

Financial services: 'Quincecare Duty' when customer agents act fraudulently

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Bankers and Registered Agents in UK offshore jurisdictions need to be able to execute payment requests with the comfort that doing so with reasonable skill and diligence will protect them from becoming defendants to fraud claims in circumstances where funds are misappropriated.

The duty to provide such services with reasonable skill and diligence was recently considered by the UK Supreme Court in the context of the infamous 'Quincecare Duty' of a service provider to refrain from making payments to agents acting on behalf of a provider's customers if they have reasonable grounds to believe the agents are acting fraudulently. The Supreme Court decision in *Philipp v Barclays Bank* sheds light on the scope of this duty. How should a bank, or others, display a reasonable level of diligence to prevent fraud?

Quincecare

A bank is bound to refrain from executing an order if and so long as an 'ordinary prudent banker' in its position was "put on enquiry" in the sense that they had reasonable grounds for believing that the order was an attempt to misappropriate funds, or in other words that the agent is attempting to defraud the customer: *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363. Mr Justice Steyn's key and oft-cited passage is at p.376 of *Quincecare* (the Quincecare Duty).

Philipp v Barclays Bank

The extent of the Quincecare Duty was considered, initially, by HHJ Russen QC in the English High Court case of *Philipp v Barclays Bank* [2021] EWHC 10 (Comm): the court held that it is not the job of banks to protect customers against the consequences of their own decisions where payment instructions were valid and not of themselves fraudulently given.

This reasoning was reversed on appeal ([2022] EWCA Civ 318): the English Court of Appeal held that it was reasonably arguable that such a duty arose even where the bank was instructed to execute a payment instruction by the claimant account holder (rather than the account holder's agent).

The matter came before the UK Supreme Court: *Philipp v Barclays Bank UK plc* [2023] UKSC 25. On 12 July 2023, Lord Leggatt — giving the unanimous decision of a five-judge panel of the Supreme Court (Lord Reed, Lord Hodge, Lord Sales, Lord Hamblen and Lord Leggatt SCJJ) — reversed the decision of the Court of Appeal.

The facts of the case exemplify a fraud known as 'authorised push payment' ('APP') fraud, where the customer gives instructions to their bankers to execute a payment: APP fraud does not require that the fraudster access the funds without authority.

How should a bank, or others, display a reasonable level of diligence to prevent fraud?

In *Philipp*, a fraudster claimed to work for the UK FCA and, in conjunction with the UK's NCA, claimed to be investigating a fraud within a well-known high-street bank and household-name investment firm. The victims were, sadly, led to believe that their money needed to be transferred to accounts in Dubai, UAE, leading to a series of payment instructions from the bank's customers to the fraudsters. In these circumstances, did the bank owe the claimants a duty of care?

The bank's basic duties

The basis of the contract between (i) a bank and (ii) its customer with a current account is settled law. See the House of Lords decision of *Foley v Hill* (1848) 2 HL Cas 28: under ordinary circumstances a bank is not a trustee or fiduciary of money deposited by a customer, but simply a debtor. The bank is obliged to repay to the customer, on demand, an equivalent sum to that deposited.

In *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340, 1356, May LJ held that there is nothing in the contract between a bank and its customer which could require a banker to consider the commercial wisdom or otherwise of a particular transaction.

Under common law, a contract for the supply of services in the course of business implies a term that the provider will carry out such services with reasonable care and skill.

The Quincecare Duty

The mischief which the Quincecare Duty addresses is the case where (i) a payment instruction is given to a bank by (ii) an agent who was an authorised signatory of the customer's account but acting fraudulently. A banker must refrain from executing such an

order if and for as long as the banker has reasonable grounds for believing that the order is an attempt to misappropriate funds.

The Quincecare Duty was formulated as operating in conflict with other duties, such conflict being between the bank's duties (i) to execute valid payment instructions and (ii) to carry out services with reasonable care and skill.

The flaws in Quincecare

It is at paragraph [63] of *Philipp* where the Supreme Court's criticism of *Quincecare* begins. The line of authority supporting the formulation of the Quincecare Duty is discussed at [90] and [91] of *Philipp*, and the Supreme Court notes in particular that there shouldn't be a conflict between (i) a bank's duty of care to verify an agent's authority (as it should do when carrying out its services with reasonable care and skill) and (ii) its duty to execute a valid order to transfer money promptly.

