

## Drawing the boundaries of the Quincecare duty in cases of fraud (Philipp v Barclays Bank plc)

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**Dispute Resolution analysis: Barclays Bank plc successfully applied for summary judgment against Mrs Philipp (the claimant) in respect of her claim that Barclays breached its so-called Quincecare duty in failing to prevent the fraudulent dissipation of £700,000 following an authorised push payment fraud, ie a fraud where the victim is induced by the fraudster to authorise a payment instruction to transfer funds to the fraudster. The High Court determined that the claimant's claim had no real prospects of success since the claim was dependent upon an impermissible and unprincipled extension of the Quincecare duty to situations where a bank acts on a customer's authorised payment instructions. The duty was held to be confined to situations where an agent of the customer sought to misappropriate funds as had been the case in previously decided cases such as Singularis Holdings Ltd (In Official Liquidation) v Daiwa Capital Markets Europe Ltd. Written by Darragh Connell, barrister at Forum Chambers.**

*Philipp v Barclays Bank UK plc* [2021] EWHC 10 (Comm)

### What are the practical implications of this case?

While the judgment arises in the context of a summary judgment application, the decision is noteworthy in limiting the scope of the Quincecare duty imposed upon banks to situations where the customer's agent has made the relevant payment request rather than the customer themselves. According to the court in *Philipp v Barclays Bank*, the bank is not required to second-guess a customer's own outwardly genuine instruction to make a particular payment.

The judgment will embolden financial institutions to robustly resist claims predicated upon their alleged breaches of duty in failing to prevent authorised push payment fraud. Conversely, in cases where customers have directly authorised the relevant payment instruction, they will likely need to seek redress from the voluntary Contingent Reimbursement Model Code for Authorised Push Payment Scams introduced in May 2019, although that scheme does not yet extend to international payments which are more commonly used by fraudsters.

### What was the background?

In March 2018, the claimant and her husband became the victims of an authorised push payment fraud. Acting on the fraudulent instructions of an unknown fraudster falsely describing himself as an employee of the Financial Conduct Authority, the claimant instructed her bank, Barclays, to make two international transfers totalling £700,000. The transfers were made to two accounts in the United Arab Emirates.

The claimant and her husband had been fraudulently informed that they were assisting a criminal investigation and the said transfers were required to protect their funds pending the outcome of that investigation. It was evident that sophisticated means were used by the fraudsters to evince the legitimacy of the purported criminal investigation including using impersonating personnel of the National Crime Agency. The claimant and her husband were instructed not to inform Barclays or the police as to the purpose of the transfers at the time.

Having subsequently discovered the fraud after the transfers had been made, the claimant pursued a claim against Barclays primarily predicated upon an alleged breach of the so-called Quincecare duty adumbrated by Mrs Justice Steyn in the eponymous case of *Quincecare v Barclays Bank* [1992] 4 All ER 363.

The Quincecare duty is a common law duty requiring a bank to adhere to the standards of 'an ordinary and prudent banker' in refraining from executing a customer's payment order if and for so long as it was 'put on enquiry' by having reasonable grounds (although not necessarily proof) for believing that the order is an attempt to fraudulently misappropriate funds.

In effect, the claimant argued that had Barclays operated anti-fraud policies and procedures designed to detect and prevent authorised push payment fraud at the material time in accordance with the observance of its Quincecare duty, the international transfers would have either been stopped or delayed thereby preventing the loss suffered by the claimant.

Barclays acknowledged that it had a duty to act in accordance with the claimant's mandate, and to execute reasonable care and skill in executing her instructions. It also accepted that it had a duty to execute the relevant transfers unless an ordinary prudent banker would have had reasonable grounds for believing that the transactions were an attempt to misappropriate the claimant's funds.

The bank, however, denied that there had been any breaches of duty and it sought to strike out the claim and/or obtain summary judgment on the grounds that as a matter of law, the Quincecare duty did not extend to a situation where an outwardly genuine payment instruction was authorised by the relevant customer.

### **What did the court decide?**

The court granted summary judgment in favour Barclays thereby dismissing the claimant's claim in its entirety. Central to the decision was the unwillingness of the court to extend the Quincecare duty to cases involving outwardly genuine payment instructions authorised by customers.

In other words, the Quincecare duty was held to be confined to cases where the relevant bank's suspicion has been raised (or objectively could have been raised) in cases of attempted misappropriation of funds by an agent of the customer as opposed to complying with the instruction of the customer themselves.

Two core difficulties were identified with the claimant's claim which was she unable to surmount. First, it was said that that her claim sought to elevate the Quincecare duty from being a duty subordinate or ancillary to the bank's primary duty to act on a customer's instruction as to how the monies in an account should be spent to a higher level of obligation essentially involving second guessing the customer's instruction.

In so finding, the court in *Phillips v Barclays* distinguished the previous Supreme Court decision in *Singularis Holdings Ltd (In Official Liquidation) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50 where the Quincecare duty was successfully invoked to attribute liability to a financial institution in respect of payment instructions provided by a company's fraudulent director and sole shareholder. The dicta of Lady Hale in *Singularis* was said to have no relevance to a case where the cause of the customer's loss was their own desire to make the payments to an intended recipient.

Secondly, the court considered that there is no clear framework of rules by reference to which the duty, as sought to be extended, might sensibly operate. The proposed extended duty was said to involve second guessing the relevant customer's genuine payment instruction but this was unsupported by any clear form of banking code or another form of industry recognised standard.

The impracticality of the proposed extension of the Quincecare duty to the claimant's situation was explained by the court in the following terms at para [172]:

'It is because the Bank cannot be expected to carry out such urgent detective work or treated as a gatekeeper or guardian in relation to the commercial wisdom of the customer's decision and the payment instructions which result, that the duty cannot in my judgment extend to the obligations alleged by Mrs Philipp. A duty which carried with it the need for the Bank to have had in place in March 2018 procedures aimed at potentially protecting its customer from her own decisions would involve the Bank being under just the type of unduly burdensome obligation eschewed by Steyn J in Quincecare.'

It should be noted that financial institutions operating in the UK are required to act as gatekeepers and/or guardians in relation to payment instructions in a range of other contexts. By way of example, banks are obliged to consider the nature of payment instructions in the context of anti-money laundering and criminal activity by reason of their compliance with the obligations imposed by the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, [SI 2017/692](#) and the [Proceeds of Crime Act 2002](#) and similar related legislation. In addition, financial institutions assist HMRC in tackling tax evasion as part of the voluntary Code of Practice on Taxation for Banks. The court was, however, unprepared to extend any such monitoring obligations as part of the Quincecare duty in the context of an individual customer's

authorised payment instruction irrespective of the size or international nature of the intended payment or the fact the payment was being made to a payee for the first time.

Ultimately, the decision of the High Court in *Philippis v Barclays Bank* to dismiss the claim summarily and in so doing refrain from extending the Quincecare duty to a customer's outwardly genuine payment instructions induced by deceit will be disappointing to victims of authorised push payment fraud. From the perspective of financial institutions, the decision restricts the application of the Quincecare duty to cases involving payment instructions conveyed by a customer's agent.

### **Case details**

- Court: High Court of Justice, Business and Property Courts in Bristol, Circuit Commercial Court (QBD)
- Judge: His Honour Judge Russen (sitting as a High Court judge)
- Date of Judgment: 18 January 2021

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