. As Matthew Conaglen notes, where remuneration for contracted services is received directly from the principal, *prima facie* these are authorised receipts in the hands of the fiduciary. This raises performance issues directed to whether the fiduciary's breach goes to the root of the contract of retainer.⁷⁶ Other commentators have noted the misalignment of law and equity in this setting. Seb Oram observes that forfeiture is often consistent with contractual analysis, particularly where there is no performance by the agent.⁷⁷

68 For example, in the case of bribes: *Lister v Stubbs* (n 2); *Attorney General for Hong Kong* (n 2); *FHR European Ventures v Cedar Capital* (n 2).

69 See section 2 'Breach as an equitable wrong', above.

70 *Aberdeen Railway Co v Blaikie Brothers* (1854) 1 Macq 461 (HL), 471; *Boardman v Phipps* (n 13) 103; *Warman* (n 13) 557.

71 *Chan v Zacharia* (n 15) 199.

72 *Boardman v Phipps* (n 13) 124; *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1 (PC), 3–4.

73 *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465 (PC), 469; *Gwenbe Valley Development* (n 13) [145]; *Murad v Al-Saraj* [2005] EWCA Civ 959, [2005] WTLR 1573, [105]ff.

74 The latter includes conflict between duty and duty.

75 There is an intermediate point between the common law approach to forfeiture and the equitable standard. If a fiduciary's services are performed negligently or improperly, forfeiture of remuneration is not in issue. Such disputes are governed by analogy to tort (*Bristol & West Building Society v Mothew* (n 52)). The proceedings are premised on performance, albeit defective performance, in respect of which compensation may be awarded.

76 M Conaglen, 'Remedial Ramifications of Conflicts between a Fiduciary's Duties' (2010) 126 Law Quarterly Review 72, 77 and 78.

77 S Oram, 'Forfeiture of Fiduciary Remuneration Following Breach of Duty: From Contract to Conscience' [2010] Lloyd's Maritime and Commercial Law Quarterly 95.

Developing this point, Peter Watts explains that forfeiture of remuneration can be understood from the common law perspective of money had and received, where the agent's misconduct constitutes a total failure of consideration.⁷⁸ However, the concept of 'total' failure is problematic, particularly if, as in *Stevens v Premium Real Estate*, the agent's services have been performed and damages have been assessed on that basis. Indeed, it is arguable that damages and restitution are inconsistent remedies because restitution of contractual consideration removes the basis on which the plaintiff is entitled to require the defendant to perform her contractual obligations.⁷⁹ In any event, leaving aside the status of damages, the prevailing view (despite criticism)⁸⁰ is that a failure of consideration must be total, not partial.⁸¹ An agent's commission is usually an element of an entire contract. It is therefore an all or nothing situation. Partial failure will not suffice unless the contract is severable.⁸² This is unlikely in a setting where corrupt performance cannot be segregated from the overall transaction.

It is therefore necessary to confront the fundamental question whether a breach of duty amounts to a total failure of consideration. From an equitable perspective, corrupt service may be so anathema to the concept of fiduciary duty as to effectively nullify any recognition of beneficial service. This is essentially a total failure of consideration in a different guise. However, equity's position is unpredictable. As previously noted, the fiduciary principle embraces many forms of relationship and the nature of fiduciary duty and its breach is driven by the particular facts. In some cases the threshold for forfeiture is equitable fraud; in other cases, forfeiture is only available if dishonesty and actual fraud are established. In contrast, the common law insists on a breach of basic proscriptive duties. It is evident that this is a more coherent and principled approach when considered from the perspective of a failure of basis.

Discussion to this point has adopted the traditional language of failure of consideration. However, in the present context it has aptly been observed that the term 'failure of basis' may be preferable to 'failure of consideration' because it more accurately depicts the essence of a claim directed to failed performance⁸³ and comprehends 'the state of affairs which was within the contemplation of the parties as the basis of their dealings'.⁸⁴ In contractual cases involving an agent's commission, this is directed to the nature of the agent's promised counter-performance.⁸⁵ A claim of failure of basis applies to fundamental breaches of the relationship. This would rule out narrow and technical infractions and reflect the common law's enforcement of basic prescriptive duties.⁸⁶

78 Watts, 'Restitution and Conflicted Agents' (n 5) 369–71.

79 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 355.

