

Breach of fiduciary duty claims and the importance of keeping records - Keown v Nahoor and Others [2015]

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Keown v Nahoor concerned an accountant and his family alleged to have misappropriated substantial sums of money and clarifies where the burden of proof lies in such cases. The importance to anyone in a fiduciary position of maintaining accurate records is also illustrated.

Background

In May 2007, Mr Keown engaged Mr Nahoor as an accountant to look after the financial side of his newspaper distribution company ("AJK"). In that capacity, Nahoor was a signatory to the business bank account. Shortly after this arrangement was made, it was agreed that the other defendants, Nahoor's daughter and son-in-law ("the Hassans") would assist Nahoor with the work.

In 2011, in the course of divorce proceedings, Keown's wife instigated an investigation into the finances of AJK as she suspected her husband was trying to conceal assets. The Judge in those proceedings appointed an independent accountant, Mr O'Leary, to review AJK's books. Mr O'Leary concluded the business accounts were inaccurate, with numerous sums apparently missing. It subsequently transpired that between May 2007 and July 2012, £666,308 had been paid from AJK's accounts to an account belonging to Nahoor, in the name of MNP, along with various other smaller amounts into Nahoor's own account.

Mr Keown terminated Nahoor's retainer and brought a claim against him on three bases: (i) failure to account for sums in breach of fiduciary duty; and/or (ii) unjust enrichment; and/or (iii) constructive trust. The claim against the Hassans was similar, in that they had allegedly received sums in excess of their proper remuneration for which they were required to account as knowing recipients and/or on the basis of unjust enrichment and/or as constructive trustees.

The Court's Findings

The Court held that, given his role in managing AJK's accounts - in effect "controlling the purse strings" - Nahoor was in a fiduciary relationship with Mr Keown. Accordingly, the burden of proof was on Nahoor to justify the payments made to him.

The Court also applied *Keefe v Isle of Man Steam Packet Co Ltd [2010]* which stated that: "A defendant who, in breach of duty, made it difficult or impossible for a claimant to adduce relevant evidence must run the risk of adverse factual findings". Nahoor had himself been responsible for providing an account, but had failed to do so both during his retainer and at trial, and hence the Judge was entitled to make adverse findings, namely that he would find against Nahoor in relation to any monies for which he failed to explain the source. This extended to one of Nahoor's accounts for which Mr Keown was only able to obtain statements for one year. In that year £48,180 had been wrongly received from AJK, and the Judge was asked to, and did, infer that such payments must have continued throughout the period of Nahoor's retainer.

As a result, the Court found that Nahoor had taken over £700,000 more than the sums to which he was entitled. The Court also accepted, on an alternative basis, the claim for unjust enrichment and that there was a constructive trust over the sums misappropriated by Nahoor.

However, the facts differed in relation to the Hassans, as it was agreed they were not retained or employed by Mr Keown, and hence were not in a fiduciary relationship with him. The burden of proof therefore fell to Mr Keown and, on the facts and evidence, the Court held that the claims of knowing receipt and unjust enrichment failed. On the claim of constructive trust, however, the burden moved back to the Hassans. They failed to discharge that burden and hence there was a constructive trust in favour of Mr Keown over any monies overpaid to them.

Comment

The case illustrates the importance of where the burden of proof lies when the court comes to awarding damages.

For accountants and other professionals faced with claims for breach of fiduciary duty, it is important if they are fiduciaries to be able to justify every benefit received in that role through maintaining accurate records. In the absence of such records

the court can and will make adverse findings against the fiduciary, even where there are obvious gaps in a claimant's evidence on quantum.

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