Private: Philipp v Barclays Bank UK Plc: the latest chapter for the Quincecare duty

ANNA LINTNER PHILIPPE KUHN | APRIL 11, 2022

This article first appeared on the Practical Law Dispute Resolution Blog on 11 April 2022 – to view click **HERE**

Introduction

The Court of Appeal handed down its much-anticipated decision in *Philipp v Barclays Bank UK Plc* [2022] EWCA Civ 318 on 14 March 2022.

The decision is essential reading for anyone with an interest in the "*Quincecare*" duty of care (derived from *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363) which requires a bank to exercise reasonable care and skill in carrying out a customer's instructions. In particular, *Philipp* addresses the application of the *Quincecare* duty in the context of authorised push payment ("APP") fraud, which is believed to be the second most common type of personal banking fraud in the UK.

In *Philipp*, the Court of Appeal has provided helpful guidance on the nature and scope of the *Quincecare* duty. On the facts, it reversed the decision of HHJ Russen QC (sitting as a Deputy High Court Judge) who had granted (reverse) summary judgment on the claim in favour of Barclays, essentially on the basis that the *Quincecare* duty could not be engaged in a case where an individual customer had provided the relevant payment instruction. The Court of Appeal disagreed with the judge, both on the general principle and on case management grounds. It did not consider the existing authorities limited the *Quincecare* duty to so-called "agent" cases where payment instructions are given by someone on behalf of a corporate customer. Further, it was emphatic in its view that a trial was required to determine whether the application of the *Quincecare* duty in this context was onerous and unworkable.

Facts and first instance decision

For the purposes of the appeal in *Philipp*, the special feature of the *Quincecare* duty claim that was under scrutiny was that the claimant had herself authorised the transactions in question. Mrs Philipp was persuaded by a fraudster to make two payments totalling £700,000 from her account with Barclays to accounts in the UAE as part of a sophisticated APP fraud. Mrs Philipp believed that by making the payments she was assisting an investigation by the Financial Conduct Authority and National Crime Agency, and securing her funds from an attempted fraud.

A second notable feature of the case is that Mrs Philipp and her husband had been so thoroughly deceived that they did not trust the police or Barclays and did not reveal to the bank the purpose of the transfers in these terms. This forms the subject matter of a separate causation defence which HHJ Russen QC considered had to go trial and was therefore not considered further on appeal.

By the time the fraud was discovered, the sums could not be recovered. Mrs Philipp brought a claim against Barclays, alleging that in order to discharge its duty to exercise her instructions with reasonable care and skill the bank ought to have had in place policies and procedures for the purpose of detecting and preventing APP fraud.

HHJ Russen QC, in granting Barclays' application for summary judgment, had considered that requiring the bank to take the preventative measures contended for by the claimant would elevate the *Quincecare* duty to a point where too much doubt would be cast over the effectiveness of a customer's instructions. In his judgment, it would impose unduly onerous and commercially unrealistic policing obligations. Importantly, he held (as a matter of law) that the *Quincecare* duty should be confined to cases where the suspicion raised is one of attempted misappropriation of the customer's funds by an agent of the customer. His analysis was that, where the customer is an individual, their authority to give instruction to the bank is apparent and must be taken by the bank to be real and genuine.

Court of Appeal decision

The Court of Appeal disagreed with the judge both on the point of law as to the application of the *Quincecare* duty to individual customer cases and his summary determination of the issue of whether recognising the duty in this context would be onerous and unworkable. The sole judgment was given by Birss LJ, with whom Flaux LJ (the Chancellor of the High Court) and Coulson LJ agreed.

Birss LJ summarised his core reasons for allowing the appeal crisply at [78]. In short:

1. As a matter of law, the *Quincecare* duty "*does not depend on the fact that the bank is instructed by an agent of the customer of the bank*." The Court of Appeal considered that it is "*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*."

2. The right occasion on which to decide whether such a duty in fact arises in this case is at trial. Summary judgment in favour of Barclays was wrongly entered.

A – The legal nature of the Quincecare duty

The judgment of Birss LJ and decision of the Court of Appeal on the legal nature of the *Quincecare* duty is best understood by reference to the following core propositions.

