IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL: NO. 02(f)-98-11/2022(W)

BETWEEN

RHB INVESTMENT BANK BERHAD **... APPELLANT**
(COMPANY NO:19663-P)

AND

KOPERASI SAHABAT AMANAH IKHTIAR BERHAD **... RESPONDENT**
(COOPERATIVE NO: W-6-0818)

[In the Matter of the Court of Appeal Malaysia
(Appellate Jurisdiction)
Civil Appeal No. W-02(NCvC)(W)-2084-10/2018]

Between

Koperasi Sahabat Amanah Ikhtiar Berhad ... Appellant
(Cooperative No. W-6-0818)

And

RHB Investment Bank Berhad ... Respondent
(Company No: 19663-P)

[In the matter of the High Court of Malaya at Kuala Lumpur
Civil Law No. WA-22-NCvC-17-01/2017]

Between

Koperasi Sahabat Amanah Ikhtiar Berhad ... Plaintiff
(Cooperative No. W-6-0818)

And

1. RHB Investment Bank Berhad
   (Company No: 19663-P
2. Lotfi bin Miskam (No. K/P: 660220-04-5299)
3. Tareeq Asset Management Sdn Bhd
   (Company No: 1025467)
   Formerly known as Abhar Capital Holdings Berhad
   And later known as IT TU Capital Sdn Bhd ... Defendants

CORAM:

MOHAMAD ZABIDIN MOHD DIAH, CJM

MARY LIM THIAM SUAN, FCJ

NORDIN HASSAN, FCJ

BROAD GROUNDS OF JUDGMENT OF THE COURT

[1] This is an appeal by RHB Investment Bank ("the appellant") against the decision of the Court of Appeal which overturned the decision of the High Court and allowed the respondent's claim for negligence in transferring or allocating an amount of RM10 million into the trading account of Abhar Capital Holdings Berhad ("the 3rd defendant").

[2] 2 questions of law were posed before this Court as follows:

(i) whether a financial institution owes a duty of care to third parties who are not its customers and to whom it had not assumed any responsibility in a case of pure economic loss;

(ii) if such a duty of care exists, is the applicable standard of care that of whether the financial institution is 'put on inquiry' on a particular transaction;

Background facts

[3] In mid-2013, Lotfi bin Miskam ("the 2nd defendant,") represented to the respondent that he was an officer, representative, or agent of the appellant and in that capacity, proposed that the respondent invest with the appellant, an investment bank, a sum of RM10 million for 3 years in a category of fund known as "equity fund/special issue/IPO, with a 10.5% annual profit or dividend. Lotfi presented this same proposal again at the respondent's board of directors' meeting on 13.11.2013.

[4] Be that as it may, the respondent's Investment Committee decided to proceed with the investment on 9.09.2013 after receiving a letter dated 30.8.2013 supposedly from the appellant's Joint Committee confirming the terms of investment as proposed by Lotfi.

[5] As such, on 18.9.2013 the respondent issued a Maybank Islamic Berhad cheque for the sum of RM10 million payable to the appellant. The cheque was given to Lotfi to be deposited with the appellant

[6] On 23.9.2013, Lotfi deposited the said cheque into the appellant's pool account in Malayan Banking Berhad. He then informed Zainol Azwan bin Muktar ("SP2"), who was the appellant's employee, that the deposit of RM10 million was for the share trading account held by his company, the 3rd defendant. SP2 managed the trading accounts that the 3rd defendant had with the appellants.

[7] Lotfi gave SP2 a bank-in slip as proof that the RM10 million had been deposited into the appellant's account. That bank-in slip stated that the cheque was for the 3rd defendant. The appellant then allocated the RM10 million into the 3rd defendant's trading account held with the appellant.

[8] The respondent received a letter dated 25.9.2013 purportedly with the appellant's letterhead confirming the respondent's investment with the detailed particulars of the said investment.

[9] The respondent thereafter received a letter dated 10.2.2014 purportedly with the appellant's letterhead attaching a cheque also dated 10.2.2014 in a sum of RM73,000 as the first dividends from the respondent's investment with the appellant. This payment was via a bank draft from RHB Bank Berhad where the 3rd, defendant's had an account.

[10] Eventually, it was discovered that there was no such investment by the respondent with the appellant, Lotfi was not the appellant's employee, and all the letters dated 30.8.2013, 25.9.2013, and 10.2.2014 purportedly from the appellant were forged. The funds in the 3rd defendant's account had also been taken out and the account was closed.

