B.C. Court of Appeal: Financial institutions may have a duty to warn customers about known financial scams

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Financial institutions may owe their customers a duty to make inquiry where there are suspicious circumstances presented by an instruction to transfer funds, and if not satisfied by the inquiry, a duty to warn the customer about the risk of fraud.

Overview

In a recent decision from the Court of Appeal for British Columbia (*Zheng v. Bank of China*, 2023 BCCA 43), the Court held that financial institutions may have a duty to specifically warn customers about the risk of fraud where: (a) the financial institution knows about a particular fraudulent scheme happening in the community; and (b) a customer provides an instruction to transfer funds from their account in suspicious circumstances and where the customer matches the profile of targets of the fraud.

While the Zheng decision has attracted media attention and a flurry of social media commentary, the decision does not change the law in any way relating to the duties that banks owe to their customers. The Court of Appeal's decision is not surprising considering the limitations of the summary judgment rule in British Columbia and the peculiar allegations made by the Plaintiff in Zheng. The two decisions leading to the appeal and the Court of Appeal's decision itself provide a helpful overview and recitation of the duties owed by banks to their customers and the circumstances in which an exclusion clause in a banking agreement (or for a particular banking transaction) may be unenforceable.

Key takeaways

- The key foundations of the banker-customer relationship remain unchanged: The bank owes a contractual duty to its customers to exercise reasonable care and skill in the discharge of the bank's obligations to its customers.
- Where there are suspicious or sufficiently unusual circumstances present in connection with an instruction given by a customer, then the bank may owe an additional duty to the customer to inquire about the nature of the intended

transaction. If the bank knows about a prevailing scam targeting people in the customer's demographic, and if the intended transaction presents a "clear probability of fraud", then the bank may have a duty to warn the customer about the prevailing fraud.
- Banks are not required to "play amateur detective" with regards to every instruction from its customers, and they do not have a general duty to investigate all types of prevailing fraud circulating in the communities in which they do business.
- Exclusion clauses in banking agreements are enforceable for acts or omissions that fall within the scope of the exclusion, unless the bargain would be unconscionable or otherwise voidable on public policy grounds (*Tercon v. British Columbia*, 2010 SCC 4).

Background

The Plaintiff received a phone call from someone purporting to be from the Chinese consulate. She was instructed to transfer $69,000 into a Hong Kong bank account, under threats that her own accounts would be frozen and that she would face deportation and imprisonment if she failed to do so.

The Plaintiff, believing the scammer, visited a Bank of China branch in Richmond, British Columbia where she instructed the teller to make the transfer to a Bank of China account in Hong Kong. The intended transfer represented all or most of the money in her account. She had not made such a large transfer from her account in the past.

Since the intended transaction was over $10,000, the bank's compliance officer asked the Plaintiff about her relationship to the intended beneficiary, but the Plaintiff did not answer. The bank followed her instructions and made the wire transfer.

In connection with the wire transfer, the Plaintiff signed an "Application for Remittance", which contained a clause that excluded liability unless the customer's loss was caused "solely" by the "negligence or wilful misconduct" of the bank.

A month later, the Plaintiff discovered that she had been the victim of fraud, and reported it to the bank. There were no funds available for recovery. In connection with her discovery of the fraud, the Plaintiff found out that similar types of scams had been reported in the Vancouver area.

The Plaintiff commenced a claim against the bank in the Supreme Court of British Columbia, in which she alleged that the bank knew or ought to have known about the fraud and owed a duty to warn her that the wire transfer was a fraud. The Plaintiff contends that the bank breached the applicable standard of care by not warning her about the fraud and that the exclusion clause does not apply or is otherwise unenforceable.

The Chambers decision

The bank applied to dismiss the claim under the summary judgment rule, which permits only a limited review of evidence and requires the applicant to satisfy the Court beyond a reasonable doubt that there is no genuine issue for trial raised by the Plaintiff's claim.

In support of its application, the bank filed an affidavit from the branch's compliance officer, which described the process of submitting a wire transfer remittance and the teller's obligation to process the Plaintiff's instruction in the absence of any suspicious conduct or circumstances. The compliance officer did not testify as to the bank's prior knowledge (or lack of knowledge) about the particular type of scam that targeted the Plaintiff.

Master Vos noted that the relationship between banker and customer is debtor/creditor and purely commercial. He observed in his reasons that there were no material facts pleaded by the Plaintiff that could give rise to one of the rare circumstances in which a bank will owe a fiduciary duty to its customer.

Master Vos characterized the Plaintiff's claim as requiring banks to owe their customers a general duty to investigate pervasive frauds in Canada and warn their customers about those frauds. He concluded that there is no such duty in Canadian law, and dismissed the claim accordingly.

The appeal to a Supreme Court Justice

The Plaintiff commenced the action and defended the bank's summary judgment application on her own. Following the chambers' decision, the Plaintiff retained counsel and filed an appeal, which was heard by Justice Kirchner (2021 BCSC 2357).

Justice Kirchner found that it was not plain and obvious that the Plaintiff's duty to warn claim was bound to fail, as required on a summary judgment application. The Plaintiff's "worried and stressed appearance" at the branch could possibly trigger a duty for the bank to conduct further injury about her instruction, especially since the instruction involved the transfer of all of the money in her account, it was inconsistent with the stated purpose of the account in her account agreement, and her pleading that the bank knew about the very fraud to which she fell victim.

However, Justice Kirchner held that the exclusion clause provided a complete defence because the loss was not caused "solely" by the bank since the Plaintiff admitted that she provided instructions for the transfer, thus bringing the impugned act or omission within the scope of the exclusion.

The Court of Appeal decision

The Plaintiff appealed further to the Court of Appeal for British Columbia.

The Court of Appeal agreed with Justice Kirchner that it was not plain and obvious that the Plaintiff's duty to warn claim was bound to fail.

However, the Court allowed the appeal on the basis that it was not plain and obvious that the exclusion clause applied to the transaction at issue or that the exclusion clause was not otherwise unconscionable or voidable for public policy.

The Court concluded that the Plaintiff could argue that her loss was caused by the bank's failure to inquire and warn, which arose prior to the wire transfer, and therefore, outside of the scope of the exclusion clause.

It also remained open to the Plaintiff to argue that the exclusion itself was unconscionable. The bank's knowledge (or lack of knowledge) about the fraud will be material to that issue because the bargain may be substantially unfair if the bank knew about the prevailing fraud, but said nothing and allowed the transaction to proceed anyway.

Conclusion

While this case does not change the duties owed by bankers to their customers, it does provide a roadmap to plaintiff-side counsel to plead a sustainable duty to inquire/duty to warn case. Financial institutions may see that type of pleading arise with more frequency, although the viability of those cases will turn on a careful assessment of the evidence.

Zheng may give financial institutions occasion to bolster their in-branch processes, including recording inquires made and answers given in the bank's computer system and using waivers that include a representation from the customer that they are aware of no suspicious circumstances. Financial institutions may also use this case as an occasion to review and revise their account operating agreements.

At BLG, we have a significant breadth of experience in providing counsel and representation to financial institutions regarding the issues raised by the Zheng decision. If you have any questions about the duty to inquire and duty to warn, or any other financial institution litigation issues, please reach out to any of the key contacts below.

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