Federal Republic of Nigeria v JPMorgan Chase Bank NA – the Quincecare saga continues

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On 14 June 2022, Cockerill J handed down her much-anticipated judgment in the trial of the claim by the Federal Republic of Nigeria (the "**FRN**") against JPMorgan Chase Bank NA ("***JPMorgan***"): [2022] EWHC 1447 (Comm). The FRN alleged breaches of the so-called *Quincecare* duty against JPMorgan and sought to recover in the region of USD 1 billion in relation to payments made in 2011 and 2013. The claim was commenced in 2017 and went to a heavy trial from late February to early April 2022.

This is the biggest *Quincecare* claim to go to trial in England to date, eclipsing the over USD 200 million in issue in *Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50; [2020] AC 1189. *Singularis* remains the leading appellate authority on the *Quincecare* duty, alongside the Court of Appeal's topical decision in *Philipp v Barclays Bank UK Plc* [2022] EWCA Civ 318; [2022] 2 WLR 872 handed down in March 2022.

Cockerill J dismissed the *Quincecare* claim. The judgment also contains interesting analysis in relation to issues of Act of State given that the facts involved a careful analysis of several decisions within the highest rungs of the FRN dating back to 1998. The focus of this comment, however, is on the *Quincecare* duty.

Factual background

The judgment is long and considered. At its briefest, for the purposes of understanding the *Quincecare* issue, the claim was framed as turning on the interaction between events in the FRN in 1998 and payments made in 2011 and 2013.

There were wide-ranging allegations of fraud, money laundering and corruption related to the previous military regime of former President Abacha and specifically the then Minister of Petroleum Resources, Mr Etete. In a letter dated 29 April 1998, Mr Etete granted an oil production licence to a Nigerian company, Malabu Oil and Gas Ltd ("**Malabu**"), in respect of Block 245 ("**OPL 245**"). The grant was stated to be subject to payment by Malabu of application and bidding fees and a signature bonus of USD 20 million, of which Malabu paid USD 2.04 million. Malabu had been incorporated only five days before and it has been widely alleged that Mr Etete was one of its shareholders.

In 1999, the government of a different president reviewed the grant and decided not to revoke it. In January 2001 Malabu entered into an agreement with Shell Nigeria whereby they would develop and operate OPL 245 and pay the balance of the signature bonus. In May 2001 the grant to Malabu was revoked by the government, apparently for reasons linked to the allegations of corruption as regards the original grant. There was then a grant to a Shell Nigeria entity, but that was challenged by Malabu in Nigeria, both politically and in

the courts.

These events were followed by a Settlement Agreement involving the then Nigerian government in 2006 and Resolution Agreements in 2011. The Resolution Agreements are most directly linked to the payments in the region of USD 1 billion in 2011 and 2013 out of which the FRN's claim in these proceedings arose. For context, in 2010 during the administration of then President Goodluck Jonathan, Malabu sought to persuade the FRN to allow it to perform its obligations under the 2006 Settlement Agreement. This was supported by the new Attorney General, Mr Adoke. At the end of the year a proposal for a sale of Malabu's interest to Eni and Shell and the discontinuance of all pending litigation emerged. This resulted in the 2011 Resolution Agreements and 2011 and 2013 payments which are summarised at [14]–[63] of the judgment. In these proceedings, the FRN identified a number of putative red flags in relation to both payments.

Decision

1 Summary of the law on Quincecare duty

Cockerill J provided a useful summary of the modern decisions in *Singularis* and *Philipp* in particular, and also drew on the foundational decision in *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363 in summarising the law. She also had the benefit of the Privy Council's very recent decision in *Royal Bank of Scotland International Ltd v JP SPC 4* [2022] UKPC 18, which dealt with the distinct issue of whether the *Quincecare* duty applied to a receiving bank but also contained some general discussion on the authorities. We have written about that decision in a separate comment.

