2021: DEVELOPMENTS IN QUINCECARE

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The Supreme Court's 2019 decision in Singularis[1], the first in which a breach of Quincecare duty[2] was found, brought about a rejuvenated appetite for a duty that had lain relatively dormant for decades. This year's cases have further tested the limits and application of the duty.

For example, is the duty owed to creditors? Is it owed to non-customer beneficial owners of an account? How if at all can the duty be excluded by contractual terms? Further and significantly, the subject matter of cases also reflects the massive technological advances since the duty was first articulated, nearly thirty years ago. With those advances have come sophisticated APP [3] and phishing scams, and customers seeking redress for their losses by invoking the Quincecare duty against deep-pocketed financial institutions.

Below we summarise key 2021 decisions on Quincecare. Along the way, we illustrate some of the apparently divergent approaches across different jurisdictions and contemplate what may be in store for the Quincecare duty in 2022 and beyond.

England and Wales

Philipp v Barclays Bank UK Plc[4]

2021 started off well for financial institutions with January's decision in Philipp restricting the ambit of the Quincecare duty to internal fraud only, i.e. fraud by an authorised or trusted agent of the customer.

The case involved an APP fraud. Mrs Philipp sought to hold Barclays accountable for her loss on the basis that it had failed to comply with a duty to have in place policies and procedures for detecting potential APP fraud and to protect her from its consequences.

1 Singularis Holdings Ltd (in Official Liquidation) (A Company Incorporated in the Cayman Islands) v Daiwa Capital Markets Europe Ltd [2019] UKSC 50

2 Barclays Bank plc v Quincecare Ltd [1992] 4 All ER 363. Per Steyn J (as he then was), this is the duty of a banker to "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 … for believing that the order is an attempt to misappropriate the funds of the company". Following the decision of the English High Court in Hamblin v World First Limited [2020] EWHC 2383 (Comm), it seems that the Quincecare duty extends to financial institutions more widely (Hamlin involved a payment services provider)

3 "Authorised Push Payment" fraud. This is a scam involving the fraudster tricking a victim into willingly making large bank transfers to the fraudster

4 [2021] EWHC 10 (Comm)

Unfortunately for Mrs Philipp, HHJ Russen struck out her claim. He found that Mrs Philipp was in effect inviting the court to extend the Quincecare duty beyond the confines of attempted misappropriation of the customer's funds by the customer's agent, to situations involving ostensibly freely willed transactions of the customer herself. Such an extension (found the ourt) would elevate the Quincecare duty, which is subordinate or ancillary to the bank's primary duty to act on the customer's instructions, to a point where there would be too much doubt over the effectiveness of customers' instructions. Further, there is no clear framework of rules by reference to which such an extended duty might operate, and the purpose of the Quincecare duty really relates to testing the genuineness of the instruction to pay monies, not the genuineness of the payee[5].

Yet it seems this is not the last word on the matter; Mrs Philipp has been granted permission to appeal, with the appeal due to be heard in February 2022. Given the prevalence of APP fraud, this decision may have significant implications for financial institutions.

Stanford International Bank Ltd ("SIB") v HSBC Bank Plc[6]

April brought further good cheer for the financial institutions, with the Court of Appeal's decision in Stanford.

The case concerns the multi-billion dollar Ponzi scheme masterminded by the now notorious Robert Stanford. The Court of Appeal found that SIB had suffered no loss capable of sounding in damages for breach of the Quincecare duty in respect of c.£116m of the c.£118m claimed. That c.£116m had been paid to discharge SIB liabilities pre-liquidation. While it was the case that had the c.£116m not been paid out, there would have been more in the pot for creditors upon liquidation, HSBC did not owe a Quincecare duty to SIB's creditors, only to SIB – even if SIB was insolvent at the time of the payments. As the payments were balance sheet neutral, SIB had not lost anything[7].

The cheer for financial institutions was perhaps dampened when the Supreme Court granted SIB permission to appeal, with the appeal due to be heard in early 2022. We understand the grounds of appeal will provide the Supreme Court the opportunity to clarify whether recoverable losses for breach of the Quincecare duty are confined to payments that impact the customer's balance sheet or whether they can extend to payments reducing assets available for distribution in insolvency.

The Rest of the World

Scotland: Sekers Fabrics Limited v Clydesdale Bank[8]

Sekers was another APP fraud case. However, in a chink of light for victims of APP fraud, the Court of Session declined to strike out Sekers' claim.

While the court declined to find that the Quincecare duty extends beyond internal fraud [9], Lord Clark distinguished Philipp; the claimant's case there was much broader than the case here and earlier authorities bearing upon the bank's general implied duty of care, under its contract with the bank, to exercise reasonable skill and care, were not before the court[10]. In particular, Sekers involved pre-authorisation communications between Sekers and Clydesdale regarding whether the individual who had contacted the claimant was a genuine member of the bank's staff. The question therefore arose as to whether the existence of a duty to exercise reasonable skill and care may have application in the present context of the pre-authorisation communications with the bank, and if so, whether the bank, when giving advice, fell below the required standard.

It remains to be seen if such reliance on a more "general" duty becomes a feature of these types of claims.

Hong Kong: Luk Wing Yan v CMB Wing Lung Bank Ltd[11]

Shortly after Philipp came Coleman J's judgment in the Hong Kong Court of First Instance in Yan. Ms Yan was deceived by a bank employee into transferring significant sums into the employee's personal account for the purpose of an investment with apparently fantastic returns. As the Judge wisely said, "[i]t is often said that if something seems too good to be true, it probably is". So it was.

