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 mislead 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


- 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

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

- 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
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