# Feature

KEY POINTS

* In *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363, Steyn J famously stated *“*trust, not distrust, is [...] the basis of a bank’s dealings with its customers”. In the modern age of cryptocurrency transactions, do the same principles apply to an exchange’s dealings with its customers?
* In *Tulip Trading Ltd v Bitcoin Association for BSV* [2022] EWHC 667 (Ch), Falk J doubted that would be the case because of the different contractual relationship between exchange/customer.
* Ultimately all of these issues will have to be considered in light of the recent Supreme Court judgment in *Philipp v Barclays Bank* [2023] UKSC 25 which decided that *Quincecare* does not apply in cases of authorised push payment fraud, as to find otherwise would be *“*inconsistent with first principles of banking law”.

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“Trust, not distrust”: can Quincecare apply to cryptocurrency transactions on exchanges?

The duty in Quincecare can prove a difficult principle to apply in practice. In the current age of cryptocurrency fraud and the open question of the scope of an exchange’s liability, is now an appropriate time to extend duties found in banking law to the activities of an exchange, or is that taking matters too far?

shuts its eyes to the obvious fact of dishonesty or acts recklessly “in failing to make such inquiries as an honest and reasonable man would make, no problem arises: the bank will plainly be liable”. However, such clear facts

are seldom reality. In judging where the line

## INTRODUCTION

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*“*Banking law today is an amalgam of many different strains*”* write the editors in their preface to *Paget’s Banking*

*Law*, 16th Ed. These are *“*duties and remedies that would have been familiar to a Victorian lawyer, subsequent statutes, and copious modern regulation”. Whether those strains are capable of stretching towards the cutting-edge world of cryptocurrency is not a straightforward question because one is no longer dealing with a traditional bank.

The duty encapsulated by Steyn J in *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363 (*Quincecare* and the Quincecare duty) is a fruitful starting point in analysing the scope of liability a cryptocurrency exchange (among other types of defendant) could face. Where dissipation of assets can happen *“*at the click of a mouse*”* (*Danisz v Persons Unknown* [2022] EWHC 280 (QB) at [11] per Lane J), it is important to consider

if a cryptocurrency exchange could face liability for the wrongful transfer of cryptocurrency in the same way a bank could for wrongfully executing a payment instruction. In this article, we will attempt to answer that question by looking at the court’s approach to *Quincecare* in different contexts.

When we talk about a cryptocurrency exchange in this article, we are discussing the platform through which customers can convert fiat currency or one type of cryptocurrency into different forms of cryptocurrency. Typically, exchanges store the vast majority of their customers’ cryptocurrency in an offline or

“cold” wallet, keeping some of it active in a“hot” wallet online. The most analogous scenario to *Quincecare* would therefore be a case where an agent of the customer tries to get the exchange to transfer the asset into another form of currency and/or to a private wallet out of the customer’s reach. An alternative is where a malefactor gains access to a customer’s exchange account and moves large amounts out of the same.**1**

## REVISITING THE QUINCECARE DUTY

In *Quincecare* itself, Barclays Bank agreed to lend money to Quincecare for the purpose of buying four chemist shops. Quincecare’s chair, a Mr Stiller, instructed Barclays to transfer the funds purporting to be the drawdown of the loan to a firm of solicitors. In fact, Mr Stiller instructed the solicitors to receive the money on his behalf and transfer it to a bank account he held in the US. After Mr Stiller had misappropriated the monies, Barclays sued Quincecare and its guarantor for repayment of the loan. The defendants argued that Barclays had paid the monies in breach of its mandate or of a duty of care owed to its customer. Steyn J found there was nothing which put the bank on notice of Mr Stiller’s wrongdoing and therefore a duty did not arise.

In formulating the duty, Steyn J grappled with a number of policy concerns, first noting that *“*the bank owes a legal duty to exercise reasonable care in and about executing a customer’s order to transfer money”, but

that this is *“*subordinate to the bank’s other conflicting contractual duties*”*. If the bank

should be drawn, the law *“*should not impose too burdensome an obligation on bankers” but “should guard against the facilitation of fraud*”*. Balancing these issues, Steyn J concluded that:

### “[…] 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. That in my judgment is not too high a standard.”**

More than 30 years after Steyn J’s judgment, cases relating to *Quincecare* have been *“*few and far between” ((2022) 5 JIBFL 352). The first English case in which a financial institution was held liable for breach of the Quincecare duty is *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50 (*Singularis*). The crux of that decision can be found in Rose J’s judgment at first instance ([2017] EWHC 257 (Ch)) at [198]:

### *“*the Quincecare duty does require a bank to do something more than accept at face value whatever strange documents and implausible explanations are proffered by the officers of a company facing serious financial difficulties.”