80 See discussion in G Virgo, *The Principles of the Law of Restitution* (3rd edn, Oxford University Press 2015) at 325–329.

81 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (HL), 77; *Baltic Shipping v Dillon* (n 79) 355–56; *Raulfs v Fishy Bite Pty Ltd* [2012] NSWCA 135, [88] and [89]. See further J Edelman and E Bant, *Unjust Enrichment* (2nd edn, Hart 2016) 266–69.

82 In this limited situation, restitution is available in respect of a discrete aspect of failed performance. See *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, (2001) 208 CLR 516, [19], [106] and [165]–[167]; *Barnes v The Eastenders Cash & Carry plc* [2014] UKSC 26, [2015] 1 AC 1, [114].

83 *Barnes v The Eastenders* (n 82).

84 *Roxborough v Rothmans* (n 82) [17] per Gleeson CJ, Gaudron and Hayne JJ. See similarly *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 382.

85 Failure of basis is not limited to failure of contractual performance and has wider application to a fundamental failure of a state of affairs (*Roxborough v Rothmans* (n 82) [16] and [104]).

86 See text following n 62 above.

If the principal seeks to recover an agent's commission, there is a corresponding obligation to effect counter-restitution.⁸⁷ As pithily expressed in *Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd*:⁸⁸ 'an entitlement to sue for "counter restitution" is pro tanto an answer to a claim for restitution'. At first blush, it seems paradoxical and (from the principal's perspective) self-defeating for a delinquent agent to offset forfeiture with a claim for the value of corrupt services.⁸⁹ The most logical – albeit circuitous – response is that no benefit was conferred by those services due to a failure of basis.⁹⁰ The efficacy of this position will depend on the substantive effect of the breach. It is a question of degree. The principal's obligation to effect counter-restitution is nullified if an agent failed to confer any form of benefit. For example, if the promised service was not performed or was performed so corruptly as to negate any benefit to the principal. Thus, the scope of counter-restitution must be tested against the defence of good consideration.

It has been noted that restitution of benefits transferred from the principal to an agent may be conditional on an award to the agent for the fair value of services rendered. As explained by Edelman and Bant: 'The rationale of the defence [of good consideration] is that the plaintiff must not be unjustly enriched by an order for restitution.'⁹¹ Thus, a defence of good consideration may limit or extinguish primary liability to effect restitution due to a failure of consideration.⁹²

A defence of good consideration reverses⁹³ and complements unjust enrichment through restitution by addressing the substantive effect of the payee's services. This critical enquiry determines the retention and forfeiture of an agent's remuneration. Returning to the facts of *Stevens v Premium Real Estate*, the defendant was required to restore commission received from the plaintiffs notwithstanding that the plaintiffs were fully compensated for loss attributable to the purchaser's deception and placed in the same position as if the agent's services had been duly performed. The case for counter-restitution was strong. The defence of good consideration was evident on the facts and affirmed by the form of relief granted. In the next section it is argued that this approach should inform equitable doctrine with respect to forfeiture.

5 Equity and failure of consideration

It is submitted that an approach based on failure of consideration would produce a more consistent and predictable outcome in equity. In this setting, equitable relief should be

87 Counter-restitution is not confined to contractual relationships. See, for example, *Pavey & Matthews Pty Ltd v Paul* (1986) 162 CLR 221; *Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd* [2006] VSCA 6, (2006) V ConvR 54–713.

88 *Ovidio Carrideo v The Dog Depot* (n 87) [49] per Nettle JA.

89 Correspondingly, allowances are granted in the court's equitable jurisdiction. In *Stupples v Stupples* (n 48) doubts were expressed, *obiter*, that a defaulting agent could receive an allowance in lieu of contractual commission (at [26]). See also *Avrabami v Biran* [2013] EWHC 1776 (Ch), [345].

90 The counter-argument of good consideration is discussed below.

91 Edelman and Bant (n 81) 365. The case of *Ovidio Carrideo v The Dog Depot* (n 87) 54–713 is instructive on this point. See further *Adrenaline Pty Ltd v Bathurst Regional Council* [2015] NSWCA 123.

92 *ANZ Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662, 673; *Plan B Trustees Ltd v Parker* [2013] WASC 216, [87]–[91].

