Feature

KEY POINTS

- The Court of Appeal judgment in *Philipp v Barclays Bank Plc* [2022] EWCA Civ 318 confirms that the Quincecare duty is capable of being applied to individual customers who have been the victim of an Authorised Push Payment (APP) fraud or other external fraud, not just to corporate customers who have been defrauded by their agent.
- The court was dismissive of Barclays' argument that the application of the Quincecare duty to individual customers would create an unworkable burden on banks, saying that the scenario would only arise in a limited number of cases.
- A duty owed by a bank to a regulator in relation to its regulatory and anti-money laundering obligations is not inconsistent with the existence of the Quincecare duty at common law.
- The forthcoming trial judgment is likely to produce guidance as to how a court would assess the circumstances in which a bank would be put "on inquiry" in relation to an APP or external fraud upon an individual customer.

Authors David McIlroy and Ruhi Sethi-Smith

Bankers' liability for Authorised Push Payment fraud: the evolution of the Quincecare duty

In this article, David McIlroy and Ruhi Sethi-Smith of Forum Chambers examine the basis of the Court of Appeal decision in *Philipp v Barclays Bank Plc* [2022] EWCA Civ 318 and highlight the salient points of the appeal judgment before providing their conclusions on what this means for the victims of sophisticated Authorised Push Payment (APP) fraud scams in the future.

The question of whether a banker might owe a duty to its customer to protect that customer against fraud, even if that fraud was committed by someone who had authority to act on behalf of the company, was first considered in the case of *Barclays Bank plc v Quincecare Ltd*.[1] The case concerned the misappropriation of the majority of a £400,000 loan by the chairman of Quincecare. Steyn J appreciated the delicate balancing act faced by a bank between executing a customer's payment orders promptly and guarding against the facilitation of fraud. He struck that balance by formulating the duty in his judgment as follows:

> "A banker must refrain from executing an order if and for as long as the banker is 'put on enquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate funds of the company."

He confirmed that the standard of care required was that of an ordinary prudent banker.

This duty has since been referred to as the Quincecare duty. The first time that an English court held that the Quincecare duty had been breached was in the case of *Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd*[2] (*Singularis*). This was essentially a case of CEO fraud whereby Mr Al Sanea, the Chairman and sole shareholder of Singularis, instructed Daiwa to transfer US$204m to two other entities controlled by him in spite of Daiwa's knowledge that Mr Al Sanea's assets had been frozen and that he and Singularis were insolvent. There have been a number of subsequent decisions in which English courts have found on the facts presented to them that the Quincecare duty has been breached but all of them have concerned fraudulent agents acting for a company, firm, or government which have taken place internally, ie within the company, firm or government. *Singularis* was followed by *Federal Republic of Nigeria v J.P. Morgan Chase Bank NA*[3] in which the Court of Appeal held that the core of the Quincecare duty was an obligation on the Bank to refrain from making a payment where it had reasonable grounds for believing that the payment was part of a fraudulent scheme. Therefore, the Quincecare duty in practice usually requires a bank to do more than simply refusing to process a payment instruction where it is put "on inquiry". In most cases where such concerns arise, a bank will be under an obligation to take steps to resolve its concerns, beyond simply refusing to process a payment.

The first time the Quincecare duty was considered where the victim of the fraud was an individual was *Philipp v Barclays Bank Plc*.[4] The case was an example of the rapidly growing scam known as authorised push payment (APP) fraud. In this case, Dr and Mrs Philipp were persuaded by very sophisticated fraudsters to transfer the sum of £700,000 to a bank account in the United Arab Emirates. Although Dr Philipp was equally taken in by the fraud, because he transferred his life savings into his wife's account, and it was from her account that the payments were made to the fraudsters, she alone was the claimant before the court. The bank alleged that the Quincecare duty was not owed by banks to customers who were the victims of external fraud (because the duty only existed to protect customers against fraud committed by the customer's own agent) and applied for reverse summary judgment against Mrs Philipp on that basis.

In his judgment, HHJ Russen QC held that the Quincecare duty ought not to be

extended to such situations (ie applied to individual customers) and instead "should be confined to cases where the suspicion which has been raised (or objectively ought to have been raised) is one of attempted misappropriation of the customer's funds by an agent of the customer".[5] Therefore, as Mrs Philipp was acting on her own account and could not misappropriate her own funds, the Quincecare duty did not apply to her. HHJ Russen QC also held that Barclays Bank Plc (Barclays) was not required to play "amateur detective" and that Barclays had no reason to doubt the instructions given by Mrs Philipp and could not have been expected to know that she was being controlled by a fraudster. Essentially, HHJ Russen QC concluded that the Quincecare duty did not apply to personal customers where the fraud takes place externally and therefore struck out Mrs Philipp's claim summarily.