The Supreme Court's conclusion on the Quincecare Duty

The Supreme Court's conclusions on the Quincecare Duty are at [97] of *Philipp*: in essence, this duty is a general duty of care owed by a bank to "interpret, ascertain and act in accordance with its customer's instructions." However, where a bank is 'put on inquiry' in the sense of having reasonable grounds for believing that a payment instruction given by an agent purportedly on behalf of the customer is an attempt to defraud the customer, this duty requires the bank to refrain from executing the instruction without first making inquiries to verify that the instruction has actually been authorised by the customer.

The Court also emphasised that this duty was not limited to corporate customers: it applies wherever one person is given authority to sign cheques or give other payment instructions to a bank on behalf of another.

The revelatory finding is that the so-called Quincecare Duty has no application to a situation where, as in *Philipp*, the customer was a victim of APP fraud: "the bank's duty is to execute the instruction and any refusal or failure to do so will prima facie be a breach of duty by the bank." This will be of significant interest to offshore bankers and Registered Agents who may be anxious about the limit on their liability in situations where they have made reasonable enquiries in respect of the authority of an agent giving a payment instruction.

In conclusion, therefore, the fact that a customer's payment instruction may have been induced by fraud entitles the customer to claim repayment from the fraudster but does not invalidate the instruction or give rise to any claim against the bank.

Effect of *Philipp* in the BVI

The pursuit of relief following a misappropriation of funds based on wrongful instructions is not typically fast, particularly in circumstances where the misappropriation only becomes clear following an appointment of office-holders.

Practically, therefore, it is important to understand — when considering potential defendants and limitation periods — that a validly executed payment instruction will likely leave a customer

seeking to make a recovery (in circumstances where the instruction is induced by fraud) without any recourse against the paying bank.

Another important consideration is whether the Quincecare Duty can extend to non-banks: In circumstances where the duty has been reformulated as an extension of the duty to provide a service with reasonable care and skill, it is possible to see circumstances in which a cryptocurrency exchange, for example, might attract such a duty of care.

The Quincecare Duty has been recognised in the BVI: the EC Court of Appeal, in *Tibit Limited v Federal Republic of Nigeria* [BVIHCMAP2021/0042] (24 March 2023, unreported) (at [52]), recognised that "the Quincecare duty imposes a duty on a bank to refrain from carrying out its customer's instructions when it is put on notice that the instructions may be the result of a fraud" (emphasis added). Although this is not an inaccurate statement of the law post-*Philipp*, it is incomplete since the duty is arguably no longer restricted to banks.

Another important consideration is whether the Quincecare Duty can extend to non-banks.

A further on-point authority is the 2021 EC Court of Appeal judgment from the Saint Vincent and the Grenadines case of *RBTT Bank Caribbean Limited v Nicholson anor* [SVGHCVP2016/0005] (22 March 2021, unreported): this case looked at the Quincecare Duty and its application, drawing a similar conclusion (at [34]) to the Supreme Court in *Philipp* that "[the Quincecare Duty requires] a bank to act with reasonable skill and care to combat fraud and protect its customers."

It is arguable that, offshore, there has been a slight widening of the scope of the duty to act with reasonable skill and care following *RBTT*: the facts of that case concerned the loss of a debit card and its associated PIN and the bank's failure to put a bar on the same following notification by the customer. There was no instruction from a customer to the bank to execute a payment instruction; instead, the instruction was to prevent payments. Arguably there was no requirement for a diligent banker to have considered the authority of the person giving the instruction; the notice was actual and not constructive, distinguishing it from the facts of *Quincecare*.

Effect of *Philipp* in the Cayman Islands

There are no recorded decisions applying the Quincecare duty in the Cayman Islands Grand Court, but the applicability of the English common law in the jurisdiction means that the effect of *Philipp* will still be of interest to practitioners in the jurisdiction.

Conclusion

The Quincecare Duty has been applied in the BVI and it remains good law; however, the re-formulation of the Quincecare Duty as an extension of the duty to provide services with reasonable care and skill is potentially a widening of the scope from banks to other possible parties who operate accounts on behalf of their customers.

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