Bankers in a jam: The Quincecare duty considered

During the first half of 2022, two cases have considered the application of *Quincecare* duties. The Court of Appeal handed down its judgment in *Philipp v Barclays Bank UK plc [2022]* on 14 March 2022. With that judgment fresh off the press, Mrs Justice Cockerill considered the issue further in the Commercial Court judgment of *Federal Republic of Nigeria v JP Morgan Chase Bank NA [2022] EWHC 1447 (Comm)* handed down a month later on 14 June 2022.

The Quincecare Duty

The *Quincecare* duty derives from the decision in *Barclays Bank v Quincecare [1992] 4 All ER 363*, requiring a banker to act with reasonable skill and care when executing instructions. The duty is triggered when a banker is '*put on inquiry'*, in the sense that he has reasonable grounds for believing that the order to execute a transaction is an attempt to misappropriate funds. In such instance, the banker must refrain from executing the order for payment and make relevant enquiries before deciding whether or not to process the payment.

The *Quincecare* duty runs alongside, and is in conflict with, a co-existing duty vesting upon bankers to promptly execute customers' payment instructions. As such, the Courts have imposed the duty only narrowly, recognising the commercial backdrop against which banks operate.

Philipp v Barclays

The claim was brought by Dr and Mrs Philipp; an elderly couple who had been defrauded out of the bulk of their life savings. Following various communications with a person they believed to be representing the FCA, they were persuaded that they were at risk of being defrauded, and had to move their funds from their current account to protect themselves. Mrs Philipp went to the bank in person and instructed it to transfer monies totalling £700,000. This type of fraud, known as Authorised Push Payments (APP), is characterised by the victim actively issuing the instruction / making the payment (as opposed to 'pull payments', where card information is misused). From a bank's perspective, APP transactions are considered to be 'authorised'.

Historically, the *Quincecare* duty has been imposed in circumstances where a bank has received instructions to execute payments from an agent, rather than the accountholder (typically a company) itself. On this basis, Barclays applied for summary judgment, pleading that *Quincecare* duties do not arise at all in circumstances where a claimant has instructed the payment. The Court found in the Bank's favour.

The issue for the Court of Appeal was not whether a duty was owed on the facts, but whether the first instance Judge had been correct in deciding the issue and dismissing the claim summarily.

Leading judgment was given by Lord Justice Birss, who summarised that the *Quincecare* duty *"is a duty on a bank to make inquiries and refrain from acting on a payment instruction in the meantime"*.

Further, Lord Justice Birss held, in cases of this nature, "*duty of care and standard of care are intertwined, and it is not easy to examine one without the other".* Whether the case would succeed at trial would turn on the evidence as to ordinary banking practices, both in relation to what would put an ordinary prudent banker on inquiry as to possible misappropriation, and what the *'reasonable banker'* would have done if they were on inquiry. This meant the nature of the case made it unsuitable to be decided summarily.

Obiter, the Court of Appeal set out several factors which the Philipps may advance to support their case that a prudent banker would have been put on inquiry that Mrs Philipp was likely a victim of APP fraud:-

- Mrs Philipp was attending in person at a branch which was not her own;
- she was seeking to transfer an enormous and (for her) unprecedented sum of money;
- the money had only been moved into Mrs Philipp's account a matter of days beforehand; and
- the intended recipient was a petroleum company in the UAE.

Whilst, to this point, the cases had been concerned with the instructions given by agents, Birss LJ did not find there was any logical ground for restricting the principle in that way and that it *could* apply equally to an instruction issued by the customer personally. However, the appropriate forum for that determination was at a full trial rather than by way of summary assessment.

Federal Republic of Nigeria v JP Morgan Chase Bank

The second case arose out of a set of highly complex and, in the words of Mrs Justice Cockerill, *"striking"* facts. The Federal Republic of Nigeria ("FRN") held an escrow account at JP Morgan Chase Bank NA ("JPMC") from which payments were made on two occasions in 2011 and 2013. The money was transferred to a company called Malabu Oil and Gas Limited ("Malabu"), which was owned by the, at the time, Nigerian Petroleum Minister.

After the second payment had been made, there was a change of government in Nigeria following which allegations were made that the agreement on which the funds transfer was made had been procured by a former corrupt minister for his own personal gain. FRN brought proceedings against JPMC arguing that the bank should have been on inquiry to the corruption, and ought not to have executed the two payments. On the facts, FRN failed to prove that the transfer was brought about as the result of corruption.

Mrs Justice Cockerill set out her own observations as to the *Quincecare* duty. She noted its development had been slow and subject to adverse academic comment. In light of *Philipp,* she summarised, it is established that the duty imposed upon a banker arises whenever a banker is on inquiry that the instruction is an attempt to misappropriate funds, regardless of the source of the instructions. She also noted the *prospect* of the duty being extended – away from 'internal fraud' only, to cases where the customer itself issues the instruction (and beyond).

Due to the contractual terms, FRN would have had to prove that JPMC was grossly negligent in order to establish a breach of duty of care. Nevertheless, the Court provided some additional comment on the *Quincecare* standard of care. In light of *Philipp*, FRN was not required to prove that JPMC was on notice of a specific individual being behind the alleged corruption. However, FRN had to prove that the bank had been aware of circumstances which should have raised its suspicion to the specific fraud being committed. FRN had pointed to a number of features which, from an anti-money laundering perspective, made the payments unattractive: it was made in a high-risk jurisdiction and relating to a high-risk sector; however, this was not sufficient to establish a ***serious and obvious risk of a fraud*** relating to the specific transaction.

Comment:

These two cases provide useful guidance on a number of issues concerning the *Quincecare* duty, without resolving whether, and if so how far, the duty may extend beyond that which currently prevails.

Following *Philipp*, it is clear that the key question is not who gives the instruction to the bank to execute a payment, but rather whether the circumstances of the instruction ought to raise the concerns that funds are being misappropriated. This will be welcomed by consumers who are increasingly vulnerable to ever-more sophisticated schemes of fraud. APP fraud is on the rise in the UK, with a staggering increase in the number of cases reported – up 71% in the first half of 2021 from the equivalent period in 2020. Any victim of such fraud will want to test the scope of the bank's duties to prevent fraud in years to come.

It remains apparent from the Court of Appeal's judgment in *Philipp* that these type of cases will be highly fact sensitive. As clarified in FRN, it will not suffice to point to generic factors that make the transaction unappealing; rather, a claimant must identify factors which, in light of its usual behaviour, made a specific transaction unusual and suspicious so as to give rise to the obligation upon the Bank to inquire.

The *Philipp* judgment leaves important questions as to the standard of care and causation unanswered. It is uncertain what steps a bank must take if suspicious payments are identified and, in many cases, it will be questionable what effect such steps would have upon the customer if those suspicions are raised with them. In *Philipp*, the defendant Bank argued that, as a matter of causation, the Philipps had been so duped by the fraudster that they would have gone ahead regardless of any intervention by the bank or the Police. Those issues will require to be resolved at trial – when, it is hoped, more guidance will be forthcoming as to the evolution (or not as the case may be!) of the *Quincecare* duty.

July 2022

Any questions

If you have any questions regarding the issues highlighted in this article, please get in touch with Simon or Lisbeth.

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