“TRUST, NOT DISTRUST”: CAN QUINCECARE APPLY TO CRYPTOCURRENCY TRANSACTIONS ON EXCHANGES?

# Feature

***Biog box***

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“TRUST, NOT DISTRUST”: CAN QUINCECARE APPLY TO CRYPTOCURRENCY TRANSACTIONS ON EXCHANGES?

However, *Singularis* was a matter with *“*plenty of evidence*”* that there was *“*something seriously wrong*”* with the way in which the relevant account had been operated which

got over the high bar necessary to make out a breach of the Quincecare duty. This is important to bear in mind when considering

whether *Quincecare* is capable of expansion: the inherent difficulty of proving these cases.

## PHILIPP v BARCLAYS BANK

Fast-forwarding to the Supreme Court’s judgment in *Philipp v Barclays Bank* [2023] UKSC 25 (*Philipp*), this considered the scope of *Quincecare* in the context of Authorised Push Payment (APP) fraud. APP fraud is one of the major causes of economic loss to the public: the UK Finance’s Annual Fraud Update 2023 (2023 Update) records 207,372 incidents of APP scams reported in 2022 with gross losses of £485.2m.**2**

Mrs Philipp and her husband,

Dr Philipp, were customers of Barclays and were defrauded by a third party pretending to be a person working for the FCA in conjunction with the National Crime Agency. Mrs Philipp was induced into transferring £700,000 from her current account to two accounts held in the UAE. Upon being unable to recover the money, Mrs Philipp sued Barclays for breach of its duty under *Quincecare*. The bank applied for summary judgment and was successful at first instance ([2021] EWHC 10 (Comm)). The Court of Appeal overturned this and extended the duty to APP fraud cases ([2022] EWCA 318), but this was reversed on the bank’s successful appeal to the Supreme Court.

Lord Leggatt, delivering the judgment of the court, explained at [63] that “the duty to exercise reasonable skill and care only arises where the validity or content of the customer’s instruction is unclear or leaves the bank with a choice about how to carry out the instruction*”.* Where a customer has given a clear instruction on their own behalf it is difficult to see how that duty can be said to arise. Lord Leggatt concluded there were flaws in the reasoning in *Quincecare* and that the result was justified by the fact that the court was dealing with *“*an attempt by a dishonest agent to misappropriate the principal’s funds*”* ([60]). Such a person does not have actual authority to act on behalf of the principal and the bank may not rely on apparent authority

if it is “put on inquiry” ([90]). The duty itself is not *“*some special or idiosyncratic rule of law. Properly understood, it is simply an application of the general duty of care*”* ([97]).

Therefore, the final restatement of the law is that *Quincecare* is not as special as lawyers and litigants may have first thought. It is simply derived from the duties that may well have been contemplated by the Victorian (or early 20th century) lawyer.**3** On the one hand, *Philipp* may be an indicator that the Quincecare duty is immovable and incapable of expansion beyond a bank and customer relationship. However, if all that we are dealing with is a general duty of care, then perhaps the door is not closed to an analogous duty in relationships similar to those commonly encountered in banking law.

In addition to *Philipp*, another recent limitation on the application of *Quincecare* is illustrated by the decision of the Privy Council in *Royal Bank of Scotland International Ltd v JP SPC 4* [2022] UKPC 18, in which it was determined that a bank did not owe a duty of care to the beneficial owner of monies held in the account of a customer of the bank where the former had been defrauded by the latter. The duty is only to the customer.

## CRYPTOCURRENCY

This turns us to the question of where cryptocurrency falls into the discussion.

The UK government has set out a roadmap for regulating cryptocurrency, with HM Treasury publishing three documents on 30 October 2023.**4** The starting point, unsurprisingly, is to bring so-called “stablecoins”, ie cryptocurrency backed by the value of fiat currency into regulatory line. What this finally looks like in terms of legislation remains to be seen.