Ms Yan founded her claim against the bank in negligence on the Quincecare duty. However, in line with Philipp, Coleman J found that the duty is limited to internal fraud. Ms Yan's contention "would require a significant extension to the previously described delineation of that duty" in that the bank's duty would arise when it has reasonable grounds for believing that the payment is meant to defraud the customer "in any way and by any person". This was significantly more onerous than the duty envisaged.

Malaysia: Lee Cheong Chee v HSBC Bank Malaysia Berhad[12]

In 2019, England's Court of Appeal in JP Morgan v Nigeria [13] declined to give summary judgment to JP Morgan on the basis that the Quincecare duty was negated or excluded by the terms of a depositary agreement. This left financial institutions wondering what words (if any) could achieve this purpose.

5 At [158]-[160], [172], [174]
6 [2021] EWCA Civ 535
7 [29] to [39]
8 [2021] CSOH 89 CA13/18
9 [21]
10 Including Hilton v Westminster Bank Ltd (1926) 135 LT 358 CA; Selangor United Rubber Estates Ltd v Cradock (No.3) [1968] 1 WLR 1555; Karak Rubber Co Ltd v Burden (No.2) [1972] 1 WLR 602, at 629. The defender was adopting just such an untenable position; Royal Products Ltd v Midland Bank Ltd [1981] 2 Lloyd's Rep 194 at 198.
11 [2021] HKCFI 279
12 [2021] MLJU 574
13 JP Morgan Chase Bank NA v Federal Republic of Nigeria [2019] EWCA Civ 1641

As Nigeria proceeds to trial (due in 2022), JP Morgan may wish they had been before the judge hearing the Malaysia High Court case of Chee v HSBC. This involved investments by Mr Chee in a fraudulent scheme. He relied heavily upon the Quincecare duty. However, his claim was struck out on the basis that the relationship between a bank and its customers is purely contractual. The court found that to impose onerous duties in tort on the banks would cause banking transactions to slow down or bring them to a stop entirely and customers are solely responsible for transactions; the bank's role is merely to facilitate them, seek authorisation and execute the order.

UAE – DIFC: Aegis Resources DMCC v Union Bank Of India (DIFC) Branch[14]

July brought the DIFC Court of First Instance decision in Aegis. This concerned a phishing scam, whereby the bank paid out money to a fraudster on emailed payment instructions, purportedly from its customer but in fact from a fraudster who had hacked into the customer's email system.

The court found that the bank acted outside its mandate in paying out on fraudulent payment instructions, the terms of the contracts between the parties not entitling the bank to do so if it acted negligently, which it did.

In addition, Aegis succeeded in relying on a breach of the Quincecare duty. On one level, this is understandable; as in Singularis there was a conflation of red flags so that the bank had reasonable grounds for believing the order was an attempt to misappropriate the company's funds [15]. However, this decision does appear to extend the ambit of the Quincecare duty beyond internal fraud (in the sense of being by an authorised or trusted agent of the customer) to phishing, which is carried out by a third party. It remains to be seen whether other jurisdictions will adopt this approach. If so, given the prevalence of phishing, this could have significant implications for financial institutions.

Of interest to financial institutions is also the bank's unsuccessful attempt to rely on various contractual terms to escape liability for breach of its Quincecare duty.

Isle of Man: RBSI v JP SPC 4 & another [16]

In 2020, the Isle of Man Court of Appeal found that, while there is nothing unusual in a bank holding customer accounts which it knows are designated by the bank in a way that indicates the funds are beneficially owned by persons other than the customer, there was no authority shown to the court which indicated that a duty of care in negligence was owed to those beneficiaries. Nor should the duty be so extended.

In January 2021, the Privy Council granted permission to appeal the decision. Should the decision go the claimants' way, by widening the pool of potential claimants, this could also have significant implications for financial institutions.

2022 and Beyond?

It is likely that Quincecare claims will remain a popular route for defrauded parties to pursue – the fundamental reason being that the claims circumvent the need for expensive asset tracing exercises that may have little or no prospect of success.

A raft of eagerly awaited cases are due to be heard in 2022, not least Nigeria, Stanford, RBSI and Philipp. All of the cases have potentially significant implications.

However, in our view, one of the most significant issues is the extent to which the Quincecare duty may adapt to the very different world to that existing nearly 30 years ago, a world of ever evolving and sophisticated frauds, in particular APP and phishing scams. It might be said that adaptation to the modern world would be consistent with the growing reliance on financial institutions to play an important part in reducing and uncovering financial crime and money laundering (a factor noted by Rose J (as she then was) in Singularis). On the other hand, it may simply be a matter of square peg, round hole, and new tools being required to address these issues – for example, by relying on a more general duty or the introduction of new legislation / regulatory obligations for financial institutions.

14 [2020] DIFC CFI 004

15 The payment process being applied for the two payments in question was outside the normal process for Aegis; the beneficiaries were parties with which Aegis had not previously dealt; the Bank was unable (as it was required to do by the contract) to identify whether the beneficiaries were parties with which Aegis was licensed to trade;Aegis had never previously sent money to Mexico; and there was no way of confirming that the payments related to payment connected with the manufacturing of steel

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