

Philipp v Barclays Bank PLC:
An expansion of the *Quincecare* Duty?

Andrew Brown

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Plan of Action:

1. Why is this important? Fraud and recovery...
2. What is the *Quincecare* Duty? Some cases
 - Barclays Bank Plc v Quincecare Ltd* [1992]
 - Verjee v CIBC Bank & Co Ltd* [2001]
 - Re Singularis Holdings Ltd* [2020]
3. Summary of Principles
4. *Philipp v Barclays Bank Plc* [2022]
6. What the future holds, and how *Philipp* helps

Fraud and Recovery of Assets

- Fraud is an ever-present issue with increasingly sophisticated schemes targeting individuals and companies.
- One of the biggest issues with fraud is not proving it happened, but recovering the assets.
- Law has developed various means of recovering from individuals not directly responsible for fraud, eg: Knowing Receipt or Dishonest Assistance
- What about banks?
 - Is there a duty on banks to try and prevent fraud against their customers?

Two duties of a bank

1. Primary Duty: As agent for the custom to act upon the instructions of the customer, and to do so promptly to avoid financial loss to the customer
2. *Quincecare* Duty: The bank must use reasonable skill and care in and about executing the customer's orders, which includes not shutting one's eyes to dishonesty, acting recklessly when it should make inquiries as an honest and reasonable man would make, acting despite knowing of an underlying dishonesty, and the bank should refrain from executing an order if and for so long as it was put on inquiry by having reasonable grounds for believing that the order was an attempt to misappropriate funds.

Barclays Bank Plc v Quincecare Ltd [1992] 4 All Er 363

- Actually decided in 1988, but reported in 1992 (and only in the All Er's);
- Company had a bank account with Barclays;
- Director of Company directed the bank to transfer over £300k to a firm of solicitors, who subsequently transferred it to the D's bank account in the States;
- D absconded and spent all the monies;
- D told the bank when making the transactions they were for the company;
- D had been with company for a lengthy period, was known to the bank, and gave a legitimate reason for the transfers.

Barclays Bank Plc v Quincecare Ltd [1992] 4 All Er 363 Stynn J

- *If the bank executes the order knowing it to be dishonestly given, shutting its eyes to the obvious fact of the dishonesty, or acting recklessly in failing to make such inquiries as an honest and reasonable man would make, no problem arises: the bank will plainly be liable. But in real life such a stark situation seldom arises. [...]*
- *The critical question is: what lesser state of knowledge on the part of the bank will oblige the bank to make inquiries as to the legitimacy of the order? [...]*
- *In my judgment the sensible compromise, which strikes a fair balance between competing considerations, is simply to say that a banker must refrain from executing an order if and for as long as the banker is 'put on inquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company [...]*
- *And, the external standard of the likely perception of an ordinary prudent banker is the governing one*

Verjee v CIBC Bank & Co Ltd [2001] Lloyd's Rep. Bank 279

- V gave blank cheque to an associate, who filled it in for £20,000 without authority and presented it at the bank;
- Honouring cheque took V's account from in funds to overdraft;
- Bank presented statutory demand against V for the overdraft, V applied to set-aside the stat demand on the ground of breach of duty by bank;
- Stat Demand test is analogous to summary judgment;
- Held no triable issue (in effect the Bank could win on summary judgment), stat demand stays.

Re Singularis Holdings Ltd [2020] AC 1189 (SC)

- 'Small' sole-shareholder company incorporated to manage business assets of a Saudi businessman;
- The shareholder was one of six directors, but had unique and exceptional powers to control the finances of the company (essentially because the assets were his);
- He instructed bank to make payments of \$204million to other companies in his business group, which were misappropriations;
- Company was liquidated, liquidator claimed against bank (Daiwa) for dishonest assistance and breach of *Quincecare* duty;
- Dishonest assistance dismissed, but *Quincecare* breach upheld as bank was aware of the dire financial straits of the director and the other group companies, and the bank was already monitoring the account, but did nothing to stop the impugned payments.