In the year end 31 March 2023, the value of reported cryptocurrency fraud in the UK was £306m (an increase of 41% on the previous year).**5** Part of the increase can be explained by the liquidation of the major exchange FTX (whose founder Sam Bankman-Fried has recently been convicted for fraud and conspiracy).

What is clear is that cryptocurrency fraud is another major source of crime in the UK and the number of reported decisions relating to freezing orders and proprietary injunctions shows that the courts have been busy grappling with this growing trend, at least at an interlocutory stage.**6**

## TULIP TRADING

Beyond interim injunctions, the major cryptocurrency litigation that is ongoing in the English courts has been heard by the Court of Appeal in *Tulip Trading v van der Laan* [2023] EWCA Civ 83 (*Tulip Trading*) in which a jurisdiction challenge was defeated, and Tulip Trading therefore permitted to serve its claim outside of the jurisdiction. The claim by Tulip is for a large amount of cryptocurrency held in a private wallet to which Tulip no longer has the private key. The basis of the claim is that the underlying cryptocurrency should be amended so as to reflect Tulip’s ownership (and the software developers behind it should be held to a fiduciary duty to carry out these amendments). The existential ramifications of the case cannot be understated, as Birss LJ concluded at [91]:

### “If the decentralised governance of bitcoin really is a myth, then in my judgment there is much to be said for the submission that bitcoin developers, while acting as

**developers, owe fiduciary duties to the true owners of that property.”**

Falk J’s judgment at first instance ([2022] EWHC 667 (Ch)), which was reversed on the jurisdiction point by the Court of Appeal, considered Tulip’s submission that *Quincecare* could apply because (at [93]):**7**

### “The Networks could be equated with financial institutions, and the absence of a contractual relationship should not make a difference.

**Funds were being entrusted to controllers of the Networks, who profited from their activities, and public policy required the imposition of a corresponding duty of care.”**

Falk J rejected this (and the Court of Appeal did not need to consider the issue) stating at [103]:

### “I am unpersuaded by any analogy with *Quincecare.* The starting point for that duty of care is the contractual relationship between the bank and its customer, and the fact that a banker acts as agent of the customer in executing payment instructions

**[…] in** *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* **[2018] EWCA Civ 84; [2018] 1 WLR 2777 at [87]-[88], [it was**

# Feature

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### held that] the duty is owed only to the bank’s customer, and not to a wider class. At [63] [the court] also described the Quincecare duty as ‘carefully calibrated.’ I do not detect anything in the Court of Appeal’s recent decision in *Philipp v Barclays Bank* [2022] EWCA Civ 318 (which was handed down after the hearing) that affects these points.”

Of course, with the Supreme Court’s overturning of the decision in *Philipp*, it is likely that Falk J’s decision on this point would have been bolstered by the judgment of

Lord Leggatt. As a commentator in this journal has already suggested, it will remain to be seen if the point is taken at trial and how the court will treat it: (2023) 8 JIBFL 539.

These issues will need to ultimately be viewed not only through the lens of the judgment in *Quincecare* but also: (i) the scope of any contractual authority which in the case of developers of cryptocurrency may well be different to the position of an exchange; (ii) whether the defendant in question has the quality of agent and how and when that can place them on inquiry; and (iii) where the line needs to be drawn as to the nature of being placed on inquiry, bearing

in mind that the obligations on banks cannot simply be traced into the cryptocurrency context.

## DISCUSSION

Whilst banking law may be based on a system of trust, the original principle apparently underpinning cryptocurrency *“*is an electronic payment system based on cryptographic proof instead of trust*”*.**8** Nevertheless, the reliance on cryptographic proof has proven disastrous for those victims of cryptocurrency fraud. If the answer is that cryptocurrency is not actually decentralised and ultimately relies upon third- party interventions *viz* exchanges, developers, etc then there will need to be a greater course of regulation both from legislation passed

by Parliament and the expansion of duties developed in the courts.

