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DEMARCATING THE BANK'S DUTY IN INVESTMENT SCAMS

Scams are common these days. Hence, the regulatory bodies, financial institutions and news media often warn the public to exercise due diligence before making any investments with promises of high-profit returns.

In this connection, where does the law draw the line insofar as the banks' duty of care is concerned? Apart from checking that the payments are duly authorized, do the banks also owe a duty to query, investigate, and advise their customers about the goods, services, investments, charities, or the random stranger who just called ("**Separate Transactions**")? "Separate Transactions" – because that purchase or investment is between the customer and the Merchants, and not the banks.

These issues were analysed in a recent High Court decision. Our [Mr Yee Mei Ken](#) and his team successfully defended HSBC Malaysia against a customer's claim for approximately RM 2.1 million concerning an alleged foreign investment scam. The High Court ruled in favour of the bank and struck out the Customer's claim with costs.

Quick Facts

- (a) The Customer paid four Merchants (allegedly foreign brokerage firms) for certain investments using the bank's credit card and telegraphic transfer facilities. He made the payments over 10 months between **December 2016 to September 2017** and further repaid the bank for all the credit card transactions. The Merchants were foreign entities and were not the bank's customer.
- (b) In making those payments, the Customer relied on the Merchants' promises of high-profit returns. The bank was not a party to any of the exchanges or investments (i.e., the Separate Transactions) between the Customer and the Merchants.
- (c) According to the Customer, he later realised in **January 2018** that he was scammed when he allegedly did not receive any of the promised returns and could not access the online brokerage accounts.
- (d) Hence, he sued the bank for negligence. He complained that the bank breached its duty to investigate, query and advise him on the Merchants and his Separate Transactions and that the bank should have suspended his payments. He also alleged that the bank should have checked the Merchants' accounts and their compliance with licensing requirements to provide brokerage services.

Main Issue

The main issue before the High Court can be summarised as follows:

Whether the banks owe a duty of care to investigate the Customer's Separate Transactions, query and advise the Customer on the Separate Transactions and suspend the Customer's payments to the Merchants?

Court Decision

The High Court held that no such duty arose on the facts of this case and struck out the Customer's action. The learned Judge gave his reasons as follows: -

- (a) Firstly, the bank and its customer's relationship are governed by the Banking Contracts. The Banking Contracts do not contain the duties as alleged by the Customer. Instead, the bank's obligation under the Banking Contracts is to effect the Customer's payments which he has duly authorised.
- (b) Secondly, the Customer cannot seek to impose a duty in tort which is wider than those found expressly or by necessary implication in the Banking Contracts. To impose such a duty would amount to a circumvention of the express terms in the Banking Contracts.
- (c) Thirdly, the *Quincecare* duty (i.e. the bank's duty to suspend payments by companies where there are reasonable grounds for believing that it is an attempt

by its director or officer to misappropriate funds) does not apply here. This is because, unlike in *Quincecare*, the Customer here had made and authorised all the payments himself.

- (d) Fourthly, the Federal Court decision of *Chang Yun Tai* has confirmed that banks have no duty to advise or warn their customers in respect of their own investments. Banks providing financing facilities have no obligation to inquire or advise their customers on the legality of a SPA because the SPA is a separate transaction solely between the customer and the developer. The High Court struck out the customer's suit against the bank, and the Court of Appeal and Federal Court upheld that decision. (**Chang Yun Tai & Ors v HSBC Bank (M) Bhd and other appeals [2014] 1 MLJ 134**)
- (e) Fifthly, the Bank Negara directive which the Customer produced did not impose any duty of care as alleged. The banks were merely asked to protect themselves and the financial sector from their customers. Regardless, directives are generally a matter between the regulatory body and the bank and do not automatically give rise to a private law cause of action.
- (f) Sixthly, if the banks had to investigate and query their customers on their Separate Transactions before effecting their customers' payments, it would be too onerous on the bank and would stifle the banking business and the proper functioning of the commercial community.

Conclusion

The bank's duty is to effect their customers' authorised payment orders following the terms in the Banking Contracts, and they have no duty to query or advise their customers on their own investment or payment decisions. This is especially so in ordinary banking business where the bank is not an advising bank. Customers should never treat the banks as a substitute to their own due diligence when effecting payments or investments of their own.

So beware, when the promises of high-profit returns, discounts or love are too good to be true. Do it at your own risks.

26 April 2021

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[Editorial Note: The Customer's appeal to the Court of Appeal is pending.]



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