

COMMERCIAL DISPUTES **KNOW-HOW GUIDES**

AUTHORISED PUSH PAYMENT FRAUD

Authorised push payment (“APP”) fraud is reportedly the largest class of payment fraud in the UK.

Both the sending bank and the recipient bank have very little legal liability for this but there may be the opportunity to obtain compensation under a voluntary banking code and to complain to the Financial Services Ombudsman (“FOS”) if compensation is not paid.

APP fraud occurs when an accountholder is deceived into thinking they have transferred funds to a legitimate payee (such as a trade supplier), but in actual fact the destination account is controlled by a fraudster. The funds are typically dissipated upon receipt, making them very difficult to track down and recover.

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LEGAL LIABILITY OF THE SENDING BANK

The *Quincecare* duty (formulated in *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363) obliges banks not to carry out a customer's instructions when asked to make a payment transfer if the bank is "on inquiry" (i.e. has reasonable grounds to believe) that the proposed payment is an attempt to defraud its customer. Where the bank executes a customer's order in those circumstances, it may be liable to reimburse the customer for their ensuing losses. In practice banks are rarely put on inquiry by events but this may occur in exceptional circumstances.

In *Philipp v Barclays Bank UK Plc* [2022] EWCA Civ 318, the Court of Appeal considered whether a bank's *Quincecare* duty extends to preventing APP fraud. It was held that the *Quincecare* duty does **not** impose upon a bank any professional standards of detective or investigative work. If the bank has no reasonable grounds to believe that a fraud is being committed on its customer at the relevant time, then the *Quincecare* duty will not arise and the bank will be under no obligation to make inquiries or prevent the relevant payments. In practice, it is therefore very difficult for victims of push payment fraud to obtain recompense from their banks through the courts.

LEGAL LIABILITY OF THE RECIPIENT BANK

The recipient bank in a transaction generally does not owe any legal duty of care to protect victims of push payment fraud. In the case of *Tecnimont v NatWest* [2022] EWHC 1172 (Comm), for example, a victim of push payment fraud sued the recipient bank, alleging (amongst other things) that its account opening due diligence procedures had been insufficient and should have detected a fraud risk. The court rejected that argument and held that the bank was not required to compensate the victim. So far, no victim of push payment fraud has successfully obtained recompense from a recipient bank through the courts.

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THE BANKS' VOLUNTARY CODE/COMPLAINT TO FOS

Most high street banks are signed up to the "Contingent Reimbursement Model Code for Authorised Push Payments scams". This is a voluntary code (**available to view here**) which offers increased protection for bank customers who suffer at the hands of APP fraudsters. Providing that the recipients account is in the UK and the payer has not acted negligently, they are usually entitled to be reimbursed by their bank if it is a signatory to the code. All of the large UK banks are signatories. If the victim's bank refuses to refund their customer, then, provided that the customer is eligible to do so (see below), they can complain to FOS which will then investigate the circumstances and can order the bank to pay compensation if the customer has been treated unfairly.

FOS is not bound by strict legal rules and has the power also to investigate a recipient bank's conduct in the context of APP fraud. If FOS considers that the recipient bank should or could have done more to prevent the victim's losses, then FOS can order the bank to compensate them (subject to the eligibility criteria and compensation limit discussed above). Both individuals and small businesses are eligible to make FOS complaints, provided that the business has an annual turnover of no more than £6.5 million and fewer than 50 employees. The maximum limit on compensation that FOS can order a bank to pay is £375,000.

THE PAYMENT SYSTEMS REGULATOR ("PSR")

Toward the end of 2022, the PSR published a consultation paper that seeks to introduce greater protections for APP fraud losses. The new legislative measures being proposed would include:

- Requiring banks to reimburse victims in all but exceptional cases;
- Greater consistency in protections for all victims, irrespective of who they bank with; and
- Incentivising banks to prevent APP fraud because it is being recognised that the responsibility for allowing fraudulent payments is the responsibility of both the sending and receiving banks.

The PSR intends to publish a policy statement on mandatory reimbursement at some stage in early 2023.

This is part of a series of practical know-how guides for those involved in commercial disputes whether the dispute has led to litigation or not. They provide basic information on a wide range of disputes topics but are not a substitute for specific legal advice.

FOR MORE INFORMATION PLEASE CONTACT



ROBIN HENRY

Partner - Head of Dispute
Resolution Services

+44 20 7470 4429
+44 7943 503198
robin.henry@collyerbristow.com



STEPHEN ROSEN

Partner

+44 20 7468 7208
+44 7770 986494
stephen.rosen@collyerbristow.com



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BIOGRAPHIES AND CONTACT
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ALTERNATIVELY THE COLLYER BRISTOW TEAM AT
INFO@COLLYERBRISTOW.COM OR +44 20 7242 7363**

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