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Quincecare in the Privy Council: Royal Bank of Scotland International Ltd v JP SPC 4 and another (Isle of Man) [2022] UKPC 18

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On 12 May 2022 the Judicial Committee of the Privy Council handed down judgment in *Royal Bank of Scotland International Ltd v JP SPC 4 and another (Isle of Man)* [2022] UKPC 18. The appeal concerned the important question of whether a bank owes a duty of care in negligence to a person who is known to be the beneficial owner of moneys held in the account of a customer of the bank and who has been defrauded by the customer.

Facts

The appellant was a Cayman Island based litigation financing fund ("the Fund"). It operated its litigation funding scheme ("the Scheme") through an Isle of Man company, Synergy (Isle of Man) Ltd ("SIOM"). Loans made to solicitors by the Fund to finance litigation were advanced by and repaid to SIOM. SIOM held two bank accounts ("the Accounts") with Royal Bank of Scotland International Ltd ("the Bank"). The money held in the Accounts was said to be beneficially owned by the Fund, to the knowledge of the Bank.

The Fund alleged that SIOM and two of the individuals behind it, Mr Schools and Mr Kennedy, were parties to a fraud, by which approximately £37.8 million beneficially belonging to the Fund was paid out of the Accounts for the benefit of those individuals rather than by way of legitimate investments of the kind that the Scheme was intended to make. A further £40 million was paid to law firms in which Mr Schools had an undisclosed interest, contrary to the terms of the Scheme.

In December 2011 the Bank designated the Accounts as "client accounts" and added "JP SPC 4" to the account names (which the Fund contended reflected its underlying beneficial ownership). At some point prior to January 2012 the Bank identified the Accounts as "high risk". During 2012, following their renaming and designation as high risk, at least £60 million was misappropriated through the Accounts. The payments that the Bank made and permitted to be made included (1) £14.7 million to the fund manager, a company solely owned by Mr Schools, (2) £5.8 million to Mr Schools directly or though his offshore corporate vehicles and (3) £4.4 million to Mr Kennedy directly or through his offshore vehicles. The Fund and its directors were never under the control of Mr Schools or Mr Kennedy, were not parties to the fraud and had no ability to monitor the Accounts held by SIOM.

The Fund brought proceedings against the Bank, alleging that it owed the Fund a *Quincecare*-style duty with the effect that "*if the circumstances were such that a reasonable banker would have had grounds for considering that there was a serious or real possibility that the [Fund] was being defrauded and/or its funds were being misapplied …, [the Bank] was obliged not to honour instructions in relation to [the Accounts] until such time as it had made reasonable enquiry and satisfied itself as to the propriety of the conduct of [the Accounts]*"[1]. That duty was alleged to arise by reason of the Bank's actual or constructive knowledge of the Fund's beneficial ownership of the monies held in the Accounts.

The Fund alleged that there were numerous red flags and indications putting the Bank on notice of potential or actual fraud from the inception of the Scheme. In light of these red flags, the Fund alleged that the Bank did not take the steps that it ought to have taken in response to the evidence of potential fraud and that, had the Bank acted as it should have done, all or a very substantial part of the loss suffered by the Fund from the fraud perpetrated by Mr Schools and Mr Kennedy (amongst others) could, and would, have been prevented.

The Bank applied to strike out or summarily dismiss the claim on the basis that there was no arguable pleaded basis on

which the Fund could establish that the Bank owed it the alleged duty of care. The application was dismissed at first instance, but allowed by the Isle of Man Court of Appeal. The appeal before the Judicial Committee of the Privy Council ("the Board") was against the Court of Appeal's decision to strike out the claim.

Decision of the Board

The Board (Lord Hamblen and Lord Burrows giving the unanimous judgment) reviewed the English authorities relating to the scope of the *Quincecare* duty, including *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50 and *JP Morgan Chase Bank NA v Federal Republic of Nigeria* [2019] EWCA Civ 1641. The Board also referred to the recent decision in *Philipp v Barclays Bank UK plc* [2022] EWCA Civ 318, which was handed down after the hearing before the Board.

