

Focus on fraud and asset tracing: recent developments in the law of knowing receipt in the Cayman Islands

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A plaintiff's ability to pursue a claim for knowing receipt may be lost if the property passes through a jurisdiction in which its beneficial interest is extinguished by the law of that jurisdiction.

Fraud litigators have significant weapons in their arsenal to trace and recover assets that have been transferred in breach of trust (such as company assets that have been transferred on the orders of delinquent directors, where there is no benefit to the company, or trust assets that have been transferred on the orders of delinquent trustees). One common claim that can be brought against third party recipients of such assets is a claim for knowing receipt.

A claim for knowing receipt can be established where the third party knows the assets were transferred in breach of duty. However, in a recent decision in England (which is likely to be followed in the Cayman Islands), it was held that a claim for knowing receipt may not be available if the beneficial interest in the assets has been extinguished by the law of a jurisdiction through which the assets have passed.

Byers v Saudi National Bank

Mr A held shares in five Saudi Arabian banks on trust for a Cayman Islands company (S). The trust was governed by Cayman Islands law. In breach of trust, Mr A transferred the shares to a Saudi Arabian bank (the **Bank**) to discharge his indebtedness to it.

The Bank knew that Mr A held the shares on trust for S, and a reasonable bank would have appreciated that the transfer was a breach of trust and/or the Bank recklessly failed to make such inquiries about the transfer as an honest and reasonable bank would have made. [1] So, could S recover the value of the shares from the Bank on the grounds of knowing receipt?

One might have thought that the answer was yes. However, in *Byers v Saudi National Bank* [2022] EWCA Civ 43; [2022] 41 W.L.R. 22 (*Byers*) the English Court of Appeal held that S could not do so. The reason?

For a claim for knowing receipt to succeed, the property must be subject to a trust at the time it is received. [2] The law governing the question "who has title to the shares?" is the law of the *lex situs* (the place where the property is situated) rather than, say, the law of the *lex loci actus* (the place where the wrongful act took place). The law of the *lex situs* in *Byers* was Saudi Arabian law, and under Saudi Arabian law the shares ceased to be subject to any trust the moment they were registered in the name of the Bank. [3]

Byers therefore makes it clear that under English law, a continuing proprietary interest in the relevant property is required for a knowing receipt claim to succeed.

| Cayman Islands

Byers has not yet been the subject of any reported or unreported decision in the Cayman Islands. However, as Cayman Islands law tends to follow English law in cases concerning accessory liability in the context of civil fraud, the Cayman Islands courts are likely to follow *Byers* if a similar situation arose in the jurisdiction. [4] Though the shares in *Byers* were situated in Saudi Arabia, the position would seem to be the same if property that was otherwise capable of being traced passed through a jurisdiction that did not recognise the concept of a trust (or if the trust was defeated for some other reason), even if all the other jurisdictions through which it passed did do so.

| Conclusion

Byers therefore provides a useful warning to anyone seeking to pursue a claim for knowing receipt where property is situated in, or has passed through, another jurisdiction. That warning is to obtain expert advice about the law of the jurisdiction in question to ensure the claim will not be defeated on the grounds that the property was not subject to a trust when the recipient received it.

In *Byers*, the shares were transferred directly to the Bank, but the outcome would seem to be the same if the property ceased to be subject to a trust at any point before it reached the ultimate recipient.

| Other points

Byers does not mean the fact that the property was held on trust has no effect. It would still have effect, for example, as between the trustee and the beneficiaries. But if the beneficiaries

ceased to have any proprietary interest by the time the property was received by the recipient, a claim for knowing receipt would not be available even if all the other elements of a knowing receipt claim were present.

A claim for "dishonest assistance" might still be available because such a claim does not require the assister to have received the property. [5] However, such a claim requires the plaintiff to plead and prove dishonesty, but if it cannot do so (and the claimant in *Byers* did not do so) [6] no accessory liability claim would seem to be available.

[1] The Bank had failed to comply with an order for disclosure and, as a result, was debarred from defending the claim other than on specific grounds. Accordingly, these allegations by the claimant were taken to be true: *Byers v Saudi National Bank* at paragraph [6] and [7].

[2] *Byers v Saudi National Bank* at paragraphs [78] and [79].

[3] *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 W.L.R. 387 (CA) referred to in *Byers v Saudi National Bank* at paragraphs [40], [50] and [80].

[4] A decision in the same litigation (*Byers v Samba Financial Group Fancourt J* [2020] EWHC 853 (Ch)) was considered in *In the Matter of Sina Corporation* FSD 128 of 2021 (RJP), 25 January 2022 (unreported) at paragraph [66], but that was in relation to a different point.

[5] *Byers v Saudi National Bank* at paragraph [13].

[6] *Byers v Saudi National Bank* at paragraph [8]. Something less than dishonesty is sufficient for a claim in knowing receipt.

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