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Landmark UK Supreme Court ruling limits the scope of banks' Quincecare duty

Philipp (Respondent) v. Barclays Bank UK PLC [2023] UKSC 25

By David Hunt, Michael Jacobs, and Sagar Gupta

In a much-awaited ruling, the U.K. Supreme Court held that the so-called Quincecare duty does not extend to banks in authorised push payment fraud situations. BSF partners David Hunt and Michael Jacobs and associate Sagar Gupta consider the implications of the U.K. Supreme Court's decision and explore recent developments relevant to banks and payment service firms.

Background

The *Philipp* case is the latest in a line of cases dealing with the so-called Quincecare duty. As explained by Mr. Justice Steyn in *Barclays Bank plc v. Quincecare Ltd* [1992] 4 All ER 363, the eponymous Quincecare duty requires a banker to "refrain from executing an order if and for as long as the banker is 'put on inquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company…"

Since the resurgence of the Quincecare duty in *Singularis Holdings Ltd v. Daiwa Capital Markets Europe Ltd* [2017] Bus LR 1386, it has been applied in the context of both retail and investment banking (see for instance, *Nigeria v. JP Morgan Chase Bank, NA* [2019] 2 CLC 559; *Stanford International Bank Ltd v. HSBC Bank plc* [2023] 2 WLR 79).

In the *Philipp* case, the U.K. Supreme Court has narrowed the scope of the Quincecare duty and limiting its application to authorised push payment ("**APP**") frauds (i.e., frauds in which an account holder is tricked into ordering a payment from their bank). In so doing, the Court provides valuable judicial guidance on and clarifies the scope of the Quincecare duty.

Facts and decision

Mrs. Philipp was a victim of an APP fraud and was deceived into transferring £700,000 from her bank account that she held with Barclays to two bank accounts in the United Arab Emirates (UAE). She authorised the payment instructions herself, and her instructions were carried out by Barclays in accordance with the relevant contractual terms and conditions.

Having been defrauded, Mrs. Philipp sought to recover the lost funds from Barclays alleging that in carrying out her payment instructions, Barclays had not complied with its Quincecare duty, as it had reasonable grounds to believe that the transfers were fraudulent. The High Court dismissed Mrs. Philipp's claim by way of summary judgment and found that the Quincecare duty was not engaged as the payment instructions came from the customer herself. The Court of Appeal overturned the High Court's decision and held that the Barclays was liable for Mrs. Philipp's loss.

On appeal, the Court unanimously overturned the Court of Appeal's decision and held that the Quincecare duty does not apply to the current facts as the payment instructions were valid and were made by the customer herself. On the contrary, the Quincecare line of cases dealt with instances of agents (such as directors) misusing the authority granted by the principal customer. Therefore, in the view of the Court, if there is no issue of lack of or misuse of an agent's authority to give the payment instructions, the Quincecare duty is not engaged, and the bank is strictly bound to carry out the payment instructions.

As a result, the Court upheld the High Court's dismissal of Mrs Philipp's case in relation to the Quincecare duty by way of summary judgment. It did, however, hold that her alternative case, that Barclays was in breach of duty in not acting promptly to clawback the payments from the bank accounts in the UAE, should go to full trial.

Comment

Banks and financial institutions will welcome the *Philipp* judgment for more reason than one. Apart from not applying to APP fraud cases, the Court clarified that *Quincecare* was wrongly decided to the extent that it suggested that there was a *sui generis* duty owed by banks to check the "commercial wisdom" of the payment instructions, which was to be weighed against their duty to carry out the payment instructions promptly. Instead, the Court held that the outcome of *Quincecare* and subsequent cases in which banks have been held liable for implementing wrongful instructions by agents was a product of ordinary agency law principles of actual and apparent authority. In contrast, in cases where the payment instructions are given by the principal customer rather than their agent (as is the case in APP fraud cases) – banks are strictly bound to act in accordance with the customer's instructions, and they are not obliged to inquire into whether the client has been misled into issuing its instructions.

The Court did recognise that banks' duty to execute clear and valid payment instructions was subject to the following limits:

- the duty to not carry out an unlawful act;
- the duty to act honestly towards its customer; and
- the duty to act reasonably (as opposed to the duty to act with reasonable skill and care which is not engaged if the payment instruction is *prima facie* valid).

While it did not express any concluded view as to the correctness on the above tests, the Court noted that for the duty to act reasonably to apply, the facts known to the bank should not be known to the customer. Applying the above duties, banks and financial institutions must seek relevant clarifications from the customer if the payment instructions are ambiguous or unclear or if there is reliable information from a source such as the police in respect of a fraud. The Court's view states, "circumstances such as the destination and amount of the payment which the customer has instructed the bank to make cannot support an inference that the customer, if aware of these circumstances, would not desire the instruction to be carried out when it is plain that the customer is already aware of these circumstances." Therefore, the Court has clarified that banks and financial institutions are not expected to verify the customer's wishes without having a sound basis for doing so. In future cases, it remains to be seen if APP fraud victims try to seek compensation from banks and payment service firms on the basis of breach of the above stated duties.

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The case also demonstrates that victims of APP fraud may still be able to pursue claims if a bank was overly slow in clawing back payments when the fraud became known. Moreover, the Court did express considerable scepticism about whether it would have made any difference to the amount recovered if Barclay's had acted faster but found this issue could only be addressed at a full trial.

Regulatory reform and the FCA customer duty

As the Court notes in its judgment, there are several proposals of policy reform to ensure redress to retail customers who have fallen prey to APP fraud schemes. While the Contingent Reimbursement Model Code was introduced in 2019, its uptake has been low, with only 10 payment service providers signed up to this voluntary code. The Financial Services and Markets Act 2023 provides for a statutory mandatory reimbursement scheme for APP fraud cases. However, this mandatory reimbursement obligation will not be directly enforceable by the retail customers.

Another key development for banks and payment firms to consider is that the FCA's Consumer Duty will come into force on July 31, 2023 for existing and new financial products. The consumer principle states that "a firm must act to deliver good outcomes for retail customers." Further, the cross-cutting rules require firms to: (a) act in good faith towards retail customers; (b) avoid foreseeable harm to retail customers; and (c) enable and support retail customers to pursue their financial objectives.

In its guidance, the FCA states that firms' obligation to avoid foreseeable harm is an obligation of conduct, not one of result. In the APP fraud context, a firm will not breach this rule if it fails to prevent the fraud from occurring if it "reasonably believes that a customer understands and accepts the inherent risks in the product." Therefore, banks and payment firms need to warn customers about the threat of APP fraud but are not obliged to prevent the relevant customer from making a payment.

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