Mrs Philipp appealed this decision. The Court of Appeal's judgment was handed down on 14 March 2022.

BASIS OF THE APPEAL IN *PHILIPP v BARCLAYS BANK PLC*

The grounds of the appeal were that:

- HHJ Russen QC erred in concluding on a summary basis that there was no duty owed to Dr and Mrs Philipp by Barclays; and
- HHJ Russen QC erred in concluding that the claim had no realistic prospect of success.

The arguments put forward in support of the appeal included the following:

- HHJ Russen QC was wrongly persuaded that the bank owed no duty to take reasonable steps to protect its customers from APP fraud;
- HHJ Russen QC was wrongly persuaded that the duties of the bank as a payment service provider were solely a question of law and decided this question on case law uninformed as to the industry practice;
- HHJ Russen QC was wrongly persuaded to ignore evidence regarding banking industry practice at the time;
- HHJ Russen QC wrongly rejected the evidence regarding banking industry practice on the basis that it went to the standard of the duty of care (if the duty existed) and not to the question of whether the duty of care existed in the first place, whereas the Appellants say that it went to both and was relevant;
- HHJ Russen QC was wrongly persuaded that there was no real prospect of Mrs Philipp showing that there were relevant standards of banking practice regarding APP fraud in 2018;
- HHJ Russen QC was wrongly persuaded to treat the Quincecare duty as a "solitary island" rather than a sub-set of the well-established duty which any agent owes to exercise reasonable care and skill with regard to the interests of their principal.

During the appellant's submissions, Lord Justice Birss commented that if one was to take HHJ Russen QC's reasoning in his judgment to its logical conclusion you would end up in a strange situation whereby "the duty only really exists in relation to corporate customers and individual customers, who are the very people who most of the relevant legislation and guidance is designed to protect, would be left out in the cold".

The Consumer Association, Which?, intervened to advocate for consumer interests and the application of the Quincecare duty to victims of APP fraud. The following points were made in support of their position:

- The Quincecare duty is an aspect or sub-set of the general duty that a bank (as an agent) owes to its customer a duty to exercise reasonable care and skill.
- It would be illogical and unprincipled to limit the Quincecare duty to cases where a corporate customer is defrauded by its agent.
- The requirements of the Quincecare duty are calibrated by ordinary banking practice and do not seek to impose onerous obligations upon banks in relation to APP fraud.
- The requirements of ordinary banking practice have developed over time and were not fully taken into account by HHJ Russen QC.
- Even if the application of the Quincecare duty to individual customers involves an extension to the law, it would be fair, just and reasonable to extend it to individual customers who are the victims of APP fraud.

The overarching backdrop to the appeal is this question: given the rapid rise in APP fraud and the increasing sophistication of the fraudsters, is it entirely up to consumers to protect themselves against such fraud, or do banks owe such customers a duty to take reasonable steps to protect them from the effects of APP fraud where there are clear warning signs or "red flags".

Banking practice has evolved over the last 30 years with banks now having standard procedures for identifying unusual transactions. Anti-money laundering regulations require banks to "know your customer", and algorithmic analysis of activity on customers' accounts means that banks are, in many cases, proactive in alerting their customers to potentially fraudulent activity. The Contingent Reimbursement Model Code (introduced in May 2019) already incentivises banks to spot fraudulent transactions affecting consumers (but it does not apply to international transfers).

Barclays argued that the Quincecare duty is limited to cases where there is a fraud by an agent acting for the customer because in those cases the fraud means that there is in truth no authorisation by the customer for the transfer. Therefore, the Quincecare duty does not extend to cases like Mrs Philipp's as she authorised the transfer albeit as an unwitting victim of a sophisticated fraud.

Barclays argued that even if the bank knew that its customer was acting under a misapprehension in instructing them to make a transfer to a likely fraudster's account, the only duty upon the bank would be to execute the transfer. Barclays went further to suggest that the payment would not actually be made in such a case but that would be due to the bank's regulatory and anti-money laundering obligations, ie as a result of the duties it owes to its regulator, but not because it owed any parallel duty to its customer. As a result, the bank would be vulnerable to

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regulatory action if it failed to spot that a fraud was occurring, but a customer would have no claim (even if the police had contacted the bank and told the bank that the customer in question was the target of a fraud).

Barclays also sought to argue that the bank offered an "execution only" service to the customer and cannot therefore be liable for the consequences of fraud.

