APP FRAUD

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RECOVERY AGAINST BANKS

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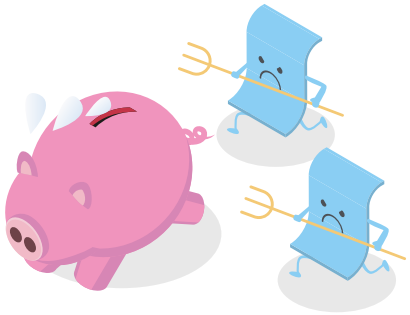
Where an individual is induced by fraud to send a payment from their bank to a bank account controlled by fraudsters, when does the law hold the banks responsible? In this article, Lucas Moore (Partner), Victor Lui and Francesca Sargent (Associates) and Daniel Burgess (Counsel, Blackstone Chambers) examine this question in view of recent case law.

What Is "Authorised Push Payment" Fraud?

According to the National Crime Agency, fraud is the most prevalent crime in the UK, the majority of which is cyber-enabled.[1] An increasingly common tactic involves fraudsters impersonating law enforcement officers or bank staff members to pressure individuals into paying them. Where the victim is deceived into authorising their bank (i.e. the "paying bank") to send a payment to the fraudsters, this is known as "authorised push payment" (APP) fraud – so-called because on its face, the payment was authorised by the victim as opposed to criminals directly stealing from the victim's account. UK Finance reported that in 2023, there were over 230,000 instances of APP frauds.[2]

1 https://www.nationalcrimeagency.gov.uk/what-we-do/crime-threats/fraud-and-economic-crime

2 https://www.ukfinance.org.uk/system/files/2024-06/UK%20Finance%20Annual%20Fraud%20report%202024.pdf



Why Go After The Banks?

It seems obvious (and just) that the victim should seek to recover their losses from the perpetrators. Legal mechanisms available to support such a claim include: (1) third party disclosure orders against the bank which received the payment (i.e. the "recipient bank") to identify the account holder and ascertain whether the funds have been transferred onwards (and if so, where); (2) freezing injunction with the objective of preserving funds for recovery.

Such exercises are, however, difficult and expensive in practice. Very often the culprits have absconded and the defrauded sums long dissipated. Alternative potential avenues of redress are the paying bank or recipient bank, whose identities are known and liquidity most likely not in doubt.

Claims Against The Paying Bank?

In the landmark decision Philipp v Barclays Bank UK plc,[3] the Supreme Court held that the bank has a fundamental duty to follow the customer's instructions. However, if there are reasonable grounds for the bank to believe that the person giving the payment instruction is attempting to defraud the customer, the bank must first make inquiries to verify that the instruction was actually authorised before executing it. Where the paying bank follows an instruction which is not authorised, it cannot debit the customer's account. The consequence is that the customer victim can sue:

1. **In debt:** as the debit was unauthorised, the amount remained to the credit of the customer at law. The bank has to restore their account to its correct balance;
2. **For damages in breach of contract and/or tort:** the bank may be in breach of its contractual mandate and/or have failed to carry out its services with reasonable care and skill.[4]

Individual Vs. Corporate Victims

It would be difficult for most individual victims to recover from the paying bank: while they may be mistaken when giving instructions, they nevertheless intended the bank to effect payment. Philipp makes clear that, if there is no independent reliable information to suggest to the bank that the instruction was not authorised, it need not be concerned with the wisdom or purpose of the customer's payment decision.[5] On those facts, Mrs Philipp, who was persuaded by a fraudster to make payments, had confirmed her instructions in person and on telephone with her bank. That did not give rise to any claim against the bank.

In contrast, where the bank customer is a company, it is at law a separate legal entity which necessarily operates through its officers. There is accordingly a real risk that the representatives giving instructions on the company's behalf to the bank may lack authority (whether actual or apparent).[6] Corporate victims could argue that the representative acted dishonestly such that the bank was placed on inquiry. This argument was successful in an earlier decision by the Hong Kong Court of Final Appeal, PT Asuransi Tugu Pratama Indonesia TBK v Citibank NA[7] (Lord Sumption NPJ giving the judgment, the reasoning of which was largely consistent with Philipp). In that case, the company victim claimed against the bank for payments made upon dishonest instructions of its two authorised signatories to themselves and other officers. The court found that the operation of the account was unauthorised, the bank was put on inquiry and its inquiries were inadequate.

