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Does a bank have a duty to warn a customer before carrying out a suspicious transaction?

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If a customer walks into a bank and asks a teller to carry out a certain transaction, does the bank owe the customer a duty to stop them? In what circumstances does a bank owe a customer any duty to warn them about certain types of suspicious transactions? Can a bank rely on a contractual limitation of liability clause to protect themselves when a customer asks them to carry out a suspicious transaction? The British Columbia Court of Appeal has referred all of these issues to trial following a successful appeal of a summary dismissal application: *Zheng v. Bank of China (Canada) Vancouver Richmond Branch*, 2023 BCCA 43 (CanLII).

The case arose from a telephone call allegedly received by the appellant customer in May 2018 from a person purporting to be with the Chinese consulate. The caller had the appellant's driver's license number and told her that international police were alleging that she was involved in an international money laundering case. She was threatened with deportation and jail if she didn't transfer funds to Hong Kong that would be returned to her after the investigation. She was told to keep the investigation confidential.

The appellant went to a branch of the Bank of China (Canada) in Richmond, British Columbia, where she sought a teller's assistance to transfer $69,000 from her account to an account in another person's name at a branch of the Bank in Hong Kong. As part of the transfer process, the Bank had her sign an "Application for Remittance" which incorporated an exclusion-of-liability clause.

The appellant later claimed that neither the teller nor a "manager" asked her any security questions about the transaction. The "manager" was in fact an Internal Control and Compliance Officer, who deposed that he assisted in locating the signature specimen card and asked about the relationship between the appellant and the intended recipient because it was an international transaction greater than $10,000. Notwithstanding that the appellant did not answer his question, the Officer deposed that he did not notice anything out of the ordinary.

The appellant subsequently learned that the person who had contacted her

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was a fraudster. She claimed that the Bank knew of this prevailing fraud at the time of the transaction since the media had been reporting on this type of fraud. The appellant sued the Bank for the return of the funds, on the basis that the Bank had a duty to warn her that she may be the victim of fraud.

In response to the claim, the Bank successfully applied for summary dismissal. The chambers judge found that although the Bank may have had a potential duty to inquire and warn the appellant about the potential fraud, the Bank's exclusion clause in the Application for Remittance barred her claim.

The exclusion clause at issue provided in part that the Bank would effect a remittance as requested in the normal course of business without any liability on its part for any cause beyond its control. The exclusion clause further provided that the Bank was not liable for incorrect or improper payment to any person arising out of the processing of any transfer, unless caused solely by the negligence or wilful misconduct of the Bank.

The chambers judge held that the exclusion clause applied since there was no reasonable prospect that the appellant could establish that her loss was caused by the Bank's negligence or wilful misconduct.

On appeal, the British Columbia Court of Appeal determined that the chambers judge erred in finding that there was no genuine issue for trial.

The Court of Appeal agreed with the chambers judge that the Bank's knowledge that there was a prevailing fraud of the nature that affected the appellant, and its knowledge of the unusual nature of this transaction for her, could form a basis for the Bank to owe her a duty to inquire and to warn her about the fact that there was a fraud targeting people like her and causing them to empty their bank accounts by transferring monies to Hong Kong branches of the same Bank.

In that regard, there is authority for finding that a bank owes a duty of care to its customers, including a duty to inquire in the face of the bank's knowledge of a potential fraud: *Groves-Raffin Construction Ltd. v. Canadian Imperial Bank of Commerce,* 1975 CanLII 912 (B.C. C.A.) and *Semac Industries Ltd. v. 1131426 Ontario Ltd.*, 2001 CanLII 28375 (ON SC).

Where the chambers judge erred, however, was in determining that there was no genuine issue for trial regarding the applicability of the exclusion clause to defeat the claim.

The Supreme Court of Canada has set out a three-stage approach to the interpretation of an exclusion clause: *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at paragraph 122. There are three issues to be addressed: (i) whether the exclusion clause applies to the circumstances established in evidence; (ii) whether the clause was unconscionable at the time it was made; and (iii) whether the clause should not be enforced for reasons of public policy.

In the case at hand, it was not clear that the exclusion clause applied since the appellant had an available argument that the duty to warn arose when she first advised the teller that she wanted to make the $69,000 transfer. Had the Bank fulfilled this duty, none of the other steps in effecting the transfer would have occurred, including filling out and signing the Application for Remittance containing the exclusion clause. Seen this way, the claim was not based on an error in processing the transfer once the Bank accepted the Application for Remittance, but upon not warning the appellant about the fraud when it first learned she wished to make such a transfer.

In the Court of Appeal's view, the chambers judge should not have interpreted the exclusion clause as barring the claim which had nothing to do with the Bank carrying out the appellant's instructions *per se* but with not warning her in the first place before carrying out her instructions. The claim would depend on the facts about the Bank's knowledge of the prevailing fraud and its duty to warn the appellant before it asked her to provide a signed Application for Remittance. These facts raised a genuine issue for trial about the enforceability of the exclusion clause.

The appellant had further alternative arguments relating to whether the exclusion clause could be found to be unconscionable in the context of the Application for Remittance form that the Bank required. These alternative arguments could not properly be determined on a summary dismissal application.

The British Columbia Court of Appeal therefore allowed the appeal and dismissed the Bank's application for summary judgment.

In Ontario, the Court of Appeal determined in a 2020 decision that a bank did not owe a duty to advise of any concerns about a potentially frauduling transaction to a customer using a self-service portal to make a transfer on its own without the assistance or supervision of any bank personnel: *Foodinvest Limited v. Royal Bank of Canada*, 2020 ONCA 665 (CanLII). Whether the British Columbia Court of Appeal reaches a different conclusion about a bank's duty of care to its customer in the circumstances at issue in that case remains to be seen.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact James Cook, at 416.865.6628 or jcook@grllp.com.

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