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ENGLISH COMMERCIAL COURT GIVES FURTHER CLARIFICATION ON THE QUINCECARE DUTY

The Commercial Court's keenly awaited judgment in *Federal Republic of Nigeria v JP Morgan Chase*[1], *the largest Quincecare claim before the English courts,* has clarified the issues to be considered when determining the standard of a reasonable and honest banker under the Quincecare Duty, and highlighted its potential extension to "external" frauds.

Once more the duty established in *Barclays Bank v Quincecare,*[2] namely that a bank has a duty to not follow a customer's instructions when a reasonable and honest banker would be put on enquiry that it may facilitate a fraud on the customer (the **Quincecare Duty**), is under consideration by the English courts.

In this briefing we continue our analysis of judgments on the developing law around the Quincecare Duty, our earlier briefings can be found on our website[3] and are set out below[4].

The Background

In this case, JP Morgan Chase (**JPMC**) made payments totalling approximately USD 1 billion to accounts held by Malabu Oil and Gas Ltd (**Malabu**) out of an account held by the Federal Republic of Nigeria (**FRN**) in 2011 and 2013.

The FRN alleged that JPMC breached their Quincecare Duty alleging that JPMC were put on notice that Malabu had a questionable history and that the persons giving the instructions to make the payments were involved in a fraud against FRN.

The factual issues around the payments and allegations of corruption, fraud, and money-laundering are complex and whilst we do not propose to go into the detail for context it is helpful to know that they related to the former President Abacha and his then Minister of Petroleum Resources, Mr Etete.

The Commercial Court's judgment

1. The Nature and Scope of the Quincecare *Duty*

In reviewing the seminal decisions of *Quincecare and Singularis v Daiwa*[5], and the more recent cases including the Privy Council's decision in Royal Bank of Scotland International Ltd v JP SPC[6], which dealt with the distinct issue of whether the Quincecare duty applied to a receiving bank but also contained general discussion on the authorities. the court highlighted that in both instances an officer of the company had defrauded the company by causing its bank to pay company funds (i.e. an "internal" fraud).

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[1] *[2022] EWHC 1447 (Comm).*

[2] *[1992] 4 All ER 363,*

[3] *HFW | Briefings | Briefings*

[4] ENRICHMENT – AN ANSWER WHEN QUINCECARE DOESN'T APPLY?

HFW | Quincecare duty applied by the DIFC Courts
HFW | Quincecare Duty in the spotlight: more trouble for banks?
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[5] *2020] AC 1189*

[6] *4 [2022] UKPC 18*

In its analysis of the Authorised Push Payment fraud cases (*Philipp v Barclays Bank UK plc* [7]*and Sekers Fabrics Ltd v Clydesdale Bank Plc*[8]), the court acknowledged that traditionally the Quincecare Duty has been confined to cases of internal fraud but found that, in light of the Court of Appeal's decision in *Philipp,* the duty *may now* extend to cases of "external fraud" and that accordingly the FRN might not need to prove that Mr Adoke (as the fraudster) was behind the payment instructions.

The court noted that the authorities unanimously agreed that the Quincecare Duty should be confined and restricted, and restated the three tenets of the Quincecare Duty, namely that:

(i) the Quincecare Duty arises in relation to payment instructions;

(ii) there needs to be a clear focus on the issue of which the bank must be on notice; and

(iii) the duty does not arise unless the bank is on notice that the instruction is an attempt to misappropriate the customer's funds.

The court focused on the third limb, emphasising that it was a pre-requisite that FRN proved the fraud in respect of the 2011 and 2013 payments, and then subsequently that JPMC was on notice of the possibility of that fraud.

2. Was there a Fraud?

Given that FRN is a foreign state, did the English court even have jurisdiction to consider the actions that led to the allegations of fraud? The court determined it had jurisdiction, as the matter was presented to it for determination by the foreign state (FRN) and therefore Rule 2 of the Foreign Act of State Doctrine, which provides that the English courts will recognise and not question a foreign executive's decision or acts, which take place within the territory of that state, did not apply.

