



What States Should Know About Knowing Receipt

Who can be sued? Knowing Receipt is an “*equitable claim*” for personal relief against a recipient of tainted assets. It is often deployed in circumstances of bribery and corruption, particularly in claims to recover stolen money or assets. It is also available against companies, trusts and associates that have received proceeds for the dishonest agent. Its essence is to make the recipient of the property a “*constructive trustee*” and impose a liability to account to the claimant for the trust property, or to pay the claimant its value.

When does it apply? It is particularly helpful in circumstances where it is not possible to prosecute the third party recipients because they do not have the requisite criminal state of knowledge or participation, but they have enough knowledge of facts or circumstances which taint the assets they have received to make them a knowing recipient and the successful target of a claim. It is also helpful where the original assets have been dissipated and are no longer identifiable, or because the assets have been transferred on to a “*bona fide purchaser for value without notice*.”

What needs to be proved? There are four essential elements of the claim. They are:

- **Fiduciary relationship.** The asset in question, which was transferred, was held under or is connected with, a trust or fiduciary relationship. Classically, in the case of a Government official who diverts an asset to a third party in exchange for payment of a bribe, the asset will usually be Government property and therefore held pursuant to a fiduciary relationship.
- **Breach.** The transfer of the asset to the recipient involved a breach of fiduciary duty. The breach of the fiduciary duty will usually be self-evident. The duty concerned is not limited to a breach of an express trust; a claim lies if a director appropriates an asset or opportunity to himself or another, or a Minister or Government official procures the transfer of land to a third party in breach of his fiduciary duty e.g. by sale at an undervalue or in breach of Government procurement rules.
- **Beneficial receipt.** The recipient received the benefit of the transfer or asset. The receipt of the benefit is usually self-evident.
- **Unconscionability.** It would be “*unconscionable*” for the third party to retain the benefit of the transfer. The final,

unconscionability, test is very broadly expressed and requires consideration of all the circumstances.

What will a claim fail? A claim will not be sustainable if the recipient is a “*bona fide purchaser for value without notice*” (i.e. a third party that has acquired the property at market value with no knowledge of the claim or, roughly, no reason to suspect a claim exists). Questions of notice can therefore arise, especially in the case of financial institutions who receive assets, as to whether they have sufficient knowledge that it would be unconscionable for them to retain the asset or fund concerned.

What is knowledge? Actual knowledge of the wrongdoing is not necessary; failing to make reasonable inquiries after having been put on inquiry by facts and matters which are unusual or out of the ordinary is generally sufficient, if established, to show the requisite degree of notice, and therefore unconscionability, provided the outcome of those inquiries, if made, would reasonably have revealed the wrongdoing.

What can be recovered? If all four elements are made out then a personal liability to account for the benefit is imposed on the recipient who has a constructive trust imposed on him. The terms of the constructive trust are the same as those voluntarily assumed by express trustees; the recipient’s core duty is to restore the misapplied trust property. If he cannot do so because, for example, he has sold it on to a bona fide purchaser for value without notice, then he will be liable for damages for breach of trust, generally assessed at the value of the asset.

What about proprietary claims? The claimant state may have a proprietary (or ownership) claim where its own assets have been stolen, or where its agent has received a bribe in the performance of its duties. This has a number of benefits. For example, the state is usually entitled to any assets acquired using the bribe or its stolen asset, including any increase in value due to market rises. If the official is insolvent, the state can recover the bribe ahead of the claims of other creditors.

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