SLAUGHTER AND MAY/

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SUPREME COURT CLARIFIES SCOPE OF THE QUINCECARE DUTY OF CARE

Overview

In its long-awaited decision *Philipp v Barclays Bank UK Plc* [2023] UKSC 25, the Supreme Court provided some much-needed clarity on the scope of the Quincecare duty of care (the "**Quincecare Duty**"), by confirming that it does not apply to cases involving Authorised Push Payment fraud ("**APP Fraud**").

We examine the approach taken by the Supreme Court - and the practical implications of this important decision - below.

The Quincecare Duty and APP Fraud

The Quincecare Duty was first established in the case of *Barclays Bank Plc v Quincecare Ltd* [1992] 4 All ER 363. Simply put, it is a duty on a bank to refuse to comply with a payment instruction in circumstances where the bank is on notice that the instruction may be part of a fraud. This duty lasts "*unless and until the bank's inquiries satisfy it that the instruction is validly authorised*[1]". To date, this duty has been confined to cases where the instruction to transfer monies (the "**Payment Instruction**") has come from an agent, as opposed to the customer.

The key question before the Supreme Court in the present case was whether the Quincecare Duty applied to a scenario in which the Payment Instruction came from the customer themselves. This is the defining feature of APP Fraud (a type of fraud in which a customer directs a bank to move funds towards the fraudster, as opposed to the fraudster "pulling" the money from the customer's account without their knowledge).

Background to the dispute

In a "*particularly egregious*"[2] example of APP Fraud, Mr and Mrs Philipp had been persuaded by fraudsters (posing as members of the FCA working alongside the National Crime Agency) to move the bulk of their life savings to accounts in the UAE. Unfortunately, these accounts were in the control of fraudsters and the Philipps' were defrauded of over £700,000.

When Mr and Mrs Philipp realised what had happened, they sought to recover their loss from Barclays Bank UK Plc (the "**Bank**"). Mrs Philipp alleged that the Bank had breached the Quincecare Duty and/or other contractual duties, including the duty to exercise reasonable care and skill.

The court at first instance granted summary judgment in favour of the bank. In its view, any decision to impose liability on the bank in relation to the APP Fraud would rest upon an "*unprincipled and impermissible extension of the Quincecare duty of care*"[3] which would not be *"fair, just or reasonable"*[4].

The Court of Appeal took a contrary view. It held that the Quincecare Duty was not limited to circumstances where the Payment Instruction had come from an agent. Rather, it was "*at least possible in principle*"[5] that the duty could apply where the Payment Instruction had come from the customer. The right occasion on which to decide whether such a duty existed was at trial. Summary judgment should not have been granted and should be set aside.

The Bank appealed to the Supreme Court.

The questions before the Supreme Court

The Supreme Court had to consider the following questions:

1. Does the Quincecare Duty (as it currently stands) apply where the Payment Instruction comes from the customer themselves, as opposed to from an agent purporting to act on behalf of a customer?

[1] *Stanford International Bank Ltd v HSBC Bank PLC* [2022] UKSC 34, paragraph 4

[2] *Philipp v Barclays Bank UK Plc* [2023] UKSC 25, paragraph 10

[3] *Philipp v Barclays Bank UK Plc* [2021] EWHC 10, paragraph 184

[4] *Philipp v Barclays Bank UK Plc* [2021] EWHC 10, paragraph 184

[5] *Philipp v Barclays Bank UK Plc* [2022] EWCA Civ 318, paragraph 78

2. If not, should the Quincecare Duty be extended to cover this scenario?

3. Should the court determine the above on a summary judgment/strike-out basis?

The answer from the Supreme Court to questions 1 and 2 was a resounding no.

In delivering its decision, the Supreme Court made the following points:

- the decision by the Court of Appeal was inconsistent with "*first principles of banking law*;"[6]

- it is the "*basic duty*"[7] of a bank to make payments from the customer's account in compliance with instructions received from that customer. This duty is strict and subject to minor limitations only;[8]

- where a customer gives valid instructions, the bank must carry out the instruction promptly. *"it is not for the bank to concern itself with the wisdom or risks of its customer's payment decisions;*[9]

- banks owe a duty of reasonable care and skill to their customers. This duty is implied by law under section 13 of the Supply of Goods and Services Act 1982 and section 49 of the Consumer Rights Act 2015. However, this duty only comes into play where the validity or content of a customer's instructions is unclear, or where it leaves the bank with a choice about how to carry out the instruction[10]. Where the bank receives a valid payment order that is clear and leaves no room for interpretation or choice about what is required to carry out the order, the bank's duty is "*simply to execute the order by making the requisite payment*";[11]

- the Quincecare Duty is not "*some special or idiosyncratic rule of law*"[12]. 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 customer instructions;

- previous cases involving the Quincecare Duty can be explained by reference to the normal principles of agency, in that the agents in question had neither actual nor apparent authority to give instructions on behalf of the customer. In relation to actual authority, it is "*inconceivable that any sane person*"[13] would give an agent authority to defraud them. As for apparent authority, this does not exist where there are circumstances suggestive of dishonesty;

- in contrast, in cases involving APP Fraud, *"the validity of the instruction is not in doubt. Provided the instruction is clear and is given by the customer personally….no inquiries are needed to clarify or verify what the bank must do"*[14]. Rather, *"the bank's duty is to execute the instruction*"[15]. Any refusal or failure to do so will prima facie be a breach of duty by the bank;

- whether victims of APP Fraud should be left to bear the loss themselves or whether losses should be redistributed by requiring receiving or paying banks to reimburse victims is a question of social policy for regulators, government and Parliament. The proper role of the court is to look at the law and apply it. Promoting policy goals aimed at protecting customers is *"not a proper basis on which to identify an implied term of [a] contract*[16]*."*

In light of the above, the Supreme Court allowed the Bank's appeal. The order granting summary judgment in favour of the bank was reinstated.

