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3VB's finance column: When do banks have to pay? Lessons from the Supreme Court's reconsideration of the Quincecare duty

by Alexia Knight and Devon Airey, 3 Verulam Buildings

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Alexia Knight and Devon Airey, of 3 Verulam Buildings look at the recent decision in *Philipp v Barclays Bank Plc [2023] UKSC 25* in which the Supreme Court reconsidered the Quincecare duty. The authors consider the bank's liability when executing payment instructions.

Authorised push payment ("APP") fraud, where the victim instructs its bank to send money to the fraudster's account, is among the most prevalent frauds in the UK.

Victims of APP fraud invariably realise too late and, once payment is made, have little chance of recovering funds from the fraudster. Many therefore seek to recover funds from their bank.

Philipp v Barclays Bank Plc [2023] UKSC 25 is one such case. In March 2018, a fraudster deceived Mrs Philipp into making two international payments from her account to separate bank accounts in the United Arab Emirates (UAE) under the pretext of assisting an investigation of the Financial Conduct Authority and the National Crime Agency. She lost £700,000.

The decision raises a number of important issues. While it usefully limits the scope of a bank's liability to its customer in circumstances of APP fraud, it also leaves unanswered important considerations essential to whether a bank will be held liable to its customer for losses sustained by APP fraud.

The Supreme Court limits a bank's liability when executing payment instructions

The essential question before the Supreme Court was whether a 'Quincecare duty' was owed to Mrs Philipp ([27]). The duty, deriving from Steyn J's decision in *Barclays Bank plc v Quincecare Ltd [1992] 4 All ER 363*, was considered relatively infrequently by the courts until a sudden flurry of recent decisions, including from the Supreme Court and Privy Council (see, for example, *Singularis Holdings Ltd (in liquidation) v Daiwa Capital Markets Europe Ltd [2019] UKSC 50; Stanford International Bank Ltd v HSBC Bank plc [2022] UKSC 34* and *Royal Bank of Scotland International Ltd v JP SPC 4 [2022] UKPC 18*).

The decision is a welcome result for banks for the following reasons:

- **The Supreme Court effectively removed the Quincecare duty.** Lord Leggatt, giving judgment for the Supreme Court, rejected the notion that there existed '*some special or idiosyncratic rule of law*' ([97]) in the form of the Quincecare duty. In so doing, Lord Leggatt overturned the Court of Appeal's decision, which was '*inconsistent with first principles of banking law*' and wrong in its application of *Quincecare* ([3]).
- **The Supreme Court clarified that a bank's strict and primary duty is to perform its mandate.** The court's *ratio decidendi* was that when a bank receives unequivocal instructions from its customer or a customer's authorised agent, its only duty is to carry out the instruction promptly. This is a strict duty and therefore, in the vast majority of cases, there will be no scope for the application of a duty of reasonable care and skill ([30]). The judgment accords with well established principles of banking law. As Lord Sumption recognised in the Hong Kong Court of Appeal: '*the law cannot coherently treat compliance with an authorised instruction as a breach of duty*' (*PT Asuransi Tugu Pratama Indonesia TBK v Citibank NA [2023] HKCFA 3*).
- **The Supreme Court considered when a bank would fall under a duty of care.** A bank is only obliged to exercise reasonable care and skill in interpreting, ascertaining and acting in accordance with instructions, if – and only if – there is 'latitude' in interpreting the instructions ([35], where the Supreme Court cited with approval *Selangor United Rubber Estates Ltd v Cradock (No 3) [1968] 1 WLR 1555*.

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- **The Supreme Court identified limits on when a bank will be obliged to make inquiries.** A bank will not be obliged to make inquiries unless the customer is acting through an agent (for example, a company acting by its director, or a personal customer with an agent with power of attorney). A person cannot steal from themselves ([51]; see *Singularis Holdings Ltd (in liquidation) v Daiwa Capital Markets Europe Ltd [2019] UKSC 50 at [37]*). Accordingly, where an agent acts dishonestly in attempting to defraud the customer, the agent does not act with actual authority ([71]). An agent can act with apparent authority, and therefore bind the customer to the fraud, unless a bank is 'on notice' of the customer's agent's fraud. Where a bank is 'on notice', it must make the inquiries that a reasonable bank would have made in all the circumstances to verify the agent's authority ([89]-[90]). A failure to do so risks liability for breach of its contractual duty of care and breach of mandate ([97]). Where such a duty arises, it applies regardless of whether the bank's customer is a corporate or an individual ([98]).