The other significant submission by Barclays was that if the Quincecare duty were to apply to individual customers who were the victims of APP fraud, it would represent "an onerous and unworkable burden" on banks.

THE COURT OF APPEAL JUDGMENT

Judgment in the case was handed down on 14 March 2022[6] and the appeal was unanimously allowed. The Court of Appeal held that it was "at least possible in principle that a relevant duty of care could arise in the case of a customer instructing their bank to make a payment when that customer is the victim of APP fraud" (as set out in para 78 of the judgment). In essence, the Quincecare duty could in theory apply to victims of APP fraud and that banks could be put "on inquiry" in the same way as they are in relation to companies. The second conclusion was that "the right occasion on which to decide whether such a duty in fact arises in this case is at trial".

The Court of Appeal was persuaded by the arguments put forward by the Appellant and on behalf of the Intervener and rejected the Respondent's submissions. Lord Justice Birss explained what in his view was the "error at the core of the respondent's case"[7] which is that the application of the duty "does not depend on whether the instruction is being given by an agent. It is capable of applying with equal force to a case in which the instruction to the bank is given by a customer themselves who is the unwitting victim of APP fraud provided the circumstances are such that the bank is on inquiry that executing the order would result in the customer's funds being misappropriated".[8] In other words, the Quincecare duty can in theory apply to internal *and* external fraud.

Barclays' submission in relation to its regulatory and anti-money laundering obligations failed to persuade the court. Whether a duty owed to a regulator ousts the possibility of a common law duty or informs the shape of the common law duty has to be determined on a case-by-case basis.[9] Nothing in those regulatory requirements is inconsistent with the existence of the Quincecare duty. The Quincecare duty is a duty shaped by ordinary banking practice. It therefore reflects the requirements of regulatory and anti-money laundering obligations, so far as those requirements have been absorbed within the ordinary practice of banks.

In rejecting Barclays' submission in relation to the "execution only" service, the court held that the duty to execute the customer's payment instruction promptly and the duty to exercise reasonable skill and care operate in tension with the former subject to the latter.[10]

The court was also dismissive of Barclays' argument that the application of the Quincecare duty to individual customers would create an unworkable burden on banks. Lord Justice Birss referred to the "careful calibration of the Quincecare duty itself".[11] He said that the duty is calibrated by the ordinary banking practice of the day and that even if the facts of Mrs Philipp's case were sufficient to put an ordinary prudent banker on inquiry about APP fraud, such a scenario will only arise in a limited number of cases. There will be no wholesale effect of slowing down the bank's ability to transact business.

CONCLUDING REMARKS

The Court of Appeal judgment in *Philipp* represents a landmark decision in this area as it confirms that the Quincecare duty is capable of being applied to individual customers who have been the victim of an APP or other external fraud. Companies too, who are targeted by APP scams, will be owed the Quincecare duty.

None of this means, however, that claims for breach of the Quincecare duty are going to be easy for customers to win. It remains to be seen how Mrs Philipp's case will be decided when it is remitted to trial and in particular the circumstances in which a bank would be put "on inquiry" when dealing with victims of APP fraud. If Mrs Philipp is able to convince the court that Barclays were "on inquiry", given that Dr and Mrs Philipp ignored warnings from the local police force, it is almost certain that Barclays will raise extensive arguments in relation to the level of the Philipps' contributory negligence (though the blatant actions of Mr Al Sanea in the *Singularis* case led only to a 25% deduction). Either way, the trial judgment will further impact the evolution of the Quincecare duty as it is likely to produce some guidance as to how a court would assess the circumstances in which a bank would be put "on inquiry" in relation to an APP or external fraud upon an individual customer, and as to what steps a bank must take if it is put "on inquiry". ■

1 [1992] 4 All E.R. 363, though the judgment was actually issued in 1988.
2 [2019] UKSC 50.
3 [2019] EWHC 347 (Comm), [2019] EWCA Civ 1641.
4 [2021] EWHC 10 (Comm).
5 See para 156 of the judgment.
6 [2022] EWCA Civ 318.
7 See paras 27 to 29 of the Court of Appeal judgment.
8 See para 30 of the Court of Appeal judgment.
9 See para 33 of the Court of Appeal judgment.
10 See para 34 of the Court of Appeal judgment.
11 See para 60 of the Court of Appeal judgment.

Further Reading:

- When is a duty to pay not a duty to pay? (2021) 4 JIBFL 246.
- Prospects for bankers' liability for authorised push payment fraud (2021) 3 JIBFL 172.
- LexisPSL: Financial Services: News: Barclays' ruling offers glimmer of hope for fraud victims.