The short point is that Cockerill J's discussion at [145]–[163] does not break new ground. It makes clear that the focus of the *Quincecare* cases has traditionally been on "internal fraud" cases (as in *Singularis*) but that the decision of the Court of Appeal in *Philipp* demonstrates that the duty might also apply in the context of authorised push payment ("**APP**") fraud. As to *Philipp*, at [153], the Judge regarded this decision as recognising (albeit *obiter*) that "*the logic of the principles which establish the Quincecare duty indicate that it is applicable whenever a banker is on inquiry that the instruction is an attempt to misappropriate funds*."

However, and this is where *JPMorgan* will probably be of most interest on the law in future cases, Cockerill J was at pains to stress that the *Quincecare* duty is "*narrow and confined*" and must be "*carefully calibrated*" due to the inherent conflict with the primary duty of a bank to honour a payment instruction: [154]–[157]. Cockerill J concluded (at [158]) that "*the focus has to be on notice of the matter that has vitiated the instruction and not any different or wider potential concern*." This clear and narrow focus assumed great significance in her factual analysis.

Applying this approach, the legal question was posed as follows at [163]:

"*the FRN has to establish that JPMC was on notice (to the relevant standard) of the specific fraud in 2011 which is said to vitiate the payment instruction. It might not (post Philipp) need to prove that JPMC was on notice of Mr Adoke being behind the payment instructions in 2011*."

2 Gross negligence

As addressed further below in relation to the 2013 payment, as an additional point going to Cockerill J's approach, it was common ground that a less stringent gross negligence standard applied to JPMorgan's conduct due to the relevant depositary agreements.

As such, Cockerill J was required to decide what this connoted. She held, at [337], that this raised two core issues "*(i) Was there an obvious risk that FRN was being defrauded in 2011? (ii) Did JPMC's conduct evidence serious disregard for that risk?*" The Judge approached her analysis of both payments on that footing.

3 Breach of duty regarding 2011 payments?

There is a detailed discussion in relation to this first set of payments at [339]–[372]. By way of short synopsis, the following provides a roadmap to Cockerill J's conclusion that JPMorgan's conduct in relation to the 2011 payment was not actionable.

Firstly, Cockerill J applied a very focused approach, limited to the 2011 fraud and its connection with the payment instruction, and excluding wider fraud, AML and corruption allegations related primarily to previous incidents in 1998 and the previous Abacha regime: [342]–[349]. Notably, at [347], she observed that:

"*it is not being argued that there is a Quincecare duty to advise wherever there is a financial crime risk or to refuse to pay whenever it would arguably incentivise corruption. This was a transaction which had unattractive features; but unattractive features and an association with past corruption cannot be enough to trigger a Quincecare duty in the context of a case about a specific fraud in 2011.*"

Secondly, on the facts, the Judge accepted (at [350]) that there were "*plainly high-risk features for the purposes of AML and financial crime and corruption generally*" but those were "*plainly not enough*" and the additional factors which the FRN pointed to (as summarised at [341]) did not shift the dial. These included matters such as:

- JPMorgan being instructed to pay Petrol Service, an entity that it had never heard of;
- the receiving bank having refused to accept the funds, citing "*compliance reasons*";
- Petrol Service not being named in the Resolution Agreements;
- the Resolution Agreements having been set up such that Shell and Eni contracted with and paid the FRN and the FRN paid Malabu; and
- two intermediaries, EVP and ILCL, each having asserted very substantial claims against Malabu and obtained freezing orders over nearly USD 300 million in support of those claims.

This is to set out but some of the many factors relied on by the FRN.

Thirdly, and interestingly, Cockerill J concluded that the "*unusual structure*" with which JPMorgan was dealing undermined rather than strengthened the FRN's case. This was, in short, because JPMorgan had identified the "*commercial rationale*" of the 2011 payment and overall transaction and, without more, was not bound to question the contractual structure: [354].

Fourthly, Cockerill J concluded that this was even the case in relation to the original payment instruction being to Petrol Service (a shell company associated with the former Minister Etete) given the commercial rationale of the transaction as understood by

JPMorgan: [359]. In her judgment, "*in normal circumstances such a mismatch of (at this stage expected) payees might well raise an eyebrow – or more; but these were not normal circumstances*."