The Supreme Court left unanswered several important issues

Despite the useful clarification of a bank's limited duties to its customer when executing payment instructions, the decision leaves several important issues unanswered.

When is a bank 'put on notice' of an agent's fraud?

The Supreme Court provided little guidance on when a bank would be 'put on notice', save that it must have '*reasonable grounds for believing that a payment instruction given by an agent purportedly on behalf of the customer is an attempt to defraud*' ([97]). In *Lipkin Gorman v Karpnale Limited [1989] 1 WLR 1340* (cited in *Singularis Holding Ltd (In Official Liquidation) v Daiwa Capital Markets Europe Ltd [2017] EWHC 257 (Ch)* at [166-167]) Parker LJ stated:

> The question must be whether, if a reasonable and honest banker knew of the relevant facts, he would have considered that there was a serious or real *possibility, albeit not amounting to a probability, that its customer might be being defrauded*. (emphasis added)

Invariably it is a question of fact. As May LJ noted in *Lipkin*, courts are hesitant to lay down any detailed rules in this context (see *Singularis* at [164]). Nonetheless, some guidance can be distilled from case law. At a general level:

- Establishing that a bank was 'put on notice' is difficult. There must be 'obvious' and 'glaring' signs of the agent's fraud (*Singularis* at [192]).
- There needs to be a 'clear focus' on notice of the matter that has vitiated the instruction and not any different or wider potential concern: 'it is a question of maintaining a distinction between the fraud which is critical and the many frauds which are not.' Although the Federal Republic of Nigeria raised concerns regarding JP Morgan's compliance with anti-money laundering and financial crime prevention best practices, this was insufficient to put JP Morgan on notice of the particular fraudulent transactions. (*Nigeria v JP Morgan Chase Bank NA [2022] EWHC 1447 (Comm)* at [158] and [345]).

More specifically, in the very few cases a bank was 'put on notice':

- It received payment instructions when it was aware that its customer was in dire financial straits (for example, its assets were frozen, and it was public knowledge that the company was undergoing insolvency/restructuring of substantial debts) (*Singularis*).
- The reason behind the payment differed from the usual motif (*Aegis Resources DMCC v Union Bank of India (DIFC) Branch [2020] DIFC CFI 004*).
- The beneficiary was not an entity the customer had previously dealt with (*Aegis Resources DMCC*).

The Supreme Court in *Philipp* canvassed the possibility raised in the Australian case of *Ryan v Bank of New South Wales [1978] VR 555* at p.579 that a bank should not comply with a payment instruction if a reasonable banker properly applying his mind to the situation would know that the account holders would not desire their orders to be carried out if they were aware of the circumstances known to the bank. Nonetheless, the court emphasised that it was not necessary for the purpose of deciding the appeal to express a concluded view ([108-109]).

Do banks have a duty to take reasonable steps to recover funds?

It is important to remember that the Supreme Court did not dismiss Mrs Philipp's claim entirely. Mrs Philipp's secondary case (that Barclays had failed to take reasonable steps to recover her funds once the fraud was identified), is being remitted to the High Court. It remains to be seen whether there is a duty on banks to take reasonable steps to try to recall payments made once the customer instructs them to do so ([115]-[119]).

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Regulatory developments in relation to APP fraud

The Supreme Court made clear that, as far as prevention of APP fraud goes, it is for regulators to impose solutions. The question of whether a bank should be liable for failing to prevent fraud is a 'question of social policy for regulators, government and ultimately for Parliament to consider' ([6], [22-23] and [67]).

In the time between the hearing in February 2023 and judgment being handed down, the *Financial Services and Markets Bill* passed into law. Section 72 of FSMA 2023 imposes a requirement to reimburse payment service providers in such 'qualifying cases' of payment orders executed subsequent to fraud or dishonesty. It provides for a 50/50 allocation of losses between the sending and receiving providers. However, the scheme, expected to be operational in April 2024, does not apply to international payments. Mrs Philipp and other victims of APP fraud who have transferred amounts abroad will remain without regulatory recourse.

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