93 As good consideration is a defence to restitution, it may be more accurately characterised as a bar to relief. Alternatively, good consideration serves to reverse an enrichment if invoked as a ground for counter-restitution.

informed by the common law.⁹⁴ More precisely, the focus must shift from overarching doctrine to the anatomy of the wrong. Equity views an agent's breach primarily as the betrayal of a relationship of trust and secondarily as a failure to observe the duty which underlies that relationship. From a common law perspective, the breach amounts to a failure of consideration. Enquiry is directed to construction of the contract and causation. If the wrongful conduct goes to the heart of the contract, it may be found that there was a failure of basis.⁹⁵ It is a question of degree. The contract will remain on foot and an agent may retain remuneration for his services if the breach of duty does not go to the whole contract,⁹⁶ or if the wrongdoing is merely incidental to the agent's performance,⁹⁷ an isolated event or severable from the core services contemplated by the agency agreement.⁹⁸

In contrast, from an equitable perspective, forfeiture is unlikely to be granted if it would be disproportionate or inequitable.⁹⁹ As the language suggests, jurisdiction is exercised on a discretionary basis and the outcome is less predictable than equivalent proceedings at law. As Dyson LJ (as he then was) observed in declining an application for rescission:¹⁰⁰

When 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.

The strict standards of fiduciary duty create a low threshold for breach,¹⁰¹ but, once liability is established, equity is circumspect with regard to relief. The enquiry is normatively driven, focusing on the manner in which the fiduciary relationship has been abused¹⁰² and its impact on the respective interests of the parties. While discretion is notionally exercised in a principled manner, the outcome is unpredictable. When a defaulting agent's contractual services have been performed and the principal has been fully compensated for any loss arising from a breach of duty, it is unclear whether an additional sanction of forfeiture will be imposed. This is both understandable and unsatisfactory. This state of affairs is not surprising given that an agency relationship is recognised both at law and in equity and judgments in this area reflect unreconciled elements of each. For this reason it is submitted that the common law's threshold of a failure of consideration would produce a more consistent and predictable outcome in equity and remove some of the more arcane distinctions between the two forms of action.

94 See A Burrows, 'We Do this at Common Law but that in Equity' (2002) 22 Oxford Journal of Legal Studies 1, where it is argued that substantive inconsistencies between common law and equity can sometimes be eliminated by a modest adjustment to their respective positions.

95 If there is a failure of basis, forfeiture can be granted as part of the process of rescission. An agent's commission is subject to forfeiture as the parties are restored to their pre-contract position. Thus, forfeiture is integral to *restitutio in integrum*. However, rescission assumes mutual, not unilateral obligations and counter-restitution can appropriately be invoked in relation to an executed agency contract.

96 In *Keppel v Wheeler* (n 12) 592, Atkin LJ accepted that 'there may well be breaches of duty which do not go to the whole contract, and which would not prevent the agent from recovering his remuneration'.

97 *Hippisley v Knee Brothers* [1905] 1 KB 1 (DC), 8.

98 *Peninsular & Oriental Steam Navigation Co v Johnson* (1938) 60 CLR 189, 216; *Nitedals Taendstikfabrik v Bruster* [1906] 2 Ch 671, 674–75; *Hippisley v Knee* (n 97) 9; *Erikson v Carr* (1945) 46 SR (NSW) 9 (Eq), 14–15; *Darmago v Fullerton Nominees Pty Ltd* 1999, SCWA CIV 1007, 27.

99 *Governor & Company of the Bank of Ireland v Jeffery* [2012] EWHC 1377 (Ch), [373]; *Avrabami v Biran* (n 89) [345].

100 *Johnson v EBS Pensioner Trustees Ltd* [2002] EWCA Civ 164, [79] per Dyson LJ.

101 See, for example, *Warman* (n 13)557.

102 The threshold is sometimes expressed in terms of whether the fiduciary acted in good faith or bad faith: *Maketu Estates Ltd v Robb* [2014] NZHC 2664.

It has been observed that the equitable standard for forfeiture is far from settled. The test is variously expressed as dishonesty, at one extreme, and equitable fraud, at the other. And traversing the remedial spectrum is an indeterminate test of unconscionability. In contrast, a single test of failure of consideration narrows the enquiry and promotes a more predictable outcome.

