CASE TRANSLATION:
REPUBLIC OF TURKEY

CASE NUMBER:
2009/11485

JUDGMENT NUMBER:
2011/4033

NAME AND LEVEL OF THE COURT:
Supreme Court of Appeal, Civil Law Circuit

DATE OF DECISION:
7 April 2011

On-line banking; unauthorized transfers between accounts by unknown third party; negligence; liability of the bank

This is a condensed verbatim account that the senior judge dictates to the stenographer for distribution to counsel at the end of each hearing or trial.

Case: It has been understood that the counsel of the plaintiff and the counsel of the defendant have requested the review of decision number 2005/984-2009/313 that was heard at Istanbul's 13th Commercial Court of the First Instance given on 06.05.2009 in relation to the legal proceedings between the parties, and that the application for appeal was submitted on time. The Supreme Court has decided the following after having heard the report prepared by the Investigating Judge S.G.B. on the case, and having once again read all the petitions, statements of claims, case records and all documents:

[Original judgment of the lower court] Judgment: The counsel of the plaintiff claimed that on 27.04. 2005, without the company issuing instructions or its prior knowledge, 15,268.64 Euros; US$6,640.00; 27,180.00 Japanese Yen and 2,216.93 Turkish Lira as well as and 599.77 Turkish Lira belonging to company representative N.K.A. [the co-plaintiff] was transferred electronically from the foreign currency and Turkish Lira accounts of the plaintiff company and co-plaintiff N.K.A. held with the defendant bank, and transferred into the bank account of Ö Limited Company, who was not known to the clients of the counsel, at the Davutpaşa branch of Koçbank via the internet. The money was then withdrawn by the company representative M.T. without the information and permission of the clients of counsel on 27.04.2005; that the defendant bank was held responsible for this because it could not provide the necessary security required for the electronic banking service; and requested a refund of US$2,500; 2,216.93 Turkish Lira belonging to the company and 599.77 Turkish Lira to N.K.A., which was later amended, and it was requested that the plaintiff company should be refunded with 15,268.84 Euros; US$6,640.00; 27,180.00 Japanese Yen and 2,216.93 Turkish Lira.

The counsel of the defendant claimed that the diligent safekeeping of the PIN and password is the responsibility of the plaintiff; that the defendant should not be responsible for any losses arising out of this; that the loss of the plaintiff was due to the fact that the password was found out by third parties; that there was no loss caused by the bank's systems; and requested the case to be dismissed.

The defendant company, Ö Limited Company did not respond to the action.

In accordance with the claim, the defense, the expert's report and all other relevant documents, the court decided that the defendant bank did not employ the necessary security measures and employed a system which was prone to causing losses for its clients; the security system that the bank used and required its clients to use could not prevent the use of stolen information; thus making the defendant bank responsible for the losses of the plaintiff; the fact that the plaintiffs could not properly protect the personal information such as their PIN and passwords which they used for internet banking required a reduction of their losses by one third in accordance with Article 44 of the Code of Obligations regulating contributory negligence, dismissed the case in respect of the defendant Ö Limited Company due to the case having been waived by Ö Limited Company, and partially accepted the case for the defendant Y. The claims against the defendant were, in part, upheld. The Maltepe branch was ordered to pay the plaintiff the following amounts, to include interest: 10,179.90 Euros; US$4,426.66; 18,120.00 Japanese Yen and 1,477.95 Turkish Lira and 399.84 Turkish Lira to be paid to the plaintiff N.K.A. and

the payment of other amounts claimed to be paid by the plaintiff company, and rejected the further claims.

The counsel of the plaintiffs and the counsel of the defendant bank appealed against the decision.

[Supreme Court judgment]

1- It has been decided that having examined and discussed all the evidence and documents that formed the basis of the judgment, and finding there was nothing that was irregular or contravened any laws or legal process, the defendant's counsel's right of appeal are refused.

