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Banks Beware: Liability For Breach of *Quincecare* Duty

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Against the backdrop of increasing incidents of bank payment fraud such as the '*Macau Scam*' which recently made headlines across the country, questions have been asked whether banks should do more in preventing these fraudulent transactions against their customers.

This alert examines the legal relationship between bankers and customers and the legal duties underpinning their association, specifically whether the victims of fraud could recover their losses from the banks who facilitated the fraud, albeit unwittingly.

Quincecare Duty of Care

Generally, the relationship between a banker and customer is primarily a contractual one, where the bank is obliged to repay and disburse the customer's money in accordance with the customer's instruction without undue delay.

On that premise, it used to be the position that banks' duties are generally limited to those provided under the terms of their engagement. However, in tandem with the advances of the technology, the common law has developed to impose a duty of care upon the banks towards their customers to not immediately execute an order for payment in circumstances where any reasonable banker would hesitate to execute that order. Such duty is called the '*Quincecare* duty', deriving its origin from the English case of *Quincecare Ltd*¹.

In the *Quincecare* case, the bank had granted a loan to Quincecare Ltd. In the loan drawdown request, the chairman of Quincecare had requested that the proceeds be disbursed to the account of a solicitors' firm instead of into Quincecare's account. Unbeknown to the bank, the chairman had earlier arranged with the solicitors to transfer the loan proceeds into another account in the United States. The chairman later absconded to the United States and misappropriated the money. The bank brought an action against Quincecare to recover the loan amount. Quincecare pursued a counterclaim against the bank claiming that the bank was

¹ *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363

negligent and should be held responsible for allowing the proceeds to be paid into the solicitors' firm. The court had to decide whether the bank owed any duty of care towards Quincecare, and if so, whether it had breached that duty.

Court's Decision

The court concluded that the bank did owe a duty of care to Quincecare but, on the facts of the case, found that the bank had not breached its duty. The basis for imposing duty of care on the bank was twofold. Firstly, the court held that the bank was acting as Quincecare's agent when it executed the chairman's instruction to transfer the loan amount directly into the account of the solicitors' firm. It is trite that an agent owes a fiduciary duty towards his principal and thus the bank was under a duty to act in the best interest of Quincecare. Further, as a matter of agency law, the bank is bound to exercise reasonable care and skill in carrying out the instructions of Quincecare. As such, it is to be implied into the contractual terms between the bank and Quincecare that the bank would exercise reasonable care and skill in and about executing its customer's orders.

Taking the legal basis into consideration, the English High Court formulated the *Quincecare* duty, as a duty of the banker to refrain from executing an order if and for as long as the banker is 'put on inquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of its customers. In assessing whether the duty has been breached, the bank will be judged according to the standard expected of an ordinary prudent banker.

Commentary: The Malaysian Perspective

The courts in Malaysia have adopted and imposed the *Quincecare* duty in several decisions. As a result, the law on bankers' duties in this particular area has been steadily developing over the years in Malaysia.

In *Abdul Rahim Abdul Hamid*,² the Federal Court found the bank to be in breach of its duty of care for misrepresenting to the customer that, the facility agreement to be executed contained the same terms as the working draft duly

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² *Abdul Rahim Abdul Hamid v Perdana Merchant Bankers Bhd* [2006] 5 MLJ 1

negotiated by the parties. In fact, the facility agreement to be executed contained a number of material changes.

In *Wong Keng Fatt*,³ the court held that a bank would be liable for breach of its duty of care in either of the following circumstances:

- the bank executes the order or instruction knowing it to have been dishonestly given or procured;
- the bank shuts its eyes to the obvious fact of the dishonesty;
- the bank acts recklessly in failing to make such inquiries as an honest and reasonable man would make; or
- the bank has been 'put on inquiry' in the sense that an ordinary prudent banker would have reasonable grounds for believing that there is an attempt to misappropriate money or that there is something otherwise amiss and does not carry out inquiries that were reasonable in the circumstances.

On the facts of the case, the court did not find the bank liable for the fraudulent disbursement of the loan money and held that the bank was not under a duty to carry out site inspection in order to ascertain the veracity of the architect's certificates. It was reasonable for the bank to regard the architect's certificates as genuine.

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In *Yatin Bin Mahmood*,⁴ the court held that the bank ought to have been 'put on inquiry' by the unusual request of eight cash withdrawals of substantial amount within the space of two days. It had breached the *Quincecare* duty by failing to take any action to prevent the misappropriation of funds and to ensure that the customer's interest is protected.

In *Exporaya*,⁵ the Court of Appeal found that the bank had complied with its duty to exercise reasonable skill and care by pre-emptively freezing the customer's bank account. The

³ *Perwira Habib Bank (M) Bhd v Wong Keng Fatt* [2015] 1 CLJ 659

⁴ *Yatin Bin Mahmood V Mohd Madzhar Bin Sapuan & Ors* [2010] 8 MLJ 647

⁵ *Public Bank Bhd v Exporaya Sdn Bhd* [2013] 1 MLJ 507

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bank had done so after it received a letter from the customer that was contradictory to its earlier request to change the signatories to the bank account.

Conclusion

The cases discussed above firmly establish the banks' duty to protect customers against fraud. A lapse in scrutinising a customer's instructions in circumstances where the bank has been put on notice (or should be on notice) of fraudulent activities could lead to it being held liable for the losses occasioned by the fraud.

In order to prevent a breach of its duty, banks are well advised to ensure there are robust fraud detection and prevention system in place, complemented by comprehensive "Know Your Client" and "Anti-Money Laundering" protocols that are to be strictly adhered to. When the bank is put on inquiry of a suspicious transaction, it must ensure that any follow up enquiry is carried out meaningfully and adequately. The effective implementation of these measures will go a long way in insulating the bank from potential claim by victims of fraud.

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