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A New Angle on Banks' Duties to Customers in Fraud Cases: Philipp v Barclays

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What is the scope of banks' duties to customers in executing their customers' instructions? In particular, what are banks' duties if the instruction is the instrument of fraud?

Earlier this month, the Court of Appeal overturned the previous decision of the High Court in *Fiona Lorraine Philipp v Barclays Bank UK Plc*. The claim concerned the liability of Barclays Bank UK Plc ("**Barclays**") for carrying out transfers that constituted an 'authorised push payment' fraud (or "**APP fraud**") on Mrs Philipp – transfers that were requested and authorised by her, but induced by a third party through the use of fraudulent representations. Mrs Philipp had argued that Barclays was liable for her losses because of its failure to comply with its Quincecare duty – a duty that has risen to prominence as a result of several high-profile cases in recent years.

In this client alert, we explain what a Quincecare duty is, and take a brief look at recent cases applying it, before discussing what *Philipp v Barclays* could mean for future cases concerning the scope of the duty.

The Quincecare Duty

The Quincecare duty was first explicitly recognised in *Barclays Bank Plc v Quincecare Ltd*. In this case, Barclays agreed to lend £400,000 to the company. A large part of that sum was then dishonestly drawn down by the company chairman and misapplied for his own purposes. Barclays sued Quincecare and the guarantor of the debt for repayment of the loan. The defendants raised a defence that Barclays had paid out the money in breach of its duties to Quincecare as its customer.

In his judgment, Steyn J held that there was an implied term in the contract between bank and customer that the bank would exercise reasonable skill and care in executing the customer's instructions. While the bank would have a prima facie duty to execute its customer's instructions as given, he held that a banker could be "*put on inquiry*", such that they had "*reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company*". In this case, the bank could be liable for breaching its duty of care (its Quincecare duty) by transferring the funds as long as such "*reasonable grounds*" existed.

Recent Cases

Two high-profile recent cases concerning the Quincecare duty are *Singularis v Daiwa* and *Nigeria v JP Morgan*.

Singularis v Daiwa

In *Singularis Holdings Limited (in official liquidation) v Daiwa Capital Markets Europe Limited*, Mr Maan Al Sanea was the sole shareholder and effective controller of Singularis Holdings Limited ("**Singularis**"), part of the Saad Group owned by Mr Al Sanea. Daiwa Capital Markets Europe Limited ("**Daiwa**") provided banking services to Singularis.

Over the course of June and July 2009, Daiwa received several payment requests from Singularis for payments to or for the benefit of Saad Group companies, including a request to transfer USD 180 million to Saad Specialist Hospital Company. Daiwa carried out these payment requests. It was common ground between the parties that Mr Al Sanea was acting fraudulently for the benefit of himself or the Saad group companies in making these payment requests, and that he had a duty to act in the best interests of the company's creditors at that stage, as the company was insolvent.

Singularis issued a claim against Daiwa for the whole amount paid out according to the payment requests, on the grounds either (i) that Daiwa dishonestly assisted Mr Al Sanea's breach of fiduciary duty in removing the money from Singularis; or (ii) that Daiwa breached the duty of care it owed to Singularis, by negligently authorising the payments. Daiwa opposed the claim on the basis that Mr Al Sanea's fraud should be attributed to Singularis, with the result that its Quincecare claim should fail for illegality, lack of causation, or because of a countervailing claim in deceit.

The High Court found against Daiwa, finding that it had executed the transfers in circumstances in which any reasonable banker would have realised there were many obvious, even glaring, signs that a fraud was being perpetrated on Singularis, and holding it liable for the amount of the payments less a 25% reduction for contributory negligence (reflecting the contributory fault of Mr Al Sanea). Daiwa's appeal to the Court of Appeal was unsuccessful, as was its appeal to the Supreme Court, which agreed that Daiwa could not defeat Singularis's claim by attributing the fraud of Mr Al Sanea to the company. It noted that allowing that defence would defeat the purpose of the Quincecare duty, which was partly to protect account holders from malfeasant agents.

