Quincecare revisited: when push comes to shove…

The Court of Appeal has opened the floodgates for customer claims against banks arising from fraudulent payments: Caroline Harbord & Nicholas Owen discuss what may come next

IN BRIEF

▶ The facts and implications of *Philipp v Barclays*, which saw the Court of Appeal allow a claim that the bank was obliged, via the *Quincecare* duty, to refrain from processing a fraudulent (albeit authorised) payment to proceed.

Retail banks will be nervously monitoring the progress of *Philipp v Barclays Bank UK plc (Consumers' Association intervening)* [2022] EWCA Civ 318 following Barclays' unsuccessful attempt to strike out the claim.

Absent a successful appeal by Barclays to the Supreme Court, Mrs Philipp's claim will now proceed to trial and, if successful, her claim may well leave banks exposed to eye-watering liabilities to customers who fall victim to authorised push payment fraud (and other fraudulent payment schemes).

Mrs Philipp's claim, which is discussed further below, centres around whether Barclays was obliged, via the *Quincecare* duty, to refrain from processing a customer's payment instructions in circumstances where said customer had unwittingly fallen victim to a fraud. Prior to the Court of Appeal's recent judgment, it was widely considered that the *Quincecare* duty (derived from *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363; ie a bank's duty to stop payments when put on inquiry of a potential fraud) only applied to payment instructions given by a customer's agent. Those widely held assumptions have now been challenged with the Court of Appeal finding that *Quincecare* may also be applicable when payment instructions are given directly by customers to their banks.

In this article, we explore the facts of *Philipp v Barclays*, the Court of Appeal's novel approach to *Quincecare*, and the many questions which will remain unanswered at least until Mrs Philipp's claim proceeds to a full trial.

Background

Mrs Philipp was deceived by a fraudster known as 'JW'. JW convinced Mrs Philipp that she was co-operating with the Financial Conduct Authority and National Crime Agency. Following conversations with JW and after being tricked into thinking that she was taking steps to protect herself from fraud, Mrs Philipp twice visited branches of Barclays and in March 2018 instructed Barclays to transfer £700,000 (the bulk of her and her husband's life savings) to a petroleum company in the United Arab Emirates. By the time Mrs Philipp realised that she had been defrauded, the money could not be recovered.

Mrs Philipp was the victim of a recognised fraud known as 'authorised push payment' (APP) fraud. A 'push' payment occurred because Mrs Philipp instructed Barclays to pay the monies herself (in contrast to a 'pull payment' where JW, or JW's accomplices, would have found a way to instruct Barclays to transfer the money from Mrs Philipp's account). The payments are considered to be 'authorised' as, from the bank's perspective, the payments had been approved personally by Mrs Philipp.

The *Quincecare* duty

Mrs Philipp's claim is, in essence, a claim that Barclays is liable to her for breaching the *Quincecare* duty—a duty which was coincidentally established in another case involving Barclays.

The *Quincecare* duty requires banks to observe reasonable skill and care when processing and executing customers' instructions.

Pursuant to the implied term found to exist between banks and their customers in the eponymous *Quincecare* case, banks must refrain from processing payment instructions once they have been put 'on inquiry' that the payment instructions may have been given dishonestly.

It has been observed (including in the recent Supreme Court judgment in *Singularis Holdings Ltd (in liquidation) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50, [2019] All ER (D) 182 (Oct)) that the *Quincecare* duty exists in tension with the primary duty of banks to process payment instructions promptly. Despite this, established law demands that banks should not make payments for as long as an ordinary and prudent banker would have reasonable grounds for believing that instructions may amount to an attempt to misappropriate funds.

It had been assumed that *Quincecare* was a negative duty (ie a duty to refrain from processing a payment) but the judgment in *JP Morgan Chase Bank, NA (JPMC) v Federal Republic of Nigeria (FRN)* [2019] EWCA Civ 1641, [2019] All ER (D) 44 (Oct) suggested that 'something more' than inaction would be required of banks to avoid breaching *Quincecare*. The words 'something more' are plainly nebulous, but imply banks have a responsibility to do something other than remain passive in the fight against fraud. What that 'something' is will inevitably vary and depend on the specific facts of a given case.

The Court of Appeal's ruling

The primary question considered by the Court of Appeal was whether *Quincecare* could be applicable to banks in circumstances in which *a customer* had themselves authorised a transaction giving rise to the fraud. Barclays argued that extrapolating *Quincecare* to cover such circumstances would be to either identify a novel duty of care or extend *Quincecare* unwarrantedly. Barclays submitted, and the High Court at first instance agreed, that *Quincecare* only applied to banks where payment instructions were not properly authorised and had been made by a customer's agent.

In overturning the High Court's decision, Birss LJ made clear that he was neither establishing a novel duty nor extending *Quincecare*. Birss LJ noted that that existing case law, including *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] All ER (D) 47 (Feb), makes it clear that *Quincecare* is not limited to agents but applies to *any case* in which the bank is on inquiry that the instruction is an attempt to misappropriate funds. Birss LJ made explicit reference to the comments referred to above in *JPMC v FRN* and noted that banks having a positive duty to actually take action in combatting fraud would not sit comfortably with *Quincecare* being limited to unauthorised payment instructions

It was on this basis alone that the Court of Appeal allowed Mrs Philipp's appeal. The judgment noted that the question of whether Barclays should have been 'on inquiry' in the present case will only be resolved by carefully considering at trial the specific facts giving rise to the fraud and the policies and procedures banks ought to have had in place in March 2018. Clearly, comprehensive clarity as to the scope of *Quincecare* will only exist following that trial, but it is not unhelpful for fraud victims (including Mrs Philipp) that the Court of Appeal observed in obiter that Barclays may have been put 'on inquiry' by the size (and unprecedented nature) of Mrs Philipp's transfers, the fact that she was moving money that had only recently been transferred to her account, and/or the fact that the recipient was based in the United Arab Emirates.

Implications

Retail banks will most likely need to revisit their policies and procedures for detecting and preventing APP fraud and/or reversing monies that have been misappropriated by virtue of it.

Banks may already be reviewing their policies, but they will at present have to rely on the decidedly vague guidance in *JPMC v FRN* that they should do 'something more'. Judicial clarification on what 'something more' means would certainly be welcomed if and when Mrs Philipp's claim proceeds to trial.

In light of the Court of Appeal's judgment, banks may be more inclined than ever before to exclude *Quincecare* in their terms of business. That said, whether or not it is possible to successfully exclude *Quincecare* remains equally uncertain given the fact that, when JPMC sought to strike out FRN's claim on the basis that their terms excluded *Quincecare*, they were told that their contractual provisions were insufficiently clear. While an unequivocal contractual exclusion could theoretically protect banks, in practice such provisions would likely be the subject of judicial scrutiny and, notwithstanding their clarity, could well be found to fall foul of the Unfair Contract Terms Act 1977 and Consumer Rights Act 2015. **NLJ**

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