[11] The respondent sued the appellant, Lotfi, and Abhar Capital Holdings Sdn Bhd as the 1st, 2nd, and 3rd defendants respectively. The respondent's case against the appellant was for the tort of negligence, essentially, in transferring the RM10 million into the 3rd defendant's trading account without further inquiring or seeking confirmation from the respondent on the purpose of the RM10 million deposit although the claim was launched on several other allegations of negligence. Specifically, at paragraph 24 of the Statement of Claim, the respondent alleged that the appellant was negligent:

i. in allowing Lotfi to represent himself as its representative, agent, or officer [paragraphs 24(a) – (d)] and/or allowing the letters complained of to be issued;

ii. in encashing the RM10 million investment to the 3rd defendant who was its agent [gagal dan/atau cuai apabila menunaikan wang pelaburan Plaintif sebanyak RM10,000,000.00 kepada Defendan Ketiga yang merupakan ejen kepada Defendan Pertama – paragraph 24(e)];

iii. in ensuring that the RM10 million was channeled to the correct investment as represented by Lotfi [gagal dan/atau cuai untuk memastikan wang pelaburan Plaintif yang berjumlah RM10,000,000.00 disalurkan kepada pelaburan yang betul sepertimana direpresentasikan oleh Defendan Kedua – paragraph 24(f)]:

iv. as an investment bank, in not further inquiring or seeking confirmation from the respondent on the purpose of the RM10 million deposit [sebagai sebuah bank pelabur, Defendan Pertama telah gagal dan/atau cuai dan/atau abai untuk membuat pertanyaan lanjut dan pengesahan daripada pihak Plaintif berkenaan tujuan pembayaran wang berjumlah RM10,000,000.00 tersebut – paragraph 24(h)];

v. in ensuring that all monies paid to the appellant are for the purpose of investment by the customer concerned [sebagai sebuah bank pelabur, Defendan Pertama telah gagal dan/atau cuai dan/atau abai untuk melepaskan duti dan tanggungjawab bagi memastikan segala wang yang dibayar kepada Defendan Pertama adalah bertujuan untuk pelaburan oleh pelanggan yang berkenaan – paragraph 24(i)].

The High Court

[12] After a full trial before the High Court, the trial judge found that the respondent had failed to establish a duty of care owed by the appellant to the respondent in the circumstances of the case. Lotfi was found not to be the appellant's employee or agent, and the relevant letters purportedly from the appellant, which induced the respondent to invest, were forged. Therefore, the respondent's claim against the appellant for negligence was dismissed. The respondent entered default judgments against both Lotfi and the 3rd defendant.

The Court of Appeal

[13] On appeal to the Court of Appeal, the decision of the High Court was overturned. The Court of Appeal held that the appellant owed a duty of care to the respondent and that the appellant had breached that duty.

[14] Further, it was held that "the moment a sum of money was deposited with an investment bank", in this case, the appellant, the appellant "must find out whose money it is and whether the depositor is already its customer". If the depositor is not a customer, the appellant should verify who the depositor is and the documents substantiating the customer's identity as well as the relevant resolutions for the opening of an account with the appellant and who are the relevant signatories of the account.

(***paragraph 56 – GOJ***)

[15] The Court of Appeal was of the view that there was a breach of duty of care by the appellant in accepting the RM10 million from the respondent and transferring it out to the 3rd defendant based on the particulars of negligence submitted by counsel for the respondent which *inter alia* are as follows:

(i) the appellant transferred the RM10 million to the 3rd defendant's trading account based on the bank-in-slip without further enquiries;

(ii) the appellant relied solely on Lotfi's oral instruction to transfer the RM10 million to the 3rd defendant without further inquiries;

(iii) the appellant failed to make inquiries to determine the owner of the RM10 million fund based on the cheque number in the bank-in-slip;

(iv) the appellant failed to ascertain if there was any mandate or authorization to "transfer" the RM10 million to the 3rd defendant's trading account;

(v) the appellant and its Credit Control Department had failed to ascertain the source of the RM10 million;

(vi) in light of the anti-money laundering regime, the appellant as a reporting institution had failed to ascertain who its customer was before dealing with the substantial sum of funds in this case.