However, this is not the end of the road for Mrs Philipp. Rather, the Supreme Court has given permission for Mrs Philipp's "*fallback argument*[17]" (a loss of chance claim) to proceed to trial. Mrs Philipp contends that the bank's failure to act promptly[18] once they became aware of the fraud deprived her of the chance of recovering the stolen monies. Although the chances of this claim succeeding are "*slim*"[19] (given the speed with which the monies would likely have been dissipated), it will no doubt be watched with interest.

Implications for banks

The key takeaways from the Supreme Court case are as follows:

- where a bank receives a valid and clear payment instruction directly from a customer, it will need to execute the instruction promptly. It does not need to concern itself with the wisdom of the customer's decisions.

[6] *Philipp v Barclays Bank UK Plc* [2023] UKSC 25, paragraph 3
[7] *Philipp v Barclays Bank UK Plc* [2023] UKSC 25, paragraph 3
[8] For example, the bank has a duty not to behave unlawfully
[9] *Philipp v Barclays Bank UK Plc* [2023] UKSC 25, paragraph 3
[10] *Philipp v Barclays Bank UK Plc* [2023] UKSC 25, paragraph 63
[11] *Philipp v Barclays Bank UK Plc* [2023] UKSC 25, paragraph 63
[12] *Philipp v Barclays Bank UK Plc* [2023] UKSC 25, paragraph 97
[13] *Philipp v Barclays Bank UK Plc* [2023] UKSC 25, paragraph 73
[14] *Philipp v Barclays Bank UK Plc* [2023] UKSC 25, paragraph 100
[15] *Philipp v Barclays Bank UK Plc* [2023] UKSC 25, paragraph 100
[16] *Philipp v Barclays Bank UK Plc* [2023] UKSC 25, paragraph 67
[17] *Philipp v Barclays Bank UK Plc* [2023] UKSC 25, paragraph 115
[18] The Bank waited some 2 months between being informed of the fraud and attempting to claw back the monies lost.
[19] *Philipp v Barclays Bank UK Plc* [2023] UKSC 25, paragraph 119

Any refusal to execute the instruction promptly will prima facie be a breach of duty by the bank;

- where a bank receives a payment order that is unclear (or leaves the bank with a choice about how to carry out the instruction), the bank is under a duty to exercise reasonable care and skill when (i) ascertaining and interpreting what the instructions are and (ii) executing them;

- the Quincecare Duty still exists, albeit in a more narrow form than that contended for by victims of APP Fraud (and as part of the general duty of care owed by a bank to interpret, ascertain and act in accordance with customer instructions). Banks will need to refrain from executing payments (and make appropriate inquiries) where there are reasonable grounds to believe that an agent, purporting to give payment instructions on behalf of a customer, is attempting to commit fraud;

- although many of the cases involving the Quincecare Duty feature an employee attempting to defraud their employer, the duty is not confined to the corporate context. Rather, it will apply whenever one person is given authority to sign cheques or give payment instructions on behalf of another[20]. This includes cases involving joint bank accounts and customers who lack mental capacity;

- where banks are informed that a fraud has been committed, the speed with which they act, and the steps that they take in order to claw back the monies lost are likely to be scrutinised closely. This could potentially form the basis of a loss of chance claim;

- given the "*growing social problem*[21]" that is APP Fraud, it may be that banks come under pressure in the future to sign up to voluntary codes such as the Contingent Reimbursement Model Code ("**The Code**"). Banks who have signed up to The Code agree (among other things) to (i) implement various measures to reduce the risk of APP Fraud and (ii) to voluntarily reimburse vulnerable customers who are victims of this type of fraud. Query whether more banks will sign up in the future and/or whether the ambit of the Code will be extended so as to offer protection in the context of payments made internationally to fraudsters (at present, international payments are not covered);

- the need to take decisive action in relation to APP Fraud has been recognised by Parliament. Section 72 of the Financial Services and Markets Act 2023 (which received Royal Assent in June) places a statutory obligation on the Payment Systems Regulator ("**PSR**") to introduce a mandatory reimbursement requirement for certain APP scams by the end of February 2024. The scheme proposed by the PSR provides for a 50/50 liability split between the bank sending and receiving the money in APP Fraud cases. As presently drafted, the scheme will operate within relatively narrow parameters. For example, it will only cover payments made under the Faster Payments Scheme and only consumers, micro-enterprises and charities will be able to avail of it (larger businesses will not). International payments (such as the kind made by Mrs Philipp) will not be covered. However, given the scale of APP Fraud and the intensity of lobbying in this area, it may be that we see policy-makers go further in the future.

Conclusion

The Supreme Court's refusal to extend the Quincecare Duty to circumstances where instructions come from the customer directly will no doubt have been met with relief by banks. However, there is no room for complacency. APP Fraud – and the vexed issue of who should bear the losses stemming from it - will continue to be topical for some time.

Banks should watch legislative developments in this sphere, and developments in in Mrs Philipp's loss of chance claim, closely.

[20] *Philipp v Barclays Bank UK Plc* [2023] UKSC 25 paragraph 98

[21] *Philipp v Barclays Bank UK Plc* [2023] UKSC 25 paragraph 6

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