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Payments made to companies by mistake before or after bankruptcy/liquidation

Situations can arise where a payment is made by one party to another party by mistake. This occurs, for example, where a debtor makes a payment to the incorrect entity within a group of companies, a bank remits funds to the account of an unintended recipient, or a finance company makes payment to a supplier of equipment based upon forged invoices.

A claim in restitution arises as an alternative to a claim under contract or tort (based upon negligence or another type of civil wrong). In the case of mistaken payment, there is unlikely to be a contract between the parties, so the law recognises a right to recover mistaken payments based on the principle of unjust enrichment, as the payee's receipt due to the payer's mistake makes the payee's enrichment unjust.

If money is paid as a result of a mistake, the plaintiff will, on the face of it, have a right of recovery. The receipt is the basis of that right. The components of a restitutionary claim are:

1. the enrichment;
2. that the enrichment was obtained at the plaintiff/payer's expense; and
3. that the enrichment (or its retention) is unjust.

Not all payments made by mistake will be recoverable. The main defence to a claim based in restitution is 'change in position', where the party in receipt of the payment has changed its position, in good faith, in reliance on the payment and should not be ordered to repay the money as it would be unjust.

Payments mistakenly made to an officer of the Court, such as a bankruptcy trustee, are generally recoverable. The trustee in bankruptcy or company liquidator is personally liable as a constructive trustee for payments, *knowingly received*, made by mistake to the bankrupt's/company's account during insolvency.

In *Wambo Coal Pty Ltd v Ariff (2007) 63 ACSR 429*, the liquidator was held personally liable for payments made by mistake to the company in liquidation. The money was paid in error by Wambo to the company, when no money was in fact owing. Before Wambo discovered the error and demanded reimbursement, the company liquidator (Ariff) used the monies to pay disbursements, even though he was aware that Wambo did not owe any money to the company. The fact that the recipient company was insolvent did not affect the remedy available to the payee (Wambo). Wambo was able to seek payment from the liquidator personally, as the liquidator had sufficient knowledge that the monies were paid by mistake and that the company had no right to keep the monies which were being held by the company on constructive trust.

In *Westpac Banking Corp v Ollis (2007) NSWSC 956*, the Court held that where moneys were paid by mistake, with the recipient having knowledge of the mistake, the monies were held on constructive trust for the bank.

In *Barnes v Addy (1874) LR 9 Ch App 244*, the Court referred to two grounds/limbs upon which third parties to a trust can become constructive trustees:

1. where the third party receives and becomes chargeable with some part of the trust property – *knowing receipt*; or
2. where the third party assists, with knowledge, in a dishonest and fraudulent design on the part of the trustee – *knowing assistance*.

Please contact SRM Lawyers if you have any enquiries relating to corporate or personal insolvency.

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