

UPDATE

Revisiting 'Quincecare': the Supreme Court in *Philipp v Barclays*

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The recent decision of the UK Supreme Court in *Philipp v Barclays Bank UK PLC* [2023] UKSC 25 has clarified the application and scope of the so-called 'Quincecare duty'. The decision provides useful guidance in relation to banking and financial processes, which in turn is relevant to insolvency proceedings.

What is the 'Quincecare duty'?

Deriving from the earlier case of *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363, the duty requires a bank to refrain from carrying out its customers instructions if it has reasonable grounds to believe that the instructions are as the result of fraud (ie an attempt to misappropriate the customer's funds). If the bank has reasonable grounds on which to query the transaction but nonetheless processes the payment, it may be liable to the customer for the resulting loss. Most of the previous cases concerned directors of client companies fraudulently transferring company funds and focused on the question of whether the bank should have been aware of the fraudulent nature of the transfers. The *Philipp* case was unusual because it involved instructions to transfer the monies given to the bank by the account holder as a result of a fraud perpetrated on her - an authorised push payment (APP) fraud.

What happened in *Philipp*?

Fraudsters had convinced Dr and Mrs Philipp to transfer £700,000 in two separate payments from Mrs Philipp's Barclays bank account to an allegedly 'secure account' in the United Arab Emirates.

Before making the first payment, Dr and Mrs Philipp were visited by a police officer warning them that they may be victims of an intended fraud. Strikingly, they were so convinced by the fraudsters that they ignored this warning and when asked by the bank for confirmation that she had made the transfer request and wished to proceed with it, Mrs Philipp gave the bank the requested confirmation. It was only when she visited the bank to make a third transfer to the fraudsters that Mrs Philipp accepted that she had been a victim of a fraud.

The bank did not effect the third transfer but then took no steps to recall the transferred funds, by which time they had been lost. Mrs Philipp commenced proceedings against Barclays Bank plc (the **Bank**), claiming that by following her instructions to make the payment the Bank had breached its *Quincecare* duty to her as a customer.

At first instance, the Bank succeeded in an application for summary judgment striking out Mrs Philipp's claim. The High Court found that the *Quincecare* duty does not apply where an individual customer gives a bank a valid payment instruction, even if that instruction was induced by fraud. Mrs Philipp appealed and the Court of Appeal held that the summary assessment was not appropriate for the case which should proceed to trial. The Bank was then granted permission to appeal to the Supreme Court against the decision to allow the case to proceed.

The Supreme Court reviewed the origins of the *Quincecare* duty and concluded that the original basis of the duty had been misunderstood. A bank is not a trustee or fiduciary of the customer's money but simply a debtor of the creditor. A bank has a duty to give effect to a customer's payment instruction as long as it is in accordance with the terms of the mandate. As part of its obligation to comply with the mandate terms, a bank must satisfy itself that the instructions received accord with the mandate. If it is put on enquiry in the sense of having 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. If the bank executes the instruction without making such inquiries and the instruction proves to have been given without the customer's authority, the bank will be in breach of its duty. It will also be making the payment and be acting outside the scope of its own authority from the customer and will therefore not be entitled to debit the payment from the customer's account.

The Court held that the *Quincecare* duty has no application in cases such as the Philipp's case. It requires dishonesty by the customer's *agent* (eg a director or other officer) to defraud the customer (ie the customer company). By contrast, APP fraud occurs where a victim is tricked into giving instructions compliant with the applicable mandate making large bank transfers to an ostensibly legitimate account belonging to the fraudster. Such a fraud does not involve dishonesty by a customer's agent, rather clear payment instructions are given to the bank by the customer personally. Unless put on notice that the transfer instructions had been induced by fraud, the bank has a duty to execute the transaction as instructed by the customer.

Context is always important. These payments were made after Dr and Mrs Philipp had visited a branch of the Bank in person and given instructions to transfer the money from Mrs Philipp's account to a bank account in the UAE. On each occasion, prior to making the transfer a representative of the Bank telephoned Mrs Philipp to seek her confirmation that she had made the transfer request and wished to proceed with it, and on each occasion Mrs Philipp provided the required confirmation. The Court concluded that, as Mrs Philipp unequivocally authorised and instructed the Bank to make the payments, and the Bank had taken all reasonable steps to ensure that the instructions were compliant with the applicable mandate, the Bank owed Mrs Philipp a duty to implement her own instructions.

What does it mean?

The judgment makes clear that a claim based on a *Quincecare* duty will be difficult for customers who are victims of APP fraud. The Supreme Court suggested that it was for parliament and regulators to determine where and to what extent banks should be liable to victims of APP fraud. Recent changes in the United Kingdom, such as the Financial Services and Markets Act 2023, seek to address this issue by implementing a mandatory reimbursement scheme in '*qualifying cases*'.

The Supreme Court specifically held that the *Quincecare* duty is not a '*special duty*', nor is it a '*rule of law*'. Instead, it is merely part of the general duty of care which a bank owes to customers to ascertain and act in accordance with its customer's instructions. In the course of those instructions, however, the bank will retain a duty to make inquiries as to whether payment instructions from an *agent* are valid, if there are circumstances suggestive of dishonesty apparent to the bank. A bank's failure to make such inquiries may result in a breach of that duty, which in turn means the customer - where the fraud in fact occurs - may seek reimbursement of the payment from the bank.

Comment

Potential for claims against financial institutions in the UK - and by extension common law offshore jurisdictions - remains open where bank accounts are used to facilitate fraud. This is particularly relevant in the context of insolvency litigation, where claims are often brought on behalf of corporate entities where those entities have been used as vehicles for fraud. A bank's *Quincecare* duty to its customer remains a potentially useful remedy in those circumstances.

Given the ongoing applicability of the *Quincecare* duty, the judgment may also serve as a useful reminder to banks to consider their anti-fraud policies and procedures.

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