It may be objected that equitable discretion fosters uncertainty regardless of how the enquiry is framed. However, this can be overplayed. In fact, some argue that, as a body of principles, modern equity is 'as refined, rigorous and ultimately unyielding as anything produced by the common law'.¹⁰³ Moreover, it does not inevitably follow that common law reasoning in this area is more stable or immune from internal inconsistencies. For example, some judgments enunciate general principle without regard to the distinct status of secret commissions from a third party and agreed remuneration from a principal.¹⁰⁴ The latter gives rise to further uncertainties. The principal and agent will usually have defined the performance standards for the agent's services. Thus, the fundamental question whether there has been a total failure of consideration is inherently uncertain in that it is qualified by the nature of the agent's undertaking. However, the uncertainty is more factual than conceptual, and to that extent the distinct focus of failure of performance is a preferable model for both law and equity. In contrast to the current equitable approach to an agent's breach of fiduciary duty, a unitary test directed to the agent's performance provides clear direction as to the normative underpinnings of the enquiry. This is persuasively propounded by Peter Watts,¹⁰⁵ who argues that there is basically just one question: did the consideration fail due to the conduct of the agent? This leaves discretionary and unpredictable equitable considerations out of the equation and also removes the risk of punitive outcomes.¹⁰⁶

6 Jurisdictional and doctrinal implications of a unitary standard

It has been argued that the equitable response to forfeiture of commission should be informed by common law principles. However, the challenges of adopting a unitary standard should not be understated. Even a modest assimilation of common law doctrine within the scheme of equitable wrongs raises significant policy¹⁰⁷ and taxonomic issues.¹⁰⁸ This draws to the fore the jurisdictional relationship between law and equity. A fundamental issue that continues to divide judges, practitioners and academics alike¹⁰⁹ is whether the Judicature Acts¹¹⁰ effected a substantive fusion of the principles and doctrines of law and equity or whether each retains a separate and distinct identity. On one view, the Judicature Acts were procedural only and merely vested the administration

103 J Hackney, *Understanding Equity and Trusts* (Fontana Press 1987) 18–19. See also J Penner, *The Law of Trusts* (9th edn, Oxford University Press 2014) 4.

104 As previously noted, the former is a wrong per se, the latter is not.

105 Watts, 'Forfeiture of Agents' (n 4) 203.

106 See, for example, *Imageview* (n 5), discussed above.

107 See, for example, New Zealand's decision to accept incremental fusion of law and equity and its implications for determining the scope of fiduciary duty (*Day v Mead* [1987] 2 NZLR 443 (CA)).

108 The contemporary relevance of the debate is evident in *Fischer v Nemeske Pty Ltd* [2016] HCA 11, (2016) 330 ALR 1, where the majority of the High Court of Australia held that, with limited exceptions, a beneficiary's claim for money had and received will not lie against a trustee in the execution of her equitable obligations.

109 See, for example, the papers collected in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005).

110 The Supreme Court of Judicature Act 1873, ch 66, and the Supreme Court of Judicature Act 1875, ch 77.

of law and equity in one court.¹¹¹ As expressed in Ashburner's oft-quoted metaphor: 'the two streams of jurisdiction . . . though they run in the same channel, run side by side and do not mingle their waters'.¹¹² The alternative view is that equity and common law are effectively 'mingled or merged'.¹¹³ The debate has profound ramifications in fashioning (or denying) jurisdictional boundaries and defining the nature and scope of obligations and remedies.¹¹⁴ A *via media* between the competing views is to recognise that each body of law has, to some degree at least, retained distinct elements. This is to be expected given their separate development over many centuries. At the same time, neither equity nor common law operate in silos and it is unrealistic to suggest that each system is impervious to the influence of the other.¹¹⁵ Before and after the passing of the Judicature Acts, both equity and common law had the capacity to adopt and adapt concepts from each other.¹¹⁶ Developing this point, Sir Anthony Mason, writing extra-curially, opined:¹¹⁷

The traditional principles of equity are not so invincibly superior to the concepts of the common law that equity cannot occasionally profit from common law ideas. And, though the courts should look at policy arguments with due circumspection, it would be absurd to suggest that the courts cannot adjust or modify equitable principle on policy grounds where to do so is appropriate.