(***paragraph 166 - GOJ***)

[16] In the circumstances, the Court of Appeal allowed the respondent's claim against the appellant and entered judgment for RM10 million less the RM73,000 dividend already received from the 3rd defendant, which is a sum of RM 9,927,000.

The decision of this court

[17] It is settled law that to succeed in a claim for the tort of negligence, there must first be a duty of care owed by the appellant to the respondent followed by a breach of that duty. This duty establishes the existence of a legal obligation between the parties.

[18] The respondent's claim, in this case, was for pure economic loss that is the financial loss suffered by the respondent due to the alleged negligence by the appellant in handling the RM10 million. This loss does not arise from any physical damage.

[19] The position in Malaysia as decided by the apex court in several cases is that because of the nature of pure economic loss, it is only

recoverable under limited situations. There is a more restrictive approach in recognizing that there exists a duty of care in a claim for pure economic loss; that there must be some special circumstances such as reliance and assumption of responsibility to show proximity between the parties, a point we will come back to shortly.

(*see Lee Kok Beng & 49 Ors v Loh Chiak Eong & Anor [2015] 4 MLJ 734 (FC); Pushpaleela a/p R Selvarajah v Rajamani d/o Meyappa Chetiar and other appeals [2019] 2 MLJ 553 (FC)*)

[20] The threshold three-fold test in ascertaining the existence of a duty of care are reasonable foreseeability, legal proximity, and policy considerations; whether it is fair, just, and reasonable in any given situation to impose a duty of care of a given scope on the one party for the benefit of the other.

(*see Lok Kok Beng (supra), Lim Kar Bee v Abdul Latif bin Ismail [1978] 1 MLJ 109 (FC), Caparo Industries plc v Dickman [1990] 2 AC 605*); *Pushpaleela a/p R Selvarajah v Rajamani d/o Meyappa Chetiar and other appeals [supra])*

[21] As regards the reasonable foreseeability test, the question is whether is reasonably foreseeable that the respondent would suffer damage as a consequence of the appellant's negligence based on the standard of the reasonable man that he ought to have foreseen it. Here, the issue is whether it is reasonable to hold that the appellant, through SP2, who was then its employee ought to have foreseen that the respondent would ultimately lose its RM10 million when he "transferred" or allocated the RM10 million into the 3rd defendant's trading account without making further inquiries as to who is its customer, the source of

the RM10 million or whether there was authorization or mandate to transfer or allocate that sum to the 3rd defendant, instead of relying on the bank-in slip and oral instruction of Lotfi which was in fact, contrary to the respondent's investment.

[22] The issue in this case is almost similar to a recent Privy Council case of ***JP SPC 4 and another v Royal Bank of Scotland International Ltd [2022] UKPC 18*** where it involved a transfer of funds by the bank to third-parties bank accounts that had been parties to a fraud. The bank was sued for negligence for the pure economic loss of the plaintiff. In that case, the test laid down by the court is that *a banker must refrain from executing an order if and for so long as the banker is 'put on inquiry' in the sense that he has reasonable grounds (although not necessary proof) for believing that the order is an attempt to misappropriate the funds.* On the facts of that case, it was decided that there was none. It was also found that there was no duty of care by the defendant to the plaintiff.

[23] In the present case, the respondent's case is that the appellant ought to have conducted verifications and inquiries beyond their normal practice of relying on the bank-in slips before transferring or allocating the funds to a trading account because the cheque of RM10 million was from a non-customer. The respondent did not have a trading account with the appellant, had no relationship or prior dealings with the appellant, and was not a customer of the appellant and under such circumstances, it was suggested by the respondent that it was reasonable to foresee that the non-customer would suffer harm if the appellant did not conduct

verifications and inquiries about authorization and mandate to transfer or allocate the sum to the 3rd defendant, or about the source of funds.

We disagree. The RM10 million cheque was deposited into the appellant's pool account at Malayan Banking Berhad by a fraudster, Lotfi, a director of the 3rd defendant, both of whom had trading accounts with the appellant and whose accounts were managed by SP2. Such payment into a pool account is industry practice and once paid in, the cheque would be held by Malayan Banking Berhad in this case. In its place will be a copy of the bank-in slip containing the essential details of the payor and payee.

From those details before the Court, there is nothing to suggest the presence of the respondent. On the contrary, all information on the bank-in slip pertains to the 3rd defendant and the appellant. If there were any inquiries to be made about authorization and mandate. It would have been upon Malayan Banking Berhad and not, the appellant.