In reviewing the evidence, the court found that on the balance of probabilities, the original grant of the oil production licence (**OPL**) (which was the root of the issue) to Malabu in 1999 was corrupt. However, whilst there were certain "suspicious" or "certainly questionable" aspects and payments there was not sufficient evidence that Mr Adoke committed or partook in the alleged fraud.

The fact that FRN failed to prove fraudulent activity was crucial for the outcome of the case, as it is an essential requirement of the Quincecare Duty.

3. Was JPMC in breach of its Quincecare Duty?

Notwithstanding that the court found that FRN's case failed to establish that Mr Adoke took part in any fraudulent activity in respect of the 2011 and 2013 payments, the court went on to analyse whether (had the fraud been proven) JPMC would have been in breach of the Quincecare Duty. In so doing it looked at:

a. Gross Negligence

Due to the applicable contractual terms, FRN had to show that JPMC was *grossly* negligent.

The judgment restates the distinction between negligence and gross negligence, highlighting that it is a very high degree of negligence, but does not require a subjective element of the appreciation of the risk:

> *"even a serious lapse is not likely to be enough to engage the concept of gross negligence"* rather it is *"mistakes or defaults which are so serious that the word reckless may often come to mind, even if the test for recklessness is not met".*

Cockerill J accepted that gross negligence may be established by demonstrating that a bank fell very seriously below the standard expected of the reasonable and honest banker. However, merely because a bank fell below that standard is not sufficient in and of itself to establish gross negligence. Ultimately it will depend on (i) the likelihood of the risk; (ii) the ease of mitigating the risk; and (iii) the seriousness of the consequences for the customer of the risk comes to fruition.

b. Was the Quincecare Duty breached in respect of the 2011 payments?

The court considered the cores issues to be:

(i) whether there was an obvious risk that FRN was being defrauded in 2011; and
(ii) if JPMC's conduct evidenced a serious disregard for that risk.

The court held that whilst the expert witnesses provided evidence on fraud and corruption generally, they were not focussed on the specific issues in dispute. Therefore, whilst the rather formidable list of "issues" of which JPMC were aware in respect of the OPL may be relevant to anti-money laundering best practice, it was not ultimately relevant to the issue of whether JPMC breached the Quincecare Duty it owed to FRN.

In this case it was necessary to assess whether there was a serious and obvious risk that the agreements resolving the matter were fraudulent and that Mr Adoke assisted in perpetrating that fraud. The court answered both in the negative.

c. Was the Quincecare Duty breached in respect of the 2013 payments?

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[7] *([2021] Bus LR 451; [2022] EWCA Civ 318)*

[8] *[2021] CSOH 89*

The court commented that the increased news articles around the OPL and Malabu, combined with the investigations being pursued in respect of the OPL throughout 2012 and 2013 (including a document production order against JPMN for documents relating to the account), would be taken very seriously by a reasonable and honest banker. However, it also considered that the various investigations would not suggest to a reasonable and honest banker that the instructions had not been made *bona fides*.

On balance, the court found that JPMC were on notice of a risk of the relevant alleged fraud and failed to act in 2013, but that the test for gross negligence had not been met.

Commentary

This is a first instance decision, which given the sums involved may well be appealed. Indeed, Cockerill J highlighted the ambiguity that still persists, noting that:

> *"...even so many years after its emergence, [it] is not entirely uncontroversial"*.

In the meantime, banks will be relieved to find that anti-money laundering and anti-corruption best practices are not synonymous with the Quincecare Duty.

The courts are trying to achieve a balance in keeping the Quincecare Duty narrow so as not to overly burden the banks, with affording sufficient protection to those who have fallen victim to a misappropriation of funds.

We will report further if this judgment is appealed.

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