Other commentators have gone further and suggested that the debate may have moved on and that the appropriate focus is no longer fusion or fusion fallacy, but the desirability of legal change and development of principle.¹¹⁸

A further qualification is necessary. Equity's assimilation of common law reasoning with respect to money had and received may be less radical than first appears. The doctrinal basis of an action for money had and received is commonly attributed to Lord Mansfield's judgment in *Moses v Macferlan*.¹¹⁹ The case was heard in King's Bench, but the proceedings were said to be 'founded in the equity of the plaintiff's case'¹²⁰ and characterised as a 'kind of equitable action to recover back money, which ought not in justice to be kept'.¹²¹ In similar vein, Lord Mansfield considered that the action was consistent 'with the judgment of the Court of Conscience'.¹²² His Lordship subsequently described such proceedings as 'a liberal action in the nature of a bill in equity'.¹²³ The

111 *Salt v Cooper* (1880) 16 Ch D 544, 549. See further P V Baker, 'The Future of Equity' (1977) 93 Law Quarterly Review 529; J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th edn, LexisNexis 2015) [2-110]–[2-150].

112 W Ashburner, *Ashburner's Principles of Equity* (Butterworths 1902) 23.

113 *Aquaculture Corporation v New Zealand Green Mussel Co* (n 37) 301 per Cooke P. See also *Day v Mead* (n 107) 451.

114 At times, discourse has been lively. For example, Lord Diplock's description of Ashburner's fluvial metaphor as 'mischievous and deceptive' (*United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 (HL), 924–25) was denounced by Meagher JA as being 'so erroneous as to be risible' (*GR Mailman & Associates v Wormold* (1991) 24 NSWLR 80 (NSWCA), 99).

115 *Harris v Digital Pulse* (n 37) [18]; *Norberg v Wynrib* [1992] 2 SCR 226, 272.

116 *Harris v Digital Pulse* (n 37) [141]. The interaction of law and equity with respect to money had and received is well documented. See, for example, *Muschinski v Dodds* (1985) 160 CLR 583, 619–20; *Baltic Shipping v Dillon* (n 79) 376; *Roxborough v Rothmans* (n 82) [100].

117 A Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 Law Quarterly Review 238, 243–44.

118 Heydon et al (n 111) [2-380]–[2-400].

119 (1760) 2 Burr 1005, 97 ER 676 (KB). The influence of *Moses v Macferlan* is discussed in R Havelock, 'Rivalry over Liability for Defective Transfers' in Devonshire and Havelock (n 4) 119.

120 *Moses v Macferlan* (n 119) 1008 (Burr) and 678 (ER).

121 *Ibid* 1012 (Burr) and 680 (ER).

122 *Ibid* 1009 (Burr) and 678 (ER).

123 *Clarke v Shee* (1774) 1 Cowp 197 (KB), 199–200, 98 ER 1041, 1042.

elision of law and equity was exemplified by Lord Mansfield's openness to different sources of law, and was noted in Gummow J's influential judgment in *Roxborough v Rothmans of Pall Mall Australia Ltd*:¹²⁴

With varying degrees of success, Lord Mansfield sought to translate equitable principles, doctrines, and procedures into the trial of actions at law; this reflected his appreciation of equitable doctrine for its flexibility and adaptability to modern needs, particularly in commercial law.

His Honour elaborated that, following *Moses v Macferlan*, the action for money had and received has been recognised as equitable in character,¹²⁵ in England,¹²⁶ Australia¹²⁷ and the United States.¹²⁸ This was subsequently affirmed by the High Court of Australia in *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd*.¹²⁹ The plurality observed that the equitable origin of the action for money had and received had long been recognised in Australia¹³⁰ and its provenance was undisputed:¹³¹

There can be no denying the equitable roots of the principle by which a claim for restitution of money had and received to the use of the payer is to be determined. In *Dale v Sollet*, Lord Mansfield said of the action: 'This is an action for money had and received to the plaintiff's use. The plaintiff can recover no more than he is in conscience and equity entitled to' . . . In *Roxborough v Rothmans of Pall Mall Australia Ltd*, Gummow J explained that the 'equitable notions' of which Lord Mansfield wrote have been absorbed into the 'fabric of the common law' right of action for money had and received.