First, the Court of Appeal was clear in its view that the overriding test for the application of the *Quincecare* duty is whether the bank was "put on inquiry". In doing so, it followed *Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50 ("***Singularis***"), amongst other authorities. As Birss LJ explained at [27]-[30], while it is undeniable that "*the factual circumstances of the major cases in which what is now called the Quincecare duty has been considered have involved instructions from a fraudulent agent acting for a company or firm*", the principles underpinning those authorities are not so limited. It is better, according to the Court of Appeal, to understand the *Quincecare* duty as operating as a check on the bank's duty to execute orders promptly. The effect of the countervailing *Quincecare* duty is to require a bank "*to refrain from executing an order if and for so long as the circumstances would put an ordinary prudent banker on inquiry*": [27]. Once the duty is understood in this way, there is no basis for a hard-edged distinction between agent (or corporate customer) and individual customer cases.

Secondly, Birss LJ considered the link between the *Quincecare* duty and anti-money laundering ("AML") obligations. The submission made by Barclays was that AML regulations were likely to cover APP fraud of the kind in issue in *Philipp* and that AML obligations were owed to the regulator not the customer. This was given short shrift by the court. Birss LJ considered that "*[t]he fact that the bank can be in a situation in which it owes a duty to a regulator which it does not owe to a customer does not answer the question*": [33]. Instead, he adopted a principled analysis of the nature and scope of the *Quincecare* duty.

Thirdly, and unsurprisingly, Birss LJ agreed that contemporaneous banking practice is highly material in deciding whether a reasonable bank would have been put on inquiry. Birss LJ made clear at [39] that Barclays' actions fell to be judged by reference to an examination of banking practice in 2018 when the relevant transactions were authorised in person by Mrs Philipp at a local Barclays branch.

Fourthly, according to the Court of Appeal, the modern reality of BACS and other fast digital payment systems does not undermine the analysis. The *Quincecare* duty is conditioned by whatever ordinary banking practice was at the time. Birss LJ stressed: "*A finding that the facts of Mrs Philipp's case would, when considered alongside ordinary banking practice in March 2018, have put an ordinary prudent banker on inquiry about APP fraud, simply does not mean that the circumstances associated with any one of the many millions of low value BACS transfers would do so*": [60].

Lastly, the distinction between duty and standard of care in this context is a fine one. The courts will therefore not take an unduly strict approach to the pleadings. This is discussed by Birss LJ at [61]-[75] in his judgment.

B – Scope for summary determination

The Court of Appeal's decision is equally notable for its guidance, at [51]-[58], on when it will be appropriate to seek to determine summarily issues as to the *Quincecare* duty.

It considered, having regard also to the general guidance in *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) and *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804, that the judge should not have summarily determined the issue of whether the imposition of the *Quincecare* duty in the present context was onerous and unworkable. According to Birss LJ, this issue clearly involved disputed facts. He considered that "*[t]here is ample evidence, including the report of Mr Brigden [Mrs Philipp's expert] and the other material which was before the judge, 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*": [54]. That was reinforced by the materials adduced by the intervener, the Consumers' Association, which intervened on appeal. Moreover, Birss LJ stressed that Barclays had not yet had to file evidence or give anything other than initial disclosure on this issue: [56].

Comment

Evidently, the Court of Appeal's decision is hugely significant for individual bank customers in the UK who are victims of APP fraud. It does not provide a short-cut to compensation, nor did the Court of Appeal go as far as expressing any view as to the ultimate prospects of the *Quincecare* claim in *Philipp*. However, importantly, the decision is emphatic in its rejection of a rigid category-based approach to the *Quincecare* duty. The Court of Appeal's preference was for a more contextual approach to the scope and application of this duty, specifically rejecting that the duty is inherently limited to "agent" cases.

Of course *Philipp* will not be the last word on the wider subject. The UK Supreme Court is due to give its judgment in *Stanford International Bank Ltd v HSBC Bank PLC*, which was heard earlier this year, and the case of *JP Morgan Chase v Nigeria* is now in the trial phase in the High Court. As such, the boundaries of the *Quincecare* duty remain fast-evolving.

The other clear upshot of the decision in *Philipp* is that defendants will not be permitted to rely on concerns about the imposition of the *Quincecare* duty being onerous unless and until these are properly evidenced at trial. This is a welcome development for claimants, not least because it provides useful leverage for early negotiated settlements in low to medium value cases in which the costs of going to trial for the relevant bank may be disproportionate. The first instance decision in *Philipp* had shut the door for *Quincecare* claims in the APP fraud context. The Court of Appeal's decision keeps that door gently open.

Anna Lintner

Philippe Kuhn