2- According to new Article 427/2 of the Code of Civil Procedure that came into effect with Law No 5219 on 21.07.2004, the conclusive decisions regarding moveable property and monetary claims that do not exceed 1,400.00 Turkish Lira in amount or value by 2009 are final as of the date of the decision 06.05.2009.

   In the current dispute, the plaintiff N.K.A. requested the refund of 599.77 Turkish Lira that was taken out of his personal account with interest. The amount that is subject to court fees for this plaintiff is 599.77 Turkish Lira. The court decided to accept his claim in part and ordered a refund of 399.84 Turkish Lira to the plaintiff N.K.A. on 06.05.2009 and it has been decided that the appeal claim of the counsel of plaintiff N. shall be dismissed on the basis that the claim amount that was rejected is below the appeal limit in accordance with the articles of the law referred to above.

3- With regards to the review of the appeal claims of the counsel of the plaintiff company; the action is about the compensation of the losses that were suffered as a result of the monies having been withdrawn from the bank accounts of the plaintiff company that were opened at the defendant bank using the internet and without the prior knowledge or permission of the plaintiff. In its written decision, the court ordered that the transfer which was the subject of the case was made using the PIN and passwords of the plaintiff that had been obtained by third parties, and allowed them to obtain access to the account and that a reduction of one third has been made due to the contributory negligence of the plaintiff.

   The banks are obliged to refund the monies that are deposited with them to the account holders in kind or in specie when requested or at a specific due date (Article 10/4 of the Law of Banks No 4389 that was amended by Law No 4491 and Article 61 of the Law of Banking). According to this definition, a bank deposit is a sui generis contract that bears the characteristics of loan and irregular deposit contracts. According to Articles 306 and 307 of the Code of Obligations, the borrower is obliged to return the borrowed money, if agreed with interest, at the end of the contract. According to Article 472/1 of the same Code, the borrower may use the money to their benefit without any explicit explanation since the benefit and damage passes absolutely on to the keeper. When reviewed in this light, the withdrawals made by way of unlawful transactions are in fact damages to the bank, and the claim of the account holder to the bank continues to be the same. The contributory negligence of the account holder in respect of the unlawful transactions may be mentioned if this can be proved, and the bank may request a reduction of the account holder's claim on the basis of the proportion of the negligence.

   In the current case, it has been decided that the decision of the court shall be repealed in favour of the plaintiff company, since judgment was based on a split of negligence, in that the plaintiff was held to be negligent because of failing to use the security measures offered by the bank, even though it could not have been proved that personal information such as the PIN and password that was used for transactions made via the internet was obtained because of the plaintiff's negligence; and therefore the bank should have been held fully responsible for the monies withdrawn from the account because the security systems employed by the bank were not sufficiently developed, and the bank failed to require their customers to use increased internet security; to this end, the bank was completely at fault and responsible for the outcome; it was also considered incorrect for the defendant to communicate in writing to the plaintiff that they had not taken sufficient care in the security precautions required of bank clients and suggesting that blame should be shared between both parties; as a result the court finds in favour of the plaintiff.

Conclusion: It has been decided unanimously on 07.04.2011 that the defendant bank grounds of appeal

are rejected due to reasons explained in paragraph (1) above; the appeal by plaintiff N.K.A. is rejected in accordance with the reasons explained in paragraph (2) above in accordance with the provisions of Article 432/4 of the Code of Civil Procedure; the appeal claims of the counsel of the plaintiff company are accepted for reasons explained in paragraph (3) above, and the judgment of the lower court is repealed in favour of the plaintiff company, and it is ordered that the amount of 1,988.90 Turkish Lira for the outstanding appeal court decision fee that is written below shall be collected from the appellant defendant bank, and that the advance appeal fee shall be refunded to the plaintiff company upon its request. Made by unanimous decision on 07.04.2011.

Commentary

The most significant problem Turkish banks have been dealing with recently is the transfers from customer accounts to unknown third party accounts by means of use of their PIN when using on-line banking. This forgery is generally caused by spyware, which is inserted into the customers' computer virtually. The customers realize the situation and then they come up against the response of their banks. Most banks refuse liability on the basis of the relevant security clauses they have inserted into on-line banking customer contracts.