Fifthly, Cockerill J made the same point in relation to knowledge of Malabu as the intended recipient of the money (which was not established on the facts). Again, an alert at AML level could not, in her judgment, put JPMorgan on notice of fraud for *Quincecare* purposes: [361]. In her concluding remarks on the 2011 payments, Cockerill J again highlighted the distinction between AML duties and the *Quincecare* duty central to her decision: [364]–[365]. Strikingly, she observed at [364]:

"*It may be the case that JPMC fell below best practice standards or even in some respects below the standards of the reasonable and honest banker as regards money laundering risk, having regard to the number and magnitude of the red flags relevant to that risk; but that does not trigger a Quincecare duty*."

4 Breach of duty regarding 2013 payment?

There were further factual features in relation to the 2013 payments. The discussion starts at [373]. Importantly, Cockerill J observed at [386] that some of the additional press articles "*did raise new allegations relating to Mr Adoke and that, given the apparently sound research basis for much of the Economist article, JPMC moved much closer to being on inquiry as regards Mr Adoke's role – despite the apparent vagueness of the allegations as regards him. At the same time given the vagueness of the Adoke allegations and the tension with the comprehended commercial rationale I would not regard the press articles alone as moving the dial*."

By way of reminder, Cockerill J was concerned with the question of whether JPMorgan had committed gross negligence in relation to the 2011 and 2013 payments. That is not the usual standard in a *Quincecare* claim and resulted from a contractual modification.
As emerges from the Judge's conclusion in relation to the 2013 payment, this had a potentially decisive impact on her findings in relation to that payment. Her conclusion, at [397], was as follows:

"*As at 2013 I do conclude that JPMC were on notice of a risk (possibly amounting to a real possibility) of the relevant fraud and that it failed to act. However, the gross negligence test is not met. I do not consider that the evidence reaches the level of establishing an obvious risk. There was a risk – but it was, on the evidence, no more than a possibility based on a slim foundation. There was insufficient connection between what was known and the fraud whose risk would need to be obvious*."

Given the application of the gross negligence test on the specific facts, Cockerill J did not have to decide whether the more general test of whether the bank was "*put on inquiry*" (endorsed in *Singularis* at [1] and *Philipp* at [27]) would have been satisfied. There is at least a possibility that Cockerill J would have found a breach of the *Quincecare* duty when assessed against the ordinary standard. However, that is not how the issue arose in *JPMorgan* and, accordingly, the *Quincecare* claim in relation to the 2013 payment failed as well.

Comment

The significance of this judgment is plainly not limited to big-ticket litigation.
The *Quincecare* duty is of interest to the full spectrum of claimants, ranging from retail banking consumers (as in *Philipp*) to large corporates (as in *Singularis*) through to sovereign

States (as in *JPMorgan*).

That may well lead to divergences in the case law or at least in decisions on specific facts, because the clear and decisive distinction drawn by Cockerill J in *JPMorgan* between AML and financial crime prevention requirements, on the one hand, and payment-specific risks engaging the *Quincecare* duty, on the other hand, is less likely to provide an immutable touchstone in the retail consumer banking context.

As to this, *Philipp* was by no means an open invitation to consumers to bring claims against banks in the context of APP fraud, but the thrust of the decision was to leave final judicial determination of the interplay between AML/ financial crime considerations and the boundaries of the *Quincecare* duty at common law to consideration on full facts at trial. It remains to be seen what approach the courts will follow in cases of more moderate value and where wider consumer protection considerations are in play.

Singularis and *JPMorgan* both involved sophisticated and well-resourced corporate and State customers respectively. In that type of case, *JPMorgan* highlights the need for a careful review of the applicable transactional documents governing the relationship between customer and bank. The gross negligence threshold in *JPMorgan* assumed centre stage. It is unlikely that a bank could seek to exclude the *Quincecare* duty entirely, but the scope for such exclusion or limitation clauses warrants further consideration.

Lastly, the decision in *JPMorgan* is of course only a first instance decision on its own facts. Cockerill J's analysis of the law did not appear to break new ground as such. It is her detailed factual analysis and application which provides a very useful illustration of a *Quincecare* claim in practice though. Moreover, an appeal would seem probable given the sums involved and the developing nature of this area of the law. Any such appeal will be of significant interest.

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