QUINCECARE: A PANACEA FOR VICTIMS OF APP FRAUD?

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The Court of Appeal recently handed down judgment in the case of *Fiona Lorraine Philipp v Barclays Bank UK Plc*. It is a judgment that is likely to have far reaching ramifications as it potentially widens the scope of the *Quincecare* duty of care owed by banks to their customers, far beyond the previously understood confines of that duty.

The *Quincecare* duty was first established in the 1992 case of *Barclays Bank Plc v Quincecare Ltd.*[1] At the time, it was regarded as an extension of the duty of care that banks are said to owe to their customers (including compliance with their instructions), which was established in the preceding case of *Lipkin Gorman v Karpnale*[2]. In the *Quincecare* case, Mr Justice Steyn (as he then was) described the duty as one whereby[3]:

"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."

In its recent decision, finding in favour of Mrs Philipp, the Court of Appeal agreed that the Judge at first instance had engaged in a "mini trial" of the facts and had wrongly ordered summary judgment in favour of Barclays Bank UK Plc ("**Barclays**"). Strikingly, rather than leaving the matter there, Lord Justice Birss (delivering the leading judgment) went further by commenting on the construction of the Quincecare duty of care, as regards individual customers (as opposed to corporate customers, which the duty had previously been understood to exclusively apply to).

Background

In 2018, Mrs Philipp and her husband were duped by a fraudster, who purported to act for the FCA. As a result, Mrs Philipp instructed Barclays to transfer over £700,000, in two payments, to separate bank accounts in the United Arab Emirates. Mrs Philipp believed what she was doing was moving the money into safe accounts to protect it from fraud. The accounts were no such thing and by the time the fraud

1 Barclays Bank plc -v- Quincecare Ltd [1992] 4 All ER 363
2 Lipkin Gorman -v- Karpnale [1989] 1 WLR 1340
3 Quincecare

was discovered, the money was gone. This type of deception and subsequent payment is commonly described as an authorised push payment ("**APP**") fraud.

Mrs Philipp's claim against Barclays is for breach of duty. The duty that is said to be owed to Mrs Philipp is characterised as a duty to observe reasonable care in and about executing her instructions, as such it was said to be a specie of the duty identified in *Quincecare*.

At first instance, Barclays argued that the *Quincecare* duty was irrelevant because it was Mrs Philipp that gave the instructions to make the transfers. Barclays position was that the *Quincecare* duty is only concerned with the proper ascertainment of instructions and arises when the instructions are