The Board concluded unequivocally that "*There is nothing in principle or in the cases to support the idea that the tortious duty of care owed by a bank to its customer to exercise reasonable care and skill, which is co-extensive with the contractual duty of care owed by a bank to its customer, can be extended across to a third party with whom the bank has no contractual relationship even if the bank knew or ought to have known that the third party was the beneficial owner of the moneys in the customer's account.*"[2]

Crucially, Lord Steyn's observation in *Quincecare* that "*the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers* ***and innocent third parties***" (emphasis added) was held to be to the effect that combating fraud committed against a bank's customers protected not only those customers, but also other innocent victims of fraud. Properly understood, it did not mean that the *Quinceare* duty was owed by banks to third parties.

The Fund also sought to rely upon the decision of Peter Gibson J in *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1983] 1 WLR 509, to the effect that a duty of care was owed by the defendant bank to the third party beneficiaries and not merely to its customer in a situation where the bank knew that the accounts were held by its customer as a fiduciary for known beneficiaries. The Board rejected this argument, holding that *Baden* "*cannot stand today as good law*"[3] on the basis that it relied upon *Anns v Merton London Borough Council* [1978] AC 728. *Anns v Merton* was subsequently overruled in *Murphy v Brentwood District Council* [1991] 1 AC 398, with Lord Keith expressly stating that "*all cases subsequent to Anns which were decided in reliance on it*" should also be overruled[4].

The Board further rejected the Fund's arguments that:

- there was on the assumed facts an (implied) assumption of responsibility by the Bank towards the Fund as beneficial owner of the money in the Accounts; and
- even assuming that the relevant duty of care is not already established in the authorities, recognition of that duty would constitute an appropriate incremental development from existing case law.

The Board saw "*no good reason in this case for incrementally developing the tort of negligence, beyond the well-established Quincecare duty of care, so as to impose on a bank an equivalent duty of care to a third party who is not a customer of the bank*"[5]. The Board noted that the Supreme Court has previously emphasised (in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2 and *N v Poole Borough Council* [2019] UKSC 25) that "*the common law does not generally impose liability for failure to prevent harm caused by others*"[6]. In order to do so, the defendant must have some special level of control over the source of danger, or have assumed a responsibility to protect the claimant from the danger. In the present case, the Bank had no special level of control over the source of danger (i.e. it was not in control of the fraudsters) and could not be said to have assumed responsibility to protect the Fund from the fraud.

Finally, in relation to dishonest assistance, the Board held that the decision in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 supported the view that no duty of care should be owed by the Bank to the Fund in this case, noting that "*Tan represents an emphatic decision, after many years of judicial uncertainty and prevarication, that banks and other parties who are alleged to be assisting a breach of fiduciary duty are liable only if they are dishonest and not if they are merely negligent*."[7] Further, the Board held that whilst that there can be exceptional circumstances where a duty of care is owed by a bank to trust beneficiaries who are not the bank's customer where trustees are acting dishonestly, there were no such exceptional circumstances on the pleaded facts of the case.

Comment

This decision is interesting for the following reasons:

1. The Board emphasised that the *Quincecare* duty is co-extensive with banks' contractual duties to their customers. The judgment provides an unambiguous and clear statement that the *Quincecare* duty is owed to a bank's customer alone and not to third parties.

2. Consequently, the Board's decision is likely to shut the door to any *Quincecare* claims against recipient banks, save possibly where there is some exceptional proximity between the victim of the fraud and a receiving bank giving rise to a relationship "akin to contract" as is the touchstone in other pure economic loss negligence cases.

3. The Board's decision, although not binding on the English courts, is highly persuasive and given the composition of the Board is likely to be indicative of how the Supreme Court will decide similar issues that may come before it.

4. The direction of travel is markedly different to the approach taken by the Court of Appeal in *Philipp* in relation to the scope of the *Quincecare* duty as regards a bank's customers in the context of authorised push payment fraud. It is likely to provide a degree of reassurance to banks (and a corresponding disappointment for potential claimants).

5. It is interesting that the issue arose as between sophisticated parties, rather than in the consumer banking context. That might conceivably provide a ground for distinction in future cases, though the thrust of the Board's reasoning will be difficult for claimants to escape.

[1] At [23]

[2] At [94]

[3] At [49]

[4] At p 472

[5] At [80]

[6] At [82]

[7] At [88]

Quincecare-in-the-Privy-Council-Royal-Bank-of-Scotland-International-Ltd-v-JP-SPC-4-and-another-Isle-of-Man-2022-UKPC-18D

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