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Financial Institutions Do Not Owe A Duty Of Care To Non-Customers

On 26 July 2023, the Federal Court allowed the appeal against the Court of Appeal's decision in *Koperasi Sahabat Amanah Ikhtiar Bhd v RHB Investment Bank Bhd* [2022] 6 MLJ 722, where the Court of Appeal had extended the duty of care owed by financial institutions to non-customers.

One of the questions of law posed to the Federal Court was whether a financial institution owes a duty of care to third parties who are not its customers and to whom it had not assumed any responsibility in a case for pure economic loss. The question was answered in the negative.

Factual background

The matter arose from a cheque of RM10 million issued by Koperasi Sahabat Amanah Ikhtiar Bhd ("Koperasi") that was deposited into a pool account of RHB Investment Bank Bhd ("RHBIB") held with Maybank.

Koperasi was defrauded by a fraudster, who had falsely held himself out as an officer of RHBIB, and deceived Koperasi into investing in a non-existent investment said

to be offered by RHBIB. Koperasi issued and handed the fraudster a cheque for RM10 million made payable to RHBIB for the purported investment.

The fraudster deposited the cheque into RHBIB's pool account. He then furnished RHBIB with the bank-in slip and deceived RHBIB to believe that the cheque was deposited for the share trading account held by his company with RHBIB.

Accordingly, RHBIB allocated the funds to the account of the fraudster's company based on the bank-in slip. The fraudster/his company subsequently absconded with the funds.

The Court of Appeal found that a duty of care arose the moment when the cheque was deposited into RHBIB's pool account. RHBIB had the duty to make certain enquiries such as verifying who the actual depositor was, whether the depositor was a customer and the depositor's mandate in respect of the funds. By not doing so, RHBIB had breached its duty of care owed to Koperasi.

Issue in the appeal before the Federal Court

The principal issue that arose is an issue of threshold in a negligence claim – whether there was a duty of care. Particularly, whether there was a duty of care owed by financial institutions such as RHBIB to a third party such as Koperasi (who was, i. not a customer of RHBIB, ii. did not have an account with RHBIB; and iii. had no prior dealings or relationship with RHBIB) for pure economic loss.

The Federal Court affirmed the trite position of apex courts that because of the nature of pure economic loss, such losses may only be recoverable under limited circumstances. A more restrictive approach is adopted when imposing a duty of care in a claim for pure economic loss. The threshold 3-fold test of reasonable foreseeability, legal proximity and whether it is fair, just and reasonable to impose a duty of care must be satisfied.

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Based on the brief grounds that was delivered, the Federal Court found that RHBIB had acted in accordance to industry practice. Based on the totality of evidence, there is no factual basis to make any inference or reasonable inference that RHBIB could reasonably foresee any loss to Koperasi.

There was also no special relationship or sufficient proximity on the facts to give rise to a duty of care. The only nexus was Koperasi's cheque that was deposited into RHBIB's pool account.

Overall, the Federal Court found that it would be unfair and unjust to impose a duty of care based on the facts. There were no lacuna or exceptional reasons to warrant the extension of a duty of care in the present case. Koperasi still had a recourse against the fraudster and the fraudster's company, both of whom Koperasi did took up legal actions against.

Concluding thoughts

The Federal Court's decision is certainly a welcomed decision. Contrary to where personal injury or damage to property is sustained as a result of negligence, pure economic loss is entirely financial. The loss merely results in the transfer of wealth. To adopt a liberal approach in imposing a duty of care in a case of pure economic loss would open the floodgates to limitless claims. Particularly in this case, it would have also affected the efficiency of day-to-day transactions of financial institutions.

RHB Investment Bank Bhd was represented by LHAG's partners, **Sean Yeow** and **Andrea Chew**, who were assisted by pupil-in-chambers, **Lee Chee Chien**.

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