As to the question of whether *Quincecare* can be applied to exchanges, this seems to be difficult for a number of reasons. First, many exchanges are based out of the jurisdiction and subject to terms and conditions that do not include English choice of law. It is therefore not axiomatic that the Quincecare principle applies to the chosen

legal system. Second, the duty only applies to the customer and not to beneficial owners of the cryptocurrency, which would exclude the many victims of fraud who do not have accounts with the exchange which ultimately ends up holding the proceeds of assets originally owned by them. Third, if the duty cannot arise *ex hypothesi* where a customer has given a valid instruction but is a victim of APP fraud then the same principle will generally prevent a customer from complaining where it has been induced by fraud to give an instruction to their exchange. Fourth, the basis of the customer’s relationship with the exchange is much looser by design and it is unlikely that the latter’s contractual obligations will be as onerous as those upon a bank. Fifth, there is no case law and great uncertainty as to what would in fact put an exchange upon inquiry as to wrongdoing in connection with an instruction by a malfeasant agent of the customer or a fraudster.

One area for more optimism arises from

Lord Leggatt’s identification of a possible qualification to a banker’s duty where the bank has information that is not known to its customer (at [106]-[110]). In that situation, according to Australian authority,**9** a bank may not comply with a payment instruction “if a reasonable bank 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”. It is possible to envisage circumstances in which an exchange (but not its customer) is aware of a pattern of transactions across different accounts which puts it firmly on notice of a fraud and which should cause it to alert its customer accordingly.

## CONCLUSION

The crossover between banking law and cryptocurrency requires working out through case law. The developing *Tulip Trading* saga may be an opportunity to develop the law, but it is unlikely to be definitive not least because it concerns the role of developers rather than exchanges. In relation to the latter, the recent banking case law does not give much succour for those wishing to extend Quincecare

principles to cryptocurrency transactions. ■

1. Interestingly, however, one of the first times

*Quincecare* has been run in a crypto context is against

the developers of bitcoin in the *Tulip Trading* case (see further below) rather than an exchange.

1. http[s://www](http://www.ukfinance.org.uk/system/).uk[fina](http://www.ukfinance.org.uk/system/)n[ce.org.uk/system/](http://www.ukfinance.org.uk/system/) files/2023-05/Annual%20Fraud%20Report%20 2023\_0.pdf. Whilst this is down significantly from the reports in 2021 totalling gross losses of

£583.2m, APP fraud remains endemic in the UK.

1. See Lord Leggatt’s discussion of the developments in the law of banking and agency from, *inter alia*, *Foley v Hill* (1848) 2 HL Cas 28, *Bodenham v Hoskins* (1852) 21 LJ Ch 864, and *Gray v Johnston* (1868) LR 3 HL 1, to *Reckitt v Barnett, Pembroke & Slater Ltd* [1929] AC 176: *Philipp* at [28] to [33] and [81] to [89].
2. (i) ‘Future financial services regulatory regime for cryptoassets’; (ii) ‘Update on Plans for the Regulation of Fiat-backed Stablecoins’; and

(iii) ‘Managing the failure of systemic digital settlement asset (including stablecoin) firms’.

1. http[s://www](http://www.rpc.co.uk/press-and-media/).rpc[.co.uk/press-and-media/](http://www.rpc.co.uk/press-and-media/)

value-of-uk-crypto-fraud-reports-increases/. RPC was provided its data by Action Fraud.

1. For example: *Danisz v Persons Unknown* [2022]

EWHC 280 (QB) (Lane J), *Osbourne v Persons Unknown* [2022] EWHC 1021 (Comm) (HHJ

Pelling QC) and *Piroozzadeh v Persons Unknown*

[2023] EWHC 1024 (Ch) (Trower J). For

commentary on interim remedies generally in this context see (2022) 10 JIBFL 697.

1. Also applying *“*the discussion in *Federal Republic*

*of Nigeria v JP Morgan Chase Bank* [2019] EWHC 347 (Comm) (*JP Morgan*) at [26]-[31]

where Andrew Burrows QC, sitting as a High Court judge, suggested that the Quincecare duty could extend beyond a negative duty (not to pay) to a positive duty of enquiry”.

1. Nakamoto, Satoshi. ‘Bitcoin: A Peer-to-Peer

Electronic Cash System.’ 2008, p 1.

1. *Ryan v Bank of New South Wales* [1978] VR 555 at 579 (per McGarvie J).

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