



A Company's Liability in Knowing Receipt for the Fiduciary Breaches of its Errant Directors

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Introduction

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1. In *Griffin Real Estate Investment Holdings Pte Ltd (in liquidation) v ERC Unicampus Pte Ltd [2018] SGHC 273* ("**GREIH v ERCU**"), the High Court examined whether in the event that directors of the plaintiff company had wrongfully caused it to extend an unauthorised loan to the defendant company, the defendant company would be liable as a knowing recipient of that loan.
2. The plaintiff, Griffin Real Estate Investment Holdings Pte Ltd (in liquidation) ("**GREIH**"), sought to recover a share of the proceeds in the sale of a property, known as Big Hotel, from the defendant ERC Unicampus Pte Ltd ("**ERCU**").
3. GREIH claimed that:
 - a. certain directors of GREIH had wrongfully caused it to extend an unauthorised loan of \$10 million (the "**\$10m Loan**") to the defendant, ERCU; and
 - b. ERCU knowingly received the \$10m Loan and used the monies to help it complete its purchase of the Big Hotel.
4. The High Court decided that:
 - a. ERCU was liable as a knowing recipient of the \$10m Loan, although it was not a trustee.
 - b. It was appropriate for ERCU to be ordered to account for the profits made as a result of its knowing receipt of the \$10m Loan.

Facts

5. In 2009/2010, Andy Ong led certain investors to invest in two properties – Bugis Cube and Big Hotel. Andy Ong set up special purpose vehicles ("**SPVs**") to hold the investment in each property. GREIH and ERCU were two of these SPVs. GREIH was the SPV used to acquire Bugis Cube, and Sakae Holdings Ltd ("**Sakae**") was one of the shareholders of GREIH.
6. The Big Hotel investment involved acquiring an old commercial building, redeveloping it into a hotel, and selling it. In 2010, ERCU acquired the Big Hotel at a purchase price of \$103m. In 2011, ERCU obtained a loan from United Overseas Bank Limited ("**UOB**") for \$77.25m to fund part of the purchase price for the Big Hotel (the "**UOB-ERCU Loan**"). The

UOB-ERCU Loan was secured by a mortgage over the Big Hotel and by guarantees given by Andy Ong and ERC Holdings Pte Ltd (the ultimate holding company of the SPVs). One of the conditions precedent in the UOB-ERCU Loan was that ERCU had to pay the balance of the purchase price before it could draw down on the loan.

7. In 2011, United Overseas Bank Limited ("**UOB**") granted GREIH a loan of \$10m for the express purpose of funding its working capital requirements (the "**UOB-GREIH Loan**"). GREIH used the UOB-GREIH Loan to make a loan of \$10m to ERCU. This enabled ERCU to complete its purchase of Big Hotel from Garden Estates Pte Ltd ("**Garden Estates**"). At GREIH's direction, the loan amount of \$10m was disbursed by UOB directly to Garden Estates, and was used to pay part of the purchase price for Big Hotel.
8. The balance of the purchase price for the Big Hotel was paid by ERCU using the UOB-ERCU loan and \$15.48m in cash contributions.
9. At the material time, Andy Ong and Ong Han Boon were directors of GREIH.
10. There had been previous legal proceedings regarding the \$10m loan, one of which was Suit No. 1098 of 2013 ("**S1098**"). In *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd and others (Foo Peow Yong Douglas, third party) and another suit* [2017] SGHC 73 ("**Sakae Holdings (HC)**"), at [315], the High Court judge found that, inter alia, Andy Ong and Ong Han Boon had breached their fiduciary duties to GREIH by causing GREIH to extend the \$10m Loan to ERCU (the "**Breach Finding**").
11. In addition, the High Court judge in *Sakae Holdings (HC)* also stated that on the evidence before her, it seemed plain that ERCU must have been a knowing recipient of the \$10 loan. However, she refused to make a declaration that ERCU was a constructive trustee of the sum for GREIH, because such a declaration could only be granted in an action commenced by GREIH.
12. In the present proceedings, GREIH submitted that:
 - a. ERCU was estopped from challenging the breach finding in S 1098 on the grounds of, inter alia, issue estoppel.
 - b. ERCU was liable as a knowing recipient of the \$10m Loan and should be construed as a constructive trustee of the balance amount outstanding; and
 - c. GREIH was entitled to its proportionate share of the proceeds of sale of the Big Hotel.