In any case, such verification or inquiries would only confirm that the RM10 million was indeed meant for the appellant.

Further, the RM10 million cheque that the respondent prepared was in the name of the appellant and although it was from the respondent's account, it was not earmarked for the respondent, be it to open a new trading account with the appellant or to invest in any particular fund of the appellant. There was nothing to alert the appellant as to the presence of

the respondent let alone, its purpose or intent in relation to the RM10 million.

[24] Based on the totality of the evidence in the present case, there is no factual basis to make any inference, let alone reasonable inference that SP2 had knowledge or reasonable grounds for believing that the instruction to allocate the RM10 million into the 3rd defendant's trading account was against mandate or authorization, or that the respondent would lose the RM10 million. In other words, there is no basis for SP2 to 'put on inquiry' the transaction or instruction. On the standard of a reasonable man, the misappropriation of the funds in the present case, we find, was not foreseeable by SP2 or by the appellant when allocating the funds into the 3rd defendant's trading account. There were no red flags and even if there were, that is still insufficient.

[25] At this juncture, we need to emphasize here that non-compliance with any standard operating procedure of the appellant or acting not in accordance with good professional practice if any, are errors made by the appellant's employees that do not lead to the existence of a duty of care. It only relates to the standard of care but not the creation of a duty of care.

(*see Pushpaleela case (supra); Esser v Brown [2004] BCJ No 1312; Burmeister v O Brian [2010] 2NZLR 395*)

[26] In any event, reasonable foreseeability *per se,* does not lead to a duty of care. A further test of legal proximity has to be established. It is pertinent to show sufficient legal proximity between the parties where the

plaintiff only suffered pure economic loss. In this regard, one of the important factors to be considered by the court is the principle of voluntary assumption of responsibility by the defendant and reliance by the plaintiff.

[27] To determine sufficient proximity between parties, the court would have to consider the closeness of the relationship between the plaintiff and the defendant and other factors and circumstances of the case.

(*see Lee Kok Beng & 49 Ors v Loh Chiak Eong (supra)*)

[28] Reverting to the present case, as alluded to earlier, the respondent did not have an account with the appellant, had no relationship or prior dealings with the appellant, and was not a customer of the appellant. The only nexus between the appellant and the respondent is that the RM10 million was deposited by a fraudster in the appellant's pool account in Malayan Banking Berhad. Further, the three letters purportedly sent by the appellant were forged. In this regard, it is a reasonable conclusion that there was no voluntary assumption of responsibility by the appellant. Consequently, there is no special relationship of sufficient legal proximity between the appellant and the respondent, in this case, to give rise to a duty of care for pure economic care.

[29] In the circumstances, it is our considered view that, on the facts of the present case, the respondent has failed to establish any duty of care by the appellant to the respondent. It would be unjust, unfair, and unreasonable to impose a duty of care owed by the appellant to the respondent a non-customer. Policy consideration would suggest against

the extension and imposition of such a duty as this would put the appellant and all investment banks, in a position of commercial inertia and indeterminate liability.

In this regard, we are of the view that the Court of Appeal fell into error in finding that there existed a duty of care owed to the respondent because of the alleged non-conduct of verification or inquiries. As opined in Pushpaleela, "this cannot be right". The duty must first be established before the Court considers whether there has been a breach of the duty of care. The Court of Appeal had also conflated the issue of duty of care with the standard of care.

[30] We also found that there is no lacuna in the law that warrants us to extend or incrementally extend the scope of the duty of care in the present case. There are no exceptional reasons to do so, the respondent is not without remedy as the respondent had already taken legal action against the 2nd and 3rd defendants.

Conclusion

[31] Based on the aforesaid reasons, we answer question 1 in the negative, and having answered question 1, we find it unnecessary to answer question 2. We, therefore, allowed the appeal and set aside the decision of the Court of Appeal. The decision of the High Court dated 18.9.2018 is reinstated. The respondent is to pay costs to the appellant in the sum of RM50,000 subject to payment of the allocator. We further

order that the judgment sum paid to the respondent on 31.12.2021 in the sum of RM10,012,116.00 be returned to the appellant with interest of 5% per annum from 31.12.2021 until full realization.

Dated this day 26 July 2023

(DATO' NORDIN BIN HASSAN)
Judge
Federal Court of Malaysia