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PHILIPP: A "QUINCECARE" LIFELINE TO RETAIL BANKING CUSTOMERS?

In a somewhat unexpected judgment[1] that widens the scope of the duty of care banks owe to their customers, the English Court of Appeal has held that the duty of care established in *Barclays Bank Plc v Quincecare Ltd [1992] 4 All ER 363* (the Quincecare Duty) can apply to individuals.

What happened?

In January 2021, the English High Court in Philipp v Barclays Bank UK PLC [2021] EWHC 10 (Comm) (**Philipp**) gave summary judgment in favour of Barclays Bank (the **Bank**), finding in the Bank's favour that the Quincecare Duty does not apply when a customer themselves gives instructions for an "authorised push payment" (**APP**), rather than via a third party.

Mrs Philipp (the **Applicant**) appealed the decision of the High Court and, in March 2022, the Court of Appeal overturned the summary judgment and re-instated the case, commenting that the matter needed to be assessed at trial and not at a more limited summary judgment hearing.

Background

In 2018, the Applicant and her husband were informed by fraudsters posing as representatives of the Financial Conduct Authority (**FCA**) and the National Crime Agency (**NCA**) that if they moved money into certain accounts, their money would be protected from fraud. On this basis the Applicant moved GBP 700,000 from the savings account she had with her husband into an account with the Bank.

The Applicant, acting on the advice of who she thought were the FCA and NCA, then instructed the Bank, to transfer GBP 700,000 from her bank account by way of two transfers of GBP 400,000 (the **First Transfer**) and GBP 300,000 (the **Second Transfer**, collectively the **Transfers**) to bank accounts held in the United Arab Emirates. The Transfers were ordered separately, a few days apart from each other.

The Applicant alleged that no safeguarding questions, nor scam warnings, were asked at the time of the Transfers, which the Bank contested. The Applicant asserted that the Bank owed her a duty of care:

1. in common law in tort;
2. as implied into the contract between her and the bank; or
3. by statute under s13 of the Supply of Goods and Services Act 1982.

The High Court summarily dismissed the Applicant's claim on the basis that:

1. the Bank did not owe a Quincecare Duty to the Applicant, which only applied where instructions were given by an agent or third party; but
2. even if the Bank did owe a Quincecare Duty, the Applicant was so deceived by the fraudsters that she would not have believed the Bank had it intervened and made inquiries, and therefore there was no causation.

The Appeal

On appeal. the Applicant sought to extend the Quincecare Duty owed by banks to include APP instructions, arguing that whilst her instructions were not fraudulent they were based on the fraud to which she was a victim.

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[1] Philipp v Barclays Bank UK Plc [2022] EWCA Civ 318 (14 March 2022) (bailii.org)

The Applicant alleged that the transfer of such a large sum should have put the Bank on inquiry, and it had therefore breached its duty of care by not having policies and procedures in place to detect, prevent, reverse or reclaim any potential APP fraud, including:

- alerting the Applicant to the risk of fraud;
- arranging a meeting with the Applicant, police, and Bank employees; and
- carrying out further investigations.

and that, had the Bank acted on the inquiries, the Transfers would not have been made.

In response, the Bank argued that the Quincecare Duty is limited to circumstances where an agent fraudulently purports to act on behalf of the customer, and APP transactions are therefore excluded, and consequently it did not owe a duty to the Applicant.

The Consumers' Association (Which?) acted as an intervener at the hearing, supporting the Applicant, and argued that the court should find a Quincecare Duty. Which? submitted evidence at the hearing, including a report by the Financial Services Ombudsman (**FOS**), which showed that the FOS upheld around three-quarters of APP complaints in the consumer's favour.

The Court of Appeal's Judgment

The Court of Appeal judgment makes it clear that the summary judgment procedure should not have been used in this matter, noting that it was not appropriate for the High Court to carry out a mini-trial, where the Applicant's case was "arguable", and that the existence of a duty and the standard of care owed to the Applicant by the Bank should more correctly have been examined and determined at trial.

On the substantive point, the Court of Appeal noted that, whether the Applicant succeeds at trial will largely depend on the evidence around ordinary banking practices, and in what circumstances the court would consider an ordinary prudent banker as being put on inquiry of possible fraudulent activity.