Given the analysis in Philipp that the issue is essentially one of authority based on general principles of agency, the following arguments appear to be available.

3 [2023] UKSC 25: https://www.supremecourt.uk/cases/uksc-2022-0075.html
4 Philipp, [28], [30], [34]-[35], [96]-[97]
5 Philipp, [3], [30], [100], [109]-[110]
6 C.f. Philipp, [98]
7 [2023] HKCFA 3: https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=150358

First, an agent acting contrary to a principal's interests (even if not extracting gain for themselves) may be sufficient to put the bank on inquiry. Support is found in Philipp, which states that an agent's authority only includes authority to act honestly in pursuit of the principal's interests.[8] Thus, where an agent was deliberate or reckless (albeit possibly honestly) in giving a payment instruction contrary to their principal's interests, the bank may be required to make reasonable inquiries before relying on that instruction.

Second, it is not necessary for the bank to be aware of the precise reason for a lack of authority before it may be liable. It would often be the case that, in giving the payment instruction, the employee has failed to comply with internal authorisation procedures of the company that are not known to the bank. However, if there are suspicious circumstances about the transaction apparent to the bank, it should nonetheless have to make reasonable inquiries.

Claims Against The Recipient Bank?

Claims against recipient banks have traditionally been difficult to pursue by reason of the absence of contractual or tortious duties towards the victim.[9] Unjust enrichment claims (on the ground that the payment was made under a mistake) were similarly challenging by reason of caselaw to the effect that a recipient bank was not enriched by the receipt of funds for an account holder (Jeremy D Stone Consultants Ltd v National Westminster Bank plc[10]) and any enrichment was not at the victim's expense (Tecnimont Arabia Ltd v National Westminster Bank plc[11]).

However, HHJ Paul Matthews rejected these arguments in the recent case of Terna Energy Trading DOO v Revolut Ltd.[12] In Terna the claimant was fraudulently induced by third parties to make a payment to the defendant "electronic money institution" (EMI) and seeks recovery in unjust enrichment.

On "enrichment" the Judge rejected the argument that, where a bank receives a payment, it is matched by an immediate balancing liability in the form of a debt owed to its customer, such that it cannot be enriched. The question of enrichment is inherently tied to the question of whether the defendant (agent) is under any liability to account to its customer (principal) for the payment (i.e. whether the defendant has any defences). Further, the defendant was the legal and beneficial owner of the incoming payment (EMIs are not relevantly different from ordinary banks). The Judge considered that Jeremy D Stone was not binding and in any event wrong in principle.[13]

On "at the claimant's expense", the Judge held that this requirement was satisfied whether viewing this as a case of agency or a series of co-ordinated transactions (applying Investment Trust Companies v HMRC[14]).

The transaction intended by the claimant was a transfer of funds from its account with its bank to the defendant. It did not make any difference how many correspondent banks were involved along the way (declining to follow Tecnimont).[15]

While *Terna* may not be the last word on these issues, it does leave open the door for victims to claim in unjust enrichment against recipient banks.

To seek advice on civil fraud and commercial litigation, please contact Lucas Moore, Victor Lui or Francesca Sargent, or alternatively, telephone on 020 7465 4300.

8 Philipp, [72]-[74]; Tugu, [16] similarly held that a plain lack of benefit for the principal or commercial purpose on the face of the transaction and unusual aspects of the transaction may be sufficient cause for inquiry
9 Royal Bank of Scotland International Ltd v JP SPC 4 [2022] UKPC 18, [94]: https://www.jcpc.uk/cases/docs/jcpc-2020-0044-judgment.pdf
10 [2013] EWHC 208 (Ch), [242]: https://www.bailii.org/ew/cases/EWHC/Ch/2013/208.html
11 [2022] EWHC 1172 (Comm), [139]-[142]: https://www.bailii.org/ew/cases/EWHC/Comm/2022/1172.html
12 [2024] EWHC 1419 (Comm): https://www.bailii.org/ew/cases/EWHC/Comm/2024/1419.html
13 Terna, [64], [66], [69]-[71]
14 [2017] UKSC 29, [48], [61]: https://www.supremecourt.uk/cases/docs/uksc-2015-0057-judgment.pdf
15 Terna, [85], [88]-[91], [93]-[94]
16 [2024] EWHC 1524 (Comm), [16], [18]: https://www.bailii.org/ew/cases/EWHC/Comm/2024/1524.html