

## ***Bankers in a jam (revisited): The Supreme Court considers the Quincecare duty***

In July 2022, we considered the Court of Appeal's judgment in *Philipp v Barclays Bank UK plc [2022]* regarding the Quincecare duty in the context of authorised push payment fraud ([here](#)). In summary, the Court of Appeal set aside the first instance decision. The Appeal Court found that the duty of a Bank to make enquiries when presented with a payment instruction could be triggered when a banker is 'put on inquiry', in the sense that it has reasonable grounds for believing that the order to execute a transaction is an attempt to misappropriate funds. In the specific case, an elderly couple had been defrauded into arranging for the majority of their live savings to be transferred to an overseas bank account.

The Bank appealed and the Supreme Court handed down judgment on 12 July 2023. *Philipp v Barclays Bank UK plc [2023] UKSC 25* is available [here](#).

### **The Quincecare Duty**

By way of recap, the *Quincecare* duty is a modification on the general duty of bankers to execute instructions without delay. It requires the banker to refrain from executing the instruction if a reasonable banker should have realised that the instruction is an attempt to misappropriate funds. Historically, the principle has been applied in cases of fraudulent agents, but the Court of Appeal found that there was no logical reason why it could not apply even if given by the account holder personally.

### **The Supreme Court's judgment**

Lord Leggatt delivered the leading judgment. As a preliminary, he pointed out that the question before him was not whether it would be sensible to impose certain duties upon bankers – a matter which is reserved for regulators and legislators - but whether such duty existed in law or had explicitly been agreed between the parties.

Turning to bankers' duties generally, Lord Leggatt recapped:

1. Banks are not trustees or fiduciaries. Fundamentally, they are debtors, and under normal circumstances their duties are to repay the customer when called to do so, including making payments to third parties when instructed to.
2. The contract between a bank and its customer contains an implied term that the bank must carry out the services with *reasonable care and skill*.

- Analysing the previous caselaw, the “Quincecare duty” is defined by a common characteristic, namely that all previous cases concerned instances where instructions were given to the bank by an authorised agent who was acting to defraud the customer.

Summarising the *Quincecare* duty, Lord Leggatt found: “[it] is not, as that epithet might suggest, some special or idiosyncratic rule of law. Properly understood, it is simply an application of the general duty of care owed by a bank to interpret, ascertain and act in accordance with its customer’s instructions.”

The banker is put on enquiry when put on notice that an instruction to execute a transfer does not come from the account holder. If the banker has “reasonable grounds for believing that a payment instruction given by an agent purportedly on behalf of the customer is an attempt to defraud the customer, ‘this duty requires the bank to refrain from executing the instruction without first making inquiries to verify that the instruction has actually been authorised by the customer’.”

Lord Leggatt clarified that this is simply an application of the bankers’ general duty of care. He further remarked that a similar principle would apply in circumstances where the banker has reasonable grounds to believe that a customer lacks capacity.

However, the duty does not require the banker to refrain from carrying out instructions in circumstances where there is no doubt that these are validly given by the customer. In those cases, the bank must exercise their instructions in accordance with their contractual duties.

Lord Leggatt dismissed the Claimant’s argument that (retrospectively), her instructions were not ‘really intended’ to transfer money to the fraudsters, holding that: “the fact that an intention or desire results from a mistaken belief does not make it any less real or genuinely held.”

That a bank must follow instructions given to it can, the Courts have recognised, be modified in some circumstances. This was exemplified by McGarvie J in the Australian case *Ryan v Bank of New South Wales* [1978] VR 555, 579, in which he found that there can be circumstances in which a person who has a duty to execute an order given by another person would not reasonably be expected to comply literally with the order. The Court held that “a reasonable banker properly applying his mind to the situation would know that the [account holders] would not desire their orders to be carried out if they were aware of the circumstances known to the bank”. (our emphasis)

It was not necessary for Lord Leggatt to conclude if McGarvie J’s test is correct, but he noted that “[what is] relevant to note is that this test presupposes that the circumstances known to the agent (here the bank) are (as the agent is aware) not known to the principal”.

The Claimant argued that the following circumstances should have put the bank on enquiry:

- the unprecedented size of the sum of money received in her current account and which she instructed the bank to transfer;
- the fact that the payments were to bank accounts in the UAE; and
- the fact that the payees were companies with which she had no previous history of dealing.

However, all those circumstances were known to the Claimant when she issued the instruction. Indeed the evidence indicated the Claimant (or her husband) had made false declarations to the Bank to seek to circumvent the Bank's enquiries (where the Claimant had been instructed to do so by the fraudster). Therefore, there was no requirement (nor apparent trigger) to justify the bank in refraining from carrying out a validly-delivered payment instruction.

### **The Bank's duty to recover funds**

Following the transactions, the Bank was informed by the police of the potential fraud – causing it to immediately freeze the Claimant's account.

The Claimant advanced the alternative argument that the bank should have attempted to call the funds back from the UAE Bank.

Lord Leggatt remarked that, at this point in time, the Claimant had not countermanded her payment instructions even though she had been alerted by the police and the Bank that she might have been the target of a fraud. Therefore, the bank had *"no authority, let alone obligation, to attempt to reverse earlier transactions when to do so would have been directly contrary to its customer's payment orders"*.

### **CPB comment:**

The Supreme Court's judgment in *Philipp* reverses the Court of Appeal judgment, and makes clear that a banker's primary duty remains to execute instructions without delay.

Pertinently, the Court dismissed the notion that there is any tension between a bank's duty of care and the obligation to execute a payment transaction. If a customer's instruction is clear then the obligation to pay arises – such that the (apparently conflicting) duty to exercise reasonable skill and care is not engaged.

As the Supreme Court made clear, to the extent that questions of public policy arise – in particular where episodes of fraud are on the increase – the obligations (to be) imposed upon the banking sector are a matter for regulators to consider, not the Courts. It remains to be seen if (and, if so, how) regulators will respond to this decision.

### **August 2023**

### **Any questions**

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

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