While determining the liable party when there is forgery, the decision should be given based on how the event happened and the presence or lack of the presence of the negligence of the parties. It should be pointed out that on-line banking contracts are signed by the customers, and they usually provide that banks are not liable. These articles are not considered valid by articles 99 and 100/III of the Turkish Code of Obligations, and these articles do not avoid the liability of the banks.

A customer might be considered negligent for failing to keep the PIN safe and if they give the PIN to third parties. The bank may be considered negligent where there is a vulnerability in bank's main server or where their security mechanisms are inadequate, or both.[1]

The approach of the Court of Appeal has changed over time, and currently the High Courts now hold banks liable in similar situations. A summary of previous decisions can be reduced to the following:

1. In 2003, the Supreme Court decided that the bank was not responsible if the customer failed to keep the PIN safe, and also from the loss because the PIN was not protected. The reason for the decision was because the contract was signed between bank and the customer, in which the customer agreed to be liable from the loss because of their negligence in keeping the PIN secret. The court decided to honour the freedom of contract rather than the consumer, without considering the significant technical issues.[2]

2. In 2006, the Supreme Court decided that the bank is an institution of trust, therefore banks should compensate the customer's loses. If the banks do not take the necessary security measures, the banks will be held liable, even if they are only slightly negligent in cases where an unknown third party authorizes a transaction from the customer's account to another account by means of hacking.[3]

3. In 2009, the Supreme Court decided that the bank was liable for the loss of eight plaintiffs, because their transaction limits were 2,000 Turkish Lira, but the bank did not block the accounts when the bank realized the customers' accounts were over the limit for such transactions. The decision of the Supreme Court is accepted as an important decision which is in favour of customer.[4]

4. In 2011, a further decision by the Supreme Court decided that if the negligence of the customer cannot be proven, and if there is not any evidence that the customer did not protect their personal data, the plaintiff customer would not be liable for transactions from the account to other accounts by on-line banking.[5]

On-line banking is very popular, however it contains many risks. The thieves are creative, and banks have failed to develop adequate security mechanisms. Based on the decisions of the Turkish Supreme Court, banks are considered as merchants. Ultimately, article 12/1-8 of the Turkish Commercial Code determined that banking is within the list of commercial organs. Banks are therefore

1 *For a comprehensive analysis on this issue, see Stephen Mason, ' Debit cards, ATMs and negligence of the bank and customer', Butterworths Journal of International Banking and Financial Law, Volume 27, Number 3, March 2012, 163 – 173.*

2 *T. C. Yargitay 11. HD 12.9.2003/8230 E. – 2003/7705 K.*

3 *T. C. Yargitay 11. HD 22.6.2006 2005/4748 E. – 2006/7341 K.*

4 *T. C. Yargitay 11. HD 25.10.2010 2009/4609 E. – 2010/10691 K.*

5 *T. C. Yargitay 19. HD 23.02.2011 2011/481 E. – 2011/2326 K.*

categorized as merchants. Furthermore, based on the Turkish Banking Law (5411), banks are categorized as aggregated structured institutions with a significant capital. Consumers are in a weak position in relation to such institutions. Article 172 of the Turkish Constitutional Law considers consumer protection as an obligation. According to the provisions of this article, the government is expected to take the necessary measures in respect of consumer protection and guidance.

Thus, consumer rights are constitutional rights. For this reason, based on the Law on the Protection of Consumers (4077), consumers are given positive help in Turkey. The protection of consumers against strong merchants such as banks should be taken into consideration by judges.

Burcu Orhan Holmgren is an Attorney at Law and founding partner of London Legal International. Burcu is an experienced litigation lawyer, and is highly experienced in overseeing legal matters from both the English and Turkish jurisdictions, due to having practiced Turkish law both in Turkey and England.

b.orhan@londonlegalint.co.uk

http://www.londonlegalint.co.uk/