



E-banking disputes

The mandate problem

Alan L Tyree

Consultant, Mallesons Stephen Jaques



Some background

- EFT Code of Conduct - April 1 2002
- Revised Banking Code of Conduct - August 2003
- ABIO Bulletin 35 - September 2002



Modern payment systems

- Modern payment systems circulate liabilities of ADIs
 - A paying bank incurs a liability to the payee's bank
 - The payee's bank assumes a liability to the payee
 - “settlement” is a transfer of liabilities of the central bank
- It is convenient to talk about the transfer of funds and of money



Payment system fundamentals

- The paying bank pays its own money
- The paying bank acts as agent of the payer
- Consequences
 - bank may only debit account if it strictly follows the mandate
 - customer must frame the mandate carefully
 - bank may debit account for a reasonable interpretation of an ambiguous mandate
 - or if misled by customer's mandate



Payment system organisation

- Scheme rules - multilateral contract
- Terms and Conditions of Use - FI/customer contract
- Merchant agreements - FI/merchant contract



The problem

- System operates solely on account numbers
- Entry screen accepts both number & name
- User enters contradictory information, usually wrong account number
- A practical suggestion - better entry formats
- Two immediate legal issues
 - Reasonable interpretation of mandate?
 - Excused by Scheme rules?



Reasonable interpretation - I

- Mandate clearly ambiguous/contradictory
- *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777
- Number *much* more likely to be wrong than name
- Breach of customer's *Macmillan* duty?
 - duty to exercise care in framing mandate
 - duty to frame mandate so as not to facilitate fraud

Reasonable interpretation - II

- Reasonable interpretation? *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30.
- Paying bank does not have information. What to do?
 - change system and rules so bank can confirm mandate (effectively done in cheque system)
 - throw losses onto customers via Terms & Conditions
 - do nothing, consider losses as self-insurance costs



Summary

- Systems should probably be changed to minimise mistakes
- Payments probably in breach of mandate
- A mistaken payment has been made
 - by the customer if account may be debited
 - by paying bank if in breach of mandate



Scheme rules

- Effect on institutions - multilateral contract
- Effect on customers
 - *Dimond (HH) (Rotorua 1966) v Australia and New Zealand Banking Group Ltd*
[1979] 2 NZLR 739
 - *Riedell*



Riedell

- *Riedell v Commercial Bank of Australia Ltd* [1931] VLR 382
- What the books say *Riedell* says
- What *Riedell* says
- Benefits/burdens of Scheme Rules
- Scheme rules generally have no effect on claims for recovery of money paid under a mistake of fact



Application: chargebacks

- nature of payment by credit card - may be agency even if no recourse
- *Amex v CSR* [2003] VSC 32 does not contradict the agency analysis
- interest of customer to be protected
- compare with stop orders, return of cheques



Mistake - basics

- *David Securities v Commonwealth Bank of Australia* (1992) 175 CLR 353
- Recovery based on unjust enrichment
- Mistake gives rise to prima facie right to recover
- Onus then on recipient to show cause why restitution is unjust



Mistake - defences

- *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988)
164 CLR 662
- Agency defence - accounting to principal
- Change of position defence



Receiving bank liability

- Receiving bank is agent for payee
- When does the recipient bank “account” to its principal?
 - account entry
 - notice to customer
 - funds drawn via operation of Clayton’s case
 - account balance too small
 - account closed
- Agency and change of position



Summary

- A mistaken payment is made to the receiving ADI
- The receiving ADI has a prima facie obligation to return the payment
- The receiving ADI has the onus of establishing a defence
- Usual defence will be “Change of position”



Confidentiality

- *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461
 - public interest
 - consent (express or implied)
 - compulsion of law
 - interests of the bank
- National Privacy Principles

Recommended bank responses - I

- Establish that a mistake has been made
- Query to receiving bank: Is account #1234 owned by John Doe?
- If “no”
 - no breach of confidence by receiving bank
 - mistake has been made
 - request repayment from receiving bank

Recommended bank responses - II

- Query to receiving bank: Is account #1234 owned by John Doe?
- If “yes”
 - information about customer disclosed, but Tournier exception
 - inform customer that no error apparent
- NPP considerations
 - NPP2.1(a) - secondary usage
 - NPP2.1(g) - authorised by law



Refusal to repay

- May refuse only if “accounted” to customer
- Must supply name of customer
- Must supply some evidence of “accounting”
- Tournier self-interest exception permits this disclosure



A better solution

- Incorporate the above procedures in BECS (or other Scheme) rules
 - uniformity in forms/responses/timing etc
 - ability to inform customers in uniform manner
 - identify evidence required for establishment of mistake
 - identify evidence required to establish agency defence
- “But that is impractical!” - no it isn’t. See the BPay rules