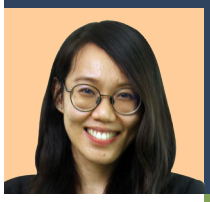
Victims of Fraud — Whose Fault is it Anyway?



by Andrea Chew Mei Yng

Online scams seem to be on the rise in Malaysia. In March 2022, the Deputy Home Affairs Minister told the Dewan Rakyat that Malaysians lost over RM1.6 billion to online scams between 2019 and 2021.[1] The majority of these cases involve online purchase scams, followed by non-existent loan scams. In the same month, the Securities Commission Malaysia warned the public against investment scams that were being promoted through the Telegram messaging app.[2]

One cannot help but feel sorry for the victims of such online scams. It can happen to anyone. However, there is a flip side to this. Without the authorisation of the victims for the transfers to be made, the scam may not have even occurred in the very first place. This type of fraud is commonly known as "authorised push payment fraud" or "APP fraud".

Can the bank be at fault?

It is only natural for a victim to want to seek recourse after discovering the scam. Given that the chances of recovering from the fraudster is almost next to nothing, some of these victims have turned the tables and put the blame on their banks for allowing them to be scammed in hopes of getting their reimbursement.

The general position of the law is that a bank is contractually obliged to execute a customer's instruction on the face of it. Hence, when a customer instructs that a sum of money be transferred from his or her account to another account, the bank should comply with the instruction, no questions asked. However, only where a bank is put on inquiry is it required to probe further into the instructions given.

A bank is said to be placed on inquiry where there are reasons to believe that an instruction may have been given as part of a scheme to defraud the customer. This is an implied duty known as the "Quincecare duty", named after the English case[3] in which it was first expounded. The Quincecare duty is recognised and has been applied here in Malaysia.

Scams involving individuals

In respect of individual customers, the English High Court in *Philipp*[4] held that the Quincecare duty is not applicable. The duty is only confined to circumstances where a bank was instructed by an agent of the customer to misappropriate funds belonging to the customer. For example,

1 Nuradzimmah Daim, 'Online scammers rake in RM1.6 billion, over 51,000 reports lodged in 2 years' *New Straits Times* (14 March 2022) https://www.nst.com.my/news/nation/2022/03/779915/online-scammers-rake-rm16-billion-over-51000-reports-lodged-2-years

2 'SC alerts public on rising scams promoted on telegram', press release dated 15 March 2022 https://www.sc.com.my/resources/media/media-release/sc-alerts-public-on-rising-scams-promoted-on-telegram

3 *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363 (HC)

4 *Philipp v Barclays Bank plc* [2021] EWHC 10 (Comm)

where a director of a company instructs a bank to transfer funds owned by the company into the director's personal account under a fraud. The Hong Kong Court of First Instance takes the same position and held that the duty is not applicable to individual customers.[5]

However, the High Court decision of *Philipp* was recently overturned by the Court of Appeal.[6] As it stands, the Quincecare duty will apply to individual customers who fall prey to an APP fraud in the UK.

Discharging the duty

Following the English case *JP Morgan Chase,*[7] the Quincecare duty comprises a negative duty and a positive duty. Hence, when a bank is put on inquiry, the negative duty requires the bank to refrain from making payment while the positive duty requires the bank to do "something more". The English Court of Appeal is careful not to set out what is the "something more" that is required.

Ultimately, what should be done is left in the hands of banks to decide. Needless to say, it is assumed that the positive duty requires the bank to probe further into the instruction. However, the degree and extent of investigation required is uncertain for now.

Quincecare duty in Malaysia

Here at home, our courts have been slow to impose the Quincecare duty, let alone make a finding that the duty has been breached. This is evident through a series of cases decided last year, where the Quincecare duty was invoked.[8]

In fact, the High Court in *Alliance Bank Malaysia*[9] held that the Quincecare

duty can only be imposed on actual knowledge of the bank and not on constructive knowledge. Meaning to say, a bank will only be put on inquiry if the bank has actual awareness that a client is being defrauded.

In comparison with the UK, proof that a customer is being defrauded is not required. Reasonable grounds to believe so would suffice. The same position is adopted in Singapore.[10] It would seem that the threshold is higher in Malaysia.

Our courts generally take guidance from the following principles laid down by the Federal Court in *Chang Yun Tai*:[11]

(a) a bank cannot be made liable for transactions involving the victim's dealings and agreement with a fraudster that the bank is not privy to;

(b) it is the victim's own duty to ensure that any such dealings and agreements are free from any legal infirmity. If they omitted to do so, they could not rely on their own ignorance and fault their bank; and

(c) in so far as a financing bank is concerned, it does not have a duty to advise its client.

Suffice to say, Malaysian courts take cognisance that imposing such burdensome requirements may impede the flow of commerce. After all, a bank's relationship with its customers is primarily contractual and Quincecare duty is tortious. It is well-established that a tortious duty cannot supersede the parties' contractual duties.[12] Furthermore, the efficiency of funds transfers is highly prized in modern banking. If Quincecare duty is readily

5 *Luk Wing Yan v CMB Wing Lung Bank Limited* [2021] HKCFI 279
6 *Philipp v Barclays Bank UK plc* [2022] EWCA Civ 318 (CA)
7 *JP Morgan Chase Bank NA v The Federal Republic of Nigeria* [2019] EWCA Civ 1641 (CA)
8 Most of these are High Court cases involving Khee San Food Industries Sdn Bhd
9 *Alliance Bank Malaysia Bhd v Khee San Food Industries Sdn Bhd & Anor* [2021] 12 MLJ 78 (HC)
10 *Hsu Ann Mei Amy (personal representative of the estate of Hwang Cheng Tsu Hsu, deceased) v Oversea-Chinese Banking Corp Ltd* [2011] 2 SLR 178 (CA)
11 *Chang Yun Tai & Ors v HSBC Bank (M) Bhd and other appeals* [2014] 1 MLJcon 134 (FC)
12 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 (PC)

imposed, it will render the banking business both impracticable and burdensome.

Striking a balance

While justice ought to be done to APP fraud victims, the Quincecare duty should be confined to very limited circumstances. After all, the transfer would not have happened without the authorisation of the customer in the very first place.

Sympathetic as one may be, there should be a price for being ignorant and the law should not be too quick to side with the victims. Apart from impeding the efficiency of modern banking, we may inadvertently encourage a society that has no second thoughts in making uncalculated commercial decisions, knowing full well that there is potentially nothing to lose.

Ultimately, a balance must be struck. Banks should not take online scams lightly and ensure that proper protocols and technological infrastructure are in place. As APP fraud continues to be a growing problem, it will be interesting to watch the development on this area of the law, be it here in Malaysia or elsewhere. **LH-AG**

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