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Online Fraud — bank's duty of care

Whether banks may be held liable for third-party fraud in online transfers depends in the first instance on the existence of the bank's duty of care to the victim.

Internet banking, whilst revolutionising banking business, has increased a bank's risk exposure for online fraud. A pivotal question is whether victims of e-banking fraud may pursue recovery of funds from the receiving bank. As this type of online fraud is often global in effect, the approach of courts across the world is instructive.

A recent United Kingdom case

In the United Kingdom, a duty of care on the part of the receiving bank to the victim of online fraud is not readily found to exist. This was so held in the recent case of **Tecnimont Arabia Ltd v National Westminster Bank plc** [2023] 1 All ER (Comm) 342.

In this case, the claimant company ("Tecnimont") was a victim of an Authorised Pushed Payment fraud. A third-party fraudster gained unauthorised access to Tecnimont's email system and fraudulently instructed Tecnimont to transfer the funds to a National Westminster Bank ("NatWest") account controlled by the fraudster. By the time the fraud was discovered, most of the funds had been dissipated by the fraudster.

Tecnimont accepted that it was not a NatWest customer, and NatWest did not have a duty of care towards it. Tecnimont claimed, however, that NatWest was liable for knowing receipt of property subject to a trust and unjust enrichment.

Tecnimont argued that: (a) the funds transferred constituted trust property in which Tecnimont held an equitable proprietary interest, and it was unconscionable for Natwest to retain such funds; also (b) Natwest was unjustly enriched at Tecnimont's expense, as the enrichment stemmed from a payment made under a mistaken belief induced by the fraudulent actions of a third party.

Dispute Resolution Update

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(i) A claim for knowingly receipt will fail when the transferred fund is not trust property

The Court held the knowingly receipt claim was not valid as (a) Tecnimont had transferred the funds under a mistake induced by the deceit of a third party; (b) the property did not constitute trust property at the time it was received; and (c) Natwest received the deposit for its customer and not for its own account.

(ii) No unjust enrichment of the bank at the expense of the victim if it did not directly deal with the victim or the victim's property

Referring to the case of **Investment Trust Companies v HMRC**, the Court stipulated four ways in which a claimant could satisfy the Court that the defendant had been unjustly enriched at its expense (assuming there to be a "*transfer of value*"):

a) the claimant and defendant had direct dealings;

b) the claimant and defendant did not have direct dealings, but the substance of their dealings was such that the law would treat them as direct;

c) the claimant and defendant dealt with each other's property; or

d) the claimant could trace an interest into property provided to the claimant by a third party.

In this case it was found there was no direct transfer between Tecnimont's bank and Natwest and the parties did not deal directly with the other's party property. The transferred funds went through international interbank transactions to effect the transfer to Natwest.

Accordingly, the Court found that the defendant bank was not enriched at Tecnimont's expense and that the unjust enrichment claim must fail. It had no right to restitution of any sums against the defendant bank.

A recent Malaysian case

On a different factual narrative, in Malaysia, the courts have found a duty of care to exist in some circumstances. The recent Malaysia case of **Nemonia Investments Ltd v Ambank Islamic Bhd** [2023] 12 MLJ 831 ruled that the bank must not ignore a notice of fraudulent transactions received through the SWIFT system even though the bank had no relationship with the party which sent the notice.

In that case, the plaintiff company ("Nemonia") had been scammed by an unidentified group of individuals; Nemonia's lawyer had been duped to transfer Nemonia's monies held in the Bank of Cyprus to four defendant banks under the account names of Matt

Advance Trading or Weez Global Trading. The payments were made under transactions undertaken through the SWIFT system. Various notices concerning the invalid payments/fraudulent transactions were issued by the Bank of Cyprus to the defendant bank.

Plaintiff's claim

Nemonia commenced a suit to the defendant banks to claim that the defendant banks were negligent in (a) the operations of the account held by Matt Advance Trading and Weez Global Trading; and (b) not ensuring that these fraudulent transactions were identified and stopped.

Nemonia suggested that when the funds were transferred via instructions received through SWIFT, the defendant banks should have made inquiries as to the purpose of the payment and ensured that the payments made from Nemonia's account were genuine.

The defendant banks argued that they had acted under the instruction given by the paying bank and they did not owe any duty of care to Nemonia as it was not their client.

(i) Bank owes a duty of care to users of financial system regardless of whether they are the customers of the bank

The High Court held that the defendant banks owed a duty of care to Nemonia although the said company was not a customer of the banks. Considering that the defendants were aware that the monies were transferred from Nemonia's accounts in the Bank of Cyprus into the accounts that were held with the defendants, the defendants did have an indirect relationship with Nemonia. Therefore, there was a relationship of proximity between Nemonia and the defendant banks which fulfilled the proximity test.

The High Court also found that it was foreseeable that the defendant banks' conduct could cause harm to Nemonia and that it was fair, just, and reasonable to impose liability on the defendant banks for such harm.

In the words of Justice Emran: "*Banks in this era should bear some responsibility and owe a duty of care to users of the financial system irrespective of whether they are their customers or otherwise*".

(ii) Bank is not negligent for failing to monitor the receipt of money into the account of the alleged scammers when there are no suspicious circumstances to warrant an investigation

On the issue of monitoring the accounts of the alleged scammers when the monies were received, the High Court held that the defendant banks had not breached any

duty of care.

The High Court held there was no evidence of any requirement or regulation that the defendants or any bank undertake any investigation as to the purpose of payments unless it was shown there were suspicious circumstances.

The High Court held at the time the monies were received, it could not be said that the said transaction was on its face suspicious; the monies were transferred through instructions received within the SWIFT system from credible financial institutions such as Deutsche Bank and Society General.

(iii) Banks cannot ignore a notice of fraudulent transaction received under the SWIFT System

The High Court held that the first defendant ("Ambank Islamic Bhd") was liable for the monies transferred ("RM315,000") after it received notice through the SWIFT system in MT999 (a form of the notice of fraudulent transaction) format from the Bank of Cyprus alerting them of the fraudulent transaction. According to the High Court, once a notice of fraudulent transaction is issued, banks should not shirk from their obligation to ensure that such transactions are stopped.

Although the defendant banks suggested that it is their practice for MT999 to be ignored and that they do not have any relationship with the Bank of Cyprus, the High Court held that the Ambank Islamic Bhd should not have ignored the notice merely because of the form used by the Bank of Cyprus especially with the growth of scams and fraudulent activities in the banking industry.

The High Court held that a prudent and reasonable banker would have at least frozen the accounts and undertaken an investigation immediately upon receipt of the notice to ascertain the validity of the claim/notice.

Meanwhile, the 2nd to 4th defendants were not held liable as the monies had left the account when the said notices were issued by the Bank of Cyprus to them.

This Update is prepared by Teo Tze Jie.

For more information about this article or dispute resolution matters in general, please contact our Dispute Resolution Practice Group.