As Havelock aptly notes, money had and received may be regarded as an action that is equitable in nature, but which has historically been enforced by the common law.¹³² Thus, equity's reception of a common law wrong does not necessitate the kind of doctrinal upheaval that might have been anticipated. In fact it is in line with the modest incremental developments that are generally accepted by both sides of the fusion/fusion fallacy debate.

7 Conclusion

The relationship of principal and agent is but one of a varied and indeterminate list of relationships that are characterised as fiduciary. Equity primarily regards breach of fiduciary duty as the betrayal of a relationship of trust. Comprehensive remedies can be invoked to purge the wrong and deter others from like conduct. Notwithstanding the strict standards that define fiduciary duty, it does not follow that the remedial response will be oppressive. Not uncommonly, equitable compensation places the principal in the same position as if the agent's duties had been faithfully performed. This may explain why in some cases equity compensates for loss but falls short of forfeiting an agent's

124 *Roxborough v Rothmans* (n 82) [84] (footnotes omitted).

125 *Ibid* [85]–[87].

126 *Kelly v Solari* (1841) 9 M & W 54, 58, 152 ER 24, 26; *Lodge v National Union Investment Co Ltd* [1907] 1 Ch 300, 311–12; *Royal Bank of Canada v King* [1913] AC 283 (PC), 296; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 (QBD), 923.

127 *Campbell v Kitchen & Sons Ltd* (1910) 12 CLR 515, 531; *Muschinski v Dodds* (n 116) 619–20; *National Commercial Banking Corporation of Australia Ltd v Batty* (1986) 160 CLR 251, 268.

128 *Myers v Hurley Motor Co* (1927) 273 US 18, 24 (SC); *United States v Jefferson Electric Manufacturing Co* (1934) 291 US 386 (SC), 402–03; *Atlantic Coast Line Railroad Co v Florida* (1935) 295 US 301, 309.

129 [2014] HCA 14, (2014) 253 CLR 560.

130 *Ibid* [75].

131 *Ibid* [68]–[69] (footnotes omitted). See also [1], [65], [70], [71], [75] and [76].

132 R Havelock, 'Rivalry over Liability for Defective Transfers' in Devonshire and Havelock (n 4) 132, citing Gummow J's dictum in *Roxborough v Rothmans* (n 82).

commission. Whether the additional sanction of forfeiture should be imposed and the basis for doing so is problematic.

The forfeiture of an agent's commission is neither compensatory nor gain-based and is best regarded as a form of *sui generis* relief which is triggered by a breach of duty. The threshold is elusive. Equity does not countenance dishonesty or fraud in absolute terms. The interests of both parties are weighed in the scales, regardless of the gravity of the wrong. For example, an account of profits against dishonest and fraudulent fiduciaries¹³³ may be partly offset by allowances.¹³⁴ Again, an errant fiduciary may be granted an equitable lien or charge over trust property if the fiduciary has contributed value to that asset.¹³⁵ Equity is therefore circumspect before depriving an agent of remuneration if the principal has received the benefit of those services. Potentially, though, forfeiture can be granted across a spectrum of wrongs, from equitable fraud to cynical breach – although predictably, the more reprehensible the wrong, the more compelling the case for relief.

The common law is guided by the nature of the agent's undertaking and its contractual foundation. A claim for money had and received restores the *status quo ante* when performance has been frustrated by the agent's dishonesty. If the agent has repudiated the agreement and the basis on which his services were promised, the right to payment falls away. However, in some cases an agent may have performed the agreed contractual services, in whole or in part. Here, the interests of the parties can be adjusted to reflect the value of the agent's services. An agent's claim for counter-restitution, founded on good consideration, is a credible basis for that determination. This model should be applied in equity as well as law. An approach based on failure of consideration would produce a more consistent and principled outcome in equity. In this setting at least, equitable doctrine is not compromised by the reception of common law principles. On the contrary, as famously expressed in a different context, there are alloys which strengthen without corrupting.¹³⁶

133 *Murad* (n 73).

134 *Crampton-Smith v Crampton-Smith* [2011] NZCA 308, [2012] 1 NZLR 5, [65]ff. See also *Chirnside v Fay* (n 56); *Boardman v Phipps* (n 13); *Warman* (n 13).

135 *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488, 499. See also *LAC Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, (1989) 61 DLR (4th) 14.

136 P Devlin, *The Enforcement of Morals* (Oxford University Press 1965) 123.