Re Singularis Holdings Ltd [2020] AC 1189 (SC)

- Lady Hale summarised the principles at [1]:

"In Barclays Bank v Quincecare [1992] 4 All ER 363 , Steyn J held that it was an implied term of the contract between a bank and its customer that the bank would use reasonable skill and care in and about executing the customer's orders; this was subject to the conflicting duty to execute those orders promptly so as to avoid causing financial loss to the customer; but there would be liability if the bank executed the order knowing it to be dishonestly given, or shut its eyes to the obvious fact of the dishonesty, or acted recklessly in failing to make such inquiries as an honest and reasonable man would make; and the bank should refrain from executing an order if and for so long as it was put on inquiry by having reasonable grounds for believing that the order was an attempt to misappropriate funds."

Summary of the *QuinceCare* Duty

- Bank owes two duties:
 - Primary: to act on instructions of client quickly;
 - Secondary: a fiduciary duty to act with reasonable care and skill, which can involve delaying or raising inquiries where the Bank has a reasonable suspicion of an attempt to misappropriate funds.
- Standard to judge the bank against is the reasonable banker.
- The line of authorities where the duty has been found involve agents making payment instructions.
- Factual matters are important: In *Verjee* and *Quincecare* the bank was not liable as the payment requests appeared legitimate.

Philipp v Barclays Bank UK Plc [2022] EWCA Civ 318 - Facts

- APP fraud (see next slide for details of how this works).
- C instated two payments from her (and husband's) life savings totalling £700,000 to an account in the UAE.
- Payment instructions given on two occasions in-person. Initially refused by bank, but then actioned.
- No safeguarding questions asked by bank nor scam warnings.
- Money gone in the wind.
- C claimed against Barclays for breach of duty (*Quincecare*).
- Barclays applied for strike-out on ground of no duty where the client makes the instruction to pay themselves. Claim was struck-out on this ground (plus one other).
- C appealed to the Court of Appeal.
- Bank argued *Quincecare* cannot apply to instructions direct from client, but only through a third-party agent.

Philipp – APP Fraud (Authorised Push Payment Fraud)

- Sounds more complex than it is – lots of examples in the news in recent years.
- The fraudster ('F') committing the fraud contacts the victim ('V') and persuades V to make a payment to the F's bank account.
- The manner/form of the explanation is variable:
 - Sometimes F tells V that a genuine payee has changed their bank details (such as a solicitor or builder's invoice),
 - Sometimes F tells V that their funds are at risk of fraud and that an authority advises them to move them to a 'safe' account operated by that authority (ie. police, bank, govt.).
 - F often withdraws the funds from the account upon receipt so that V is left unable to recoup, and the details of F's account are often a false / stolen identity or an individual abroad.

Philipp v Barclays – Reasoning (Birss LJ)

- *[27] 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.*
- *[28] ...if the circumstances were such that an ordinary prudent banker would be "on inquiry" then the duty arises. The duty is not to execute the order while on inquiry, and to make inquiries. The objective standard is expressed in different ways in different cases but they are equivalent: the ordinary prudent banker, the reasonable bank manager, and the honest and reasonable banker are the same person.*
- *[30] Crucially the line of reasoning identified does not depend on whether the instruction is being given by an agent. It is capable of applying with equal force to a case in which the instruction to the bank is given by a customer themselves who is the unwitting victim of APP fraud provided the circumstances are such that the bank is on inquiry that executing the order would result in the customer's funds being misappropriated.*
- He further went on to hold that the factual matters of whether the Bank was 'on notice' and had acted reasonably were issues of fact for trial, not for summary judgment.
- Watch this space for the remitted trial.

Takeaways / what the future holds

- General thought was that the *Quincecare* duty would only apply to agency cases where the fraudster was the agent;
- Secondary literature backed this, so Banks didn't face claims for *Quincecare* in APP fraud claims;
- Door is now opened to pursue such claims;
- Still factual at its heart – was the bank on notice to make inquiries, if so, did it do appropriate inquiries to protect the client;
- Provides a further tool for fraud recoveries.

Any Questions?

Andrew Brown

Radcliffe Chambers

Abrown@radcliffechambers.com

020 7831 0081

Radcliffe Chambers

Radcliffe Chambers
11 New Square
Lincoln's Inn
London WC2A 3QB

T: 020 7831 0081
F: 020 7405 2560
DX: 319 London
clerks@radcliffechambers.com

www.radcliffechambers.com

