Forfeiture of Trustees' Remuneration

1. It is well established that a fiduciary may forfeit his right to remuneration if he commits a serious breach of fiduciary duty (*Snell's Equity*, 33rd ed (2015), paragraph 7-062).

2. The principle applies to all fiduciaries (including partners/LLP members), but beneficiaries appear to have rarely, if ever, recovered remuneration from defaulting trustees.

3. Fees may be forfeited, if a fiduciary:

    a. acts dishonestly;
    b. takes a secret profit; or
    c. effectively fails to perform at all.

4. As Lord Alverstone CJ said, in *Andrews v Ramsay & Co* [1903] 2 KB 635, "*A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to commission*."

5. The remedy is restitutionary (*Stupples v Stupples* [2012] EWHC 1226 (Ch)), and there is no inconsistency in awarding both damages and refund of the commission (*Stevens v Premium Real Estate Ltd* [2009] 2 NZLR, at [90]).

6. There are two key defences:

    a. That the fiduciary has acted in good faith (*Keppel v Wheeler* [1927] 1 KB 577); and/or

    b. That the breach does not go to the whole contract; and/or it would be disproportionate or inequitable to impose forfeiture (*Bank of Ireland v Jaffery* [2012] EWHC 1377 (Ch)).

7. Fiduciaries may forfeit their remuneration even where the principal has derived a benefit from their services:

    a. In *Imageview v Jack* [2009] 2 All ER 666 a football agent who had made a secret profit was held to have forfeited his right to commission/agency fees, despite the fact that he did secure his principal the anticipated contract.

    b. In the case that led to the decision in *Hosking v Marathon Asset Management LLP* [2016] EWHC 2418 (Ch), the appellant had generated substantial profits for the respondent but nonetheless forfeited his share of profits.

8. The Court has power to order partial forfeiture, or forfeiture subject to an equitable allowance for the cost/time of the fiduciary; but the power is rarely exercised: Snell at paragraph 7-055 and *Imageview* at [59].

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