Their fraud, my mistake, your loss? UK Supreme Court rejects fraud victim's "duty to inquire" claim against her bank

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Overview

The increasing prevalence of "authorized push payment" (APP) fraud in Canada – a species of social engineering fraud where the victim is tricked into transferring money from their bank account to an account controlled by the scammer – has generated a number of claims filed by fraud victims against their banks. The traditional view of banking law is that the bank is not liable to an accountholder for a loss arising from a properly authorized payment instruction. However, that view has recently been challenged by plaintiffs in Canada and the United Kingdom.

Earlier this year, the Court of Appeal for British Columbia (*Zheng v. Bank of China*, 2023 BCCA 43) left open the possibility that financial institutions may owe their accountholders a duty to inquire – and potentially, to warn – where the bank knows of a prevailing fraud in the community and the payment instruction is sufficiently unusual or suspicious. While it remains to be determined whether that duty exists in Canada, a recent case from the UK Supreme Court (*Philipp v. Barclays Bank*, [2023] UKSC 25) – on facts similar to the *Zheng* case – conclusively held that financial institutions owe no such duty where the accountholder directly instructs the bank to make payment.

The *Philipp* case is an important addition to the body of banking law in common law jurisdictions and should be an important and persuasive authority for Canadian courts when considering claims brought by APP fraud victims against their banks.

Key takeaways

- The cornerstone of banking law is that financial institutions have a strict contractual duty to carry out payment instructions given or authorized by their accountholders.
- Financial institutions may have a duty to make inquiry where the payment instruction is given by the accountholder's agent if the bank has reasonable grounds to believe that the agent is attempting to defraud the accountholder. The

banker will discharge the duty by taking reasonable steps to confirm whether the principal accountholder authorized the instruction given by the agent.
- Where the accountholder, rather than an agent, directly provides a payment instruction to their bank, the financial institution does not owe a duty to make inquiry or a duty to warn the customer about the wisdom of the transaction, including the risk of fraud.

Background

The Plaintiff and her husband were contacted by an individual who claimed to be working with the financial crime department of the UK's National Crime Agency and was investigating a fraud involving the investment firm in which the Plaintiff's husband held substantial savings. The scammer not only convinced them to transfer the funds in the investment accounts to "safe accounts," but remarkably, manipulated them to refuse to cooperate with local police after a legitimate police officer visited their home and warned them that a fraud was being perpetrated on them.

On the same day that they received the warning from the police officer, the Plaintiff's husband, at the direction of the scammer, transferred £900,000 from his investment account to the Plaintiff's account with the Defendant bank. The Plaintiff then instructed the bank to transfer £400,000 to a bank account in the UAE, with the Plaintiff's husband falsely representing to the teller that he had previous dealings with the recipient. A few days later, the Plaintiff instructed the bank to make a second transfer of £300,000 to a different company. On each occasion, the bank called the Plaintiff to seek confirmation of the instruction, which she gave both times. The bank made both transfers.

After making the transfers, the Plaintiff and her husband received a second visit from the police officer, who warned them about a potential fraud. The Plaintiff and her husband said they wanted nothing to do with the police. The next day, the police informed the bank that they had credible information that the Plaintiff's account had been compromised by fraudsters in the UAE. The bank immediately froze the account.

The Plaintiff visited the bank again to transfer the remaining £250,000 to one of the UAE accounts. She was informed by the teller that her account was frozen pending further review. The Plaintiff – at the direction of the scammer – called the bank's fraud department and tried unsuccessfully to persuade the bank to unfreeze her account, even going as far as falsely claiming that she needed to make an urgent payment under a contract.

The police officer made a third visit to the Plaintiff and her husband, during which they finally realized they had been the victims of fraud. The next day, they notified the bank, but the bank's attempts to recall the funds transferred to the UAE were unsuccessful.

The Plaintiff sued the bank for the loss under the theory that the bank owed to her a contractual or common law duty not to carry out a payment instruction if the bank had reasonable grounds to believe that she was being defrauded. Her claim was initially dismissed on a summary judgment application, but the appellate court allowed the claim to stand on the basis that, in principle, the bank owes the contractual duty alleged by the Plaintiff, and whether the duty arose for the transactions at issue was a factual question for trial.

The UK Supreme Court's decision

The UK Supreme Court allowed the bank's appeal, holding that the bank did not owe a duty to the Plaintiff to warn her about the fraud or otherwise prevent her from making the transfers.

The Court acknowledged that APP fraud is a growing social problem but cautioned that it is not for the courts – motivated by "policy grounds" – to redistribute the losses suffered by victims of APP fraud to their banks under the rubric of a duty to inquire and duty to warn.

The key allegation – as framed by the Plaintiff – confronted by the Court is that the bank was under a duty, implied by the common law into the account agreement, "to refrain from executing an order from [the Plaintiff] if and for as long as it was put on inquiry, by having reasonable grounds for believing that the order was an attempt to misappropriate funds from [the Plaintiff]".

The Court observed that the bank's contractual duty to comply with payment instructions given directly or authorized by its accountholders is strict, and there is nothing in the contract that requires a banker to consider the commercial wisdom or anything else with respect to a particular transaction. The main limit on the bank's duty is that the bank cannot be obliged to act unlawfully – *e.g.*, by knowingly assisting in breach of trust, facilitating a transaction in breach of anti-money laundering laws, and other similar situations.

The bank's common law duty is limited by the terms of the account agreement. The duty owed in tort goes no further than the implied duty owed under the contract: to carry out the services offered by the bank with reasonable care and skill. The common law duty only applies where the contract gives the bank latitude or discretion in how the relevant services are carried out. Where the contract does not completely specify what the bank must do, then the bank must act in a reasonably careful and skilful way.

The duty asserted by the Plaintiff – to make inquiry with respect to certain payment instructions in suspicious circumstances – conflicts with the primary duty owed by a bank to its accountholder to strictly execute payment instructions.

The Court considered a line of authority that the Plaintiff argued stood for the broad proposition that a banker must refrain from executing an instruction provided by an accountholder if the banker is "put on inquiry" by having reasonable grounds to believe that the instruction is an attempt to misappropriate funds in the account. The Court carefully traced the history of that line of authority – known in the UK as the "*Quincecare* duty", named after a 1988 case bearing that name – and clarified that the duty only properly arises in cases where the accountholder's agent provides a payment instruction in "circumstances suggestive of dishonesty apparent to the bank which would cause a reasonable banker before executing an instruction to make inquiries to verify the agent's authority".

Since the Plaintiff herself – rather than a dishonest agent – provided the payment instructions to the bank, the Court held that the *Quincecare* duty did not arise in this case. In doing so, the Court forcefully rejected the appellate court's justification for the

attempted expansion of the *Quincecare* duty to APP fraud victims on “policy grounds”. The Court commented that the creation of new law based on policy considerations, at least when it comes to banking law, should be left to the legislature.

Conclusion

While the *Philipp* case is not binding on Canadian courts, UK Supreme Court decisions are typically treated as persuasive, and *Philipp* is likely to be argued in future cases filed by victims of APP fraud against their banks.

The decision in *Philipp* conflicts with *Zheng*. If a case on the same facts as *Zheng* were to be filed in the UK, it would likely be summarily dismissed based on a proper application of the law from *Philipp*.

Given the prevalence of APP fraud in Canada, the conflict between *Philipp* and *Zheng* will surely be litigated – and resolved, one way or the other – in Canada.

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

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