The court considered three questions needed to be addressed in order to determine whether a Quincecare Duty applied, namely:

1. What was the relationship between the Appellant and the Bank in the context of the instruction to pay?
    a. the answer is that the bank is the agent for the customer as principal, which the court found was not in dispute.
2. What were the state of affairs if the Bank knew that the relevant instruction was an attempt to misappropriate funds?
    a. in these circumstances, if the Bank executed the instruction, it would be liable. It could not simply say it was an "execution only" service - Birss LJ held that the duty to execute is not absolute, as a bank still needs to exercise reasonable skill and care.
3. What lesser state of knowledge will put the bank under a legal obligation?
    a. this was established in Quincecare and affirmed by the Supreme Court in Singularis[2] - if the circumstances are such that an *ordinary prudent banker* would be "on inquiry" then the duty arises.
    b. the duty is not to execute the order whilst on inquiry, and to make inquiries.

Did it matter that the instructions came from the Appellant and not directly from a third party?

The Court of Appeal was not persuaded that this case was automatically defeated because the line of authority developed from Quincecare involved instructions given to banks by fraudulent third parties and not (as in this case) by the duped but innocent account holder. Birrs LJ in giving the judgment stated:

> "*I hold that as a matter of law the duty of care identified in Quincecare, which is a duty on a bank to make inquiries and refrain from acting on a payment instruction in the meantime, does not depend on the fact that the bank is instructed by an agent of the customer of the bank.*"

The Floodgates argument

The High Court was persuaded by the Bank's submission that imposing the Quincecare Duty in the consumer context would put banks under an onerous and unworkable burden. However, the Court of Appeal held that this issue should not have been decided without a trial.

The Court of Appeal recognised the "*ample evidence to make it arguable that the duty of care contended for would be neither unworkable nor onerous in terms of banking practice in March 2018.*", noting that Which? the intervener, submitted further supporting evidence showing that the practices needed to have prevented this fraud were in place at the time, and had since been developed. It was not persuaded that the flood gates would open.

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[2] ***Singularis Holdings v Daiwa Capital Markets*** [2019] UKSC 50

What does this mean for the consumers, banks, and the future of the Quincecare Duty?

This decision will be welcomed by consumers, as it brings back into question whether the Quincecare Duty applies to consumer banking transactions and APPs – an increasing area of concern, with over GBP 350 million being stolen using APP mechanisms in the first six months of 2021, according to Payment Systems Regulator's data.

It has yet to be seen whether the Bank will settle this case, but if not, and unless any future trial on the substantive issues departs from the reasoning in the Court of Appeal's judgment, this judgment will act as important precedent for future APP fraud Quincecare Duty cases.

Ultimately, it appears as though the application of the Quincecare Duty will turn on when banks were, or should have been, put on notice to make reasonable inquiries with reference to industry norms.

Whilst the future of the Quincecare Duty's application is uncertain, banks should be looking at their procedures to ensure that their practices and policies comply with industry standards. This is especially important when considering the FOS' approach to APP fraud; where the majority of cases are found in favour of the consumer. Consumers may also have redress via the APP Voluntary Code under which a number of banks have agreed to reimburse victims of APP fraud where certain conditions have been met.

Whilst the Philipp's decision is an important step in the extension of the Quincecare Duty, it does not necessarily follow that the cost of all APP frauds will be borne by the banks. The facts in Philipp were unusual in that high sums and foreign banks were involved. Most consumer APP frauds will be less complex, and so may not be sufficient to put a reasonable ordinary prudent banker on notice to make inquiries.

We will write an update if there is a subsequent judgment in the Philipp case.

For further details on the Quincecare Duty and its subsequent application, please see our earlier briefings:[3]

Additional research conducted by Trainee Solicitor **Annabella Ferrari**.

For more information, please contact the author(s) of this alert

RICK BROWN
Partner, London
T +44 (0)20 7264 8461
E rick.brown@hfw.com

NICOLA GARE
Professional Support Lawyer, London
T +44 (0)20 7264 8158
E nicola.gare@hfw.com

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[3] HFW | Quincecare duty applied by the DIFC Courts

HFW | Quincecare Duty in the spotlight: more trouble for Banks?

HFW | English high court limits quincecare duty in APP Fraud Cases