The Issue of Issue Estoppel

13. The High Court's starting point was that the requirements of issue estoppel were as follows:
 - a. There must be a final and conclusive judgment on the merits of the issue which is said to be the subject of an issue estoppel.
 - b. The judgment must be made by a court of competent jurisdiction.

- c. There must be identity between the parties to the two actions that are being compared.
 - d. There must be an identity of subject matter in the two proceedings.
14. The High Court found that the S 1098 findings clearly satisfied the first two requirements of issue estoppel – there was a final and conclusive judgment on the merits of the issue, and the judgment was made by a court of competent jurisdiction.
 15. The third requirement of issue estoppel is that there must be identity between the parties to the two actions that are being compared. Although on the face of it, Sakae (not GREIH) was the one that sought the declaration against ERCU in S1098, the High Court found Sakae was effectively acting for the benefit of GREIH in relation to the \$10m loan. As such, GREIH (not Sakae) and ERCU were the effective parties to the S1098 Findings, and the third requirement was met.
 16. However, the High Court found that the fourth requirement that there must be an identity of subject matter in the two actions was not met, because in S1098, the High Court had in effect dismissed Sakae's claim against ERCU on the ground that Sakae had no standing.
 17. Hence, the High Court found that issue estoppel did not arise in relation to the S1098 Findings.

The Issue of Liability in Knowing Receipt

18. GREIH sought declarations that, inter alia:
 - a. ERCU is a knowing recipient of the \$10m transferred to it by GREIH;
 - b. ERCU is a constructive trustee and holds GREIH's share of the proceeds from the sale of Big Hotel on trust for GREIH.
19. ERCU accepted that it would be a knowing recipient of the \$10m Loan if the Court came to the conclusion that Andy Ong and Ong Han Boon (GREIH's directors at the relevant time) had breached their fiduciary duties to GREIH in arranging for the \$10m Loan. The Court in S1098 had found that they had breached their fiduciary duties to GREIH in arranging for such a loan. As a result, the High Court in the present proceedings found that ERCU was a knowing recipient of the \$10m Loan.
20. Although the High Court found that ERCU was a knowing recipient, the High Court emphasised that ERCU was not a trustee. This was because a knowing recipient was not a trustee, but his liability was that of an accessory to the breach of trust. Although a knowing recipient has often been described as a constructive trustee, that description merely indicated that he was liable to account for profits in equity as if he had been a true trustee.
21. In summary, in the present proceedings, the High Court found that:
 - a. ERCU's liability as a knowing recipient was to return the \$10m to GREIH. However, on the facts, the \$10m had already been repaid to GREIH.
 - b. In addition, ERCU might also be held liable to account for profits gained as a result of its knowing receipt of the \$10m.

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The Issue of Ordering an Account of Profits

22. The High Court stated that as a matter of principle, the personal remedy of an account of profits, which was available against a dishonest assister, must also be available against a knowing recipient.
23. On the facts, the High Court found that:
 - a. there was a direct causal link between the \$10m Loan and ERCU's profits from the Big Hotel; and
 - b. the profits from the Big Hotel investment were **not** the kind of profits that GREIH had decided to forego.
24. The High Court found that there was such a direct causal link because the evidence was clear that without the \$10m loan, ERCU would not have been able to draw down on the UOB-ERCU Loan to complete the purchase of the property. As such, the \$10m Loan was essential for the investment in the Big Hotel.
25. With regard to the issue of whether GREIH had decided to forego profits, ERCU submitted that from the outset, GREIH and ERCU were set up solely for the Bugis Cube investment and the Big Hotel investment respectively. As GREIH had deliberately limited its undertakings to the Bugis Cube investment, it had never intended to make profits from any undertaking other than the Bugis Cube investment.
26. The High Court rejected ERCU's submission as being unmeritorious. Although there was no intention that GREIH should invest in the Big Hotel, the fact of the matter was that GREIH's money had been wrongfully used by ERCU for the Big Hotel investment. The relevant question to ask, was thus, whether it could be said that GREIH would not have intended to share in the profits if GREIH had decided to invest the \$10m in the Big Hotel investment. The answer was an obvious "no".
27. Hence, the High Court found that it was appropriate for ERCU to be ordered to account for the profits made as a result of its knowing receipt of the \$10m Loan. On the facts, the High Court stated that the profits gained by ERCU as a result of its knowing receipt of the \$10m Loan would be a proportionate share of the profits from the Big Hotel investment.

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