Nigeria v JP Morgan

In *The Federal Republic of Nigeria v JP Morgan Chase Bank, N.A.*, an account was set up by the Federal Republic of Nigeria (the "**FRN**") as depositor at the London branch of JP Morgan Chase Bank, N.A. ("**JP Morgan**"). The set-up and operation of the account were governed by a depository agreement between JP Morgan and the FRN (the "**Agreement**").

From 2011 to 2013, JP Morgan received instructions from authorised signatories of the depository account to transfer nearly USD 900 million to accounts held by an oil company doing business with the FRN, and duly made those transfers.

In November 2017, the FRN commenced a claim alleging that the payment instructions were part of a scheme of corruption involving government ministers; that JP Morgan had been put on inquiry that the instructions were given dishonestly; and that the payments had therefore been made in breach of JP Morgan's Quincecare duty of care. FRN claimed damages in the amount of the payments, which JP Morgan opposed partly on the basis that the Agreement had excluded the operation of the Quincecare duty. JP Morgan made an application to strike out the claim or proceed to summary judgment in its favour.

The Court of Appeal held in October 2019, as the High Court had before it, that the FRN's claim could not be struck out or be settled by summary judgment. The Court of Appeal held that the Agreement did not appear to exclude the operation of the Quincecare duty, and that very clear words would be required to do so. The case is instructive as it illustrates the high bar that would be required to show that parties had agreed that a Quincecare duty would not apply.

Philipp v Barclays

The Facts

Mrs Philipp and her husband, a music teacher and retired physician, were persuaded by a fraudster to transfer £700,000 of their life savings to an account in the United Arab Emirates. The couple believed that they were transferring their money to safe accounts to protect it from fraud, and believed that they were doing so in cooperation with the FCA and NCA in an effort to bring fraudsters to justice. Mrs Philipp alleges that no safeguarding questions or scam warnings were given when she gave the transfer instructions in a branch of Barclays. She therefore issued a claim against Barclays alleging that they had breached their Quincecare duty to her by failing to have adequate policies and procedures to detect and prevent APP fraud of this nature.

The High Court strike-out judgment

The High Court found that Mrs Philipp's claim had no real prospect of success, and entered summary judgment in favour of Barclays. It reached this judgment partly because the Quincecare duty had only previously been applied in cases where an agent of the account-holder had misused the funds (and not, as in this case, where an individual dealt with an account over which they held sole control). The judge also felt that to impose a duty on Barclays in this case would give rise to an onerous and unworkable burden on banks.

The Court of Appeal judgment

Allowing Mrs Philipp's appeal, the Court of Appeal held that the proper scope of the Quincecare duty was not a sufficiently settled question of law to allow resolution by summary judgement, and held that the matter should proceed to a full trial. In particular, the Court held that "*the right way of looking at this case is that the Quincecare duty is not limited to agents but applies in any case in which the bank is on inquiry that the instruction is an attempt to misappropriate funds*" (para. 76). The Court's acceptance that the duty can apply in cases not involving an agent, i.e. where the victim of the fraud is itself giving the instruction, is novel and significant.

The Court also noted that, since it applies only where the bank is on notice of wrongdoing, the burden on banks from applying the Quincecare duty to cases involving individuals and APP frauds would not be onerous or unworkable.

The case will now proceed to a full trial on the issues (subject to any settlement being agreed before that time).

Concluding thoughts

Banks are already well aware of the regulatory and criminal risks around APP frauds. What is not yet well-defined is the potential civil liability that can attach to the processing of these payments, either for large corporate and national entities acting through a questionable agent, or for individuals.

It is likely that cases over the next several years will continue to develop the scope and legal basis of the Quincecare duty. The decision in *Philipp v Barclays* that the duty can potentially apply in cases where individuals give instructions that result in APP frauds being perpetrated on them (that is, where no agent of the account-holder is involved) is particularly key for consumer banks. Any further expansion of the scope of the Quincecare duty will accelerate the development of banks' already extensive policies and controls around APP frauds – potentially adding significant weight to banks' ever-growing administrative burden.

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