

NEWS BRIEF

Quincecare duty: held in check and basis clarified

The Supreme Court's recent decision in *Philipp v Barclays Bank* provides clarification on the scope of the *Quincecare* duty, overturning the Court of Appeal's decision and confirming that the duty does not extend to cases of authorised push-payment (APP) fraud where a customer has expressly authorised payment instructions to a bank ([2023] UKSC 25) (see box "*The Quincecare duty*"). The court also clarified that, properly analysed, the *Quincecare* duty is based on agency principles.

This is the latest in a series of Supreme Court decisions regarding the *Quincecare* duty, following on from *Singularis Holdings Ltd (in official liquidation) v Daiwa Capital Markets Europe Ltd* and *Stanford International Bank v HSBC Bank plc*, and the court's constraint on the duty will be welcomed by financial institutions ([2019] UKSC 50, see *News brief "Quincecare duty: the role of banks in fighting financial crime"*, www.practicallaw.com/w-022-9645; [2022] UKSC 34, see *News brief "Quincecare duty: keeping it on the straight and narrow"*, www.practicallaw.com/w-038-3444).

The claim against Barclays

In February 2018, Dr Philipp was contacted by a fraudster who claimed to be working for the Financial Conduct Authority in conjunction with the National Crime Agency and to be investigating a fraud.

Dr and Mrs Philipp were led to believe that their money needed to be moved to "safe accounts" and, for this reason, they visited a Barclays branch on two occasions and gave specific instructions for payments from Mrs Philipp's current account to be made to a bank account in the United Arab Emirates. On each occasion, the bank phoned Mrs Philipp to check that she had made the transfer request and wished to proceed with it, which she confirmed. Barclays therefore made the payments. When Mrs Philipp made a request for a third payment to be made, she was informed that the payment had been blocked pending a review. Mrs Philipp tried unsuccessfully to have the block removed. Dr and Mrs Philipp later realised that they were the victims of fraud. Barclays' attempts to recall the funds were unsuccessful.

The Quincecare duty

The *Quincecare* duty was set out for the first time in *Barclays Bank plc v Quincecare Ltd* ([1992] 4 All ER 363). It essentially consists of an implied term and a co-extensive duty of care owed by the bank to its customer to refrain from making or executing a payment when the bank is put on inquiry that a payment instruction from its customer may be a result of fraud.

Mrs Philipp brought a claim against Barclays, alleging that it had breached its *Quincecare* duty by failing to protect her from falling victim to this sophisticated scam or, alternatively, that Barclays had breached its wider duty to exercise reasonable care and skill. This was the first time that a claimant had argued that the *Quincecare* duty extends to APP fraud; all of the other recent *Quincecare* cases involved fraud by an agent of the customer.

Lower court findings

In the High Court, Barclays applied to have the claim summarily dismissed on the basis that the *Quincecare* duty does not arise in these circumstances. It argued that the *Quincecare* duty does not extend to protect customers against the consequences of their own decisions in circumstances where, as between Mrs Philipp and Barclays, the payment instructions were valid. Barclays also argued that its tortious duty of care must be framed by reference to its primary duty, which is to act on a customer's instruction by complying with payment instructions. Finally, Barclays argued that interpreting the *Quincecare* duty in such a manner would be onerous and unworkable.

The High Court granted Barclays summary judgment ([2021] EWHC 10 (Comm); www.practicallaw.com/w-029-7595). Mrs Philipp appealed to the Court of Appeal, which reversed the High Court's decision, finding that, in principle, a bank owes a contractual duty to its customers of the kind alleged and whether such a duty arises on the facts is a question for trial ([2022] EWCA Civ 318; www.practicallaw.com/w-035-3199). Barclays appealed.

Supreme Court analysis

The Supreme Court allowed Barclays' appeal, overturning the Court of Appeal's decision

and restoring the order of the High Court. It gave summary judgment in favour of Barclays on the issue as to whether the *Quincecare* duty arose.

The court noted that APP fraud is a growing social problem that can undoubtedly cause hardship for its victims, but that it is not the courts' role to formulate social policy to compensate for this. It also noted that new legislation has just been introduced, that is, the Financial Services and Markets Act 2023, which will provide compensation for victims of APP fraud, where those payments are made within the UK.

The court examined the nature of the relationship between a customer and its bank, and the way that the *Quincecare* duty was first articulated and developed. It noted that a bank's basic duty under its contract with customers is to make payments in compliance with their instructions, whether or not these are wise, and that unless a bank includes an express term stating that it will not comply with customer instructions if it has reasonable grounds for believing that the customer has been tricked into authorising a payment, a duty to do anything but make the payment cannot be imposed or implied.

The court said that *Quincecare* cases are more properly analysed through the lens of agency law, rather than the way that they were originally articulated by the High Court in *Quincecare*. Through the agency lens, there is no conflict between the *Quincecare* duty on the one hand to refrain from executing instructions where the bank is "on inquiry", and the duty to execute a valid payment instruction on the other. Put simply, the *Quincecare* duty is an application of the general duty of care owed

by a bank to interpret, ascertain and act in accordance with its customer's instructions. Therefore, where a bank has reasonable grounds to believe that an instruction given by an agent is an attempt to defraud the customer, it must refrain from executing the instruction on the basis that there is no apparent authority and that it would be acting outside the scope of its mandate if it complied with the instructions.

The court also explained that the duty does not just apply only to corporate customers; it can apply to any situation where one person is given authority to execute instructions on behalf of another, or where a customer lacks the mental capacity to manage their financial affairs. By contrast, there is no doubt as to the validity of the instruction in APP fraud cases and agency principles do not apply.

However, the court allowed Mrs Philipp's alternative case to proceed to trial; that is, that Barclays had breached its duties by failing to take adequate steps to recover the money after it had been paid out of her account.

Implications for banks

The confirmation of both the rationale for, and the application of, the *Quincecare* duty, including that it does not apply to APP fraud, will be a welcome clarification for financial institutions.

The court's decision to limit the application of the *Quincecare* duty is consistent with the courts' recent approach of emphasising the narrow and confined nature of the duty (*Stanford; Federal Republic of Nigeria v JP Morgan* [2022] EWHC 1447 (Comm), see News brief "*Quincecare duty: further guidance for banks and their customers*", www.practicallaw.com/w-036-3691). It is also consistent with the Hong Kong Court of Final Appeal's analysis of the *Quincecare* duty in relation to issues of agency law in *PT Asuransi Tugu Pratama Indonesia v Citibank NA*, Lord Sumption's analysis of the duty according to agency principles ([2023] HKCFA 3).

Philipp also represents yet another failed claim under the *Quincecare* duty, with *Singularis* being the only successful claim under the duty in the last 30 years. This is

despite multiple cases on this topic, two of which have gone to the Supreme Court. Again, this emphasises the limited parameters within which the duty operates, and that it is not simply a catch-all duty that provides compensation to claimants.

The court's clarification in *Philipp* that the duty is based on agency principles is also significant, and the observation that it is not a special duty of law but a part of a bank's general duty to identify and act in accordance with its customer's instructions may well act as a further deterrent to claimants in bringing novel types of *Quincecare* claims.

Taken together, all of these points are likely to mean that claimants will be more wary of bringing *Quincecare* claims in future, particularly those that seek to push the boundaries of the duty.

Anthea Bowater and Sarah Robinson are senior associates, Christine Simpson is an associate, and Nicole Looi is a trainee solicitor, at Freshfields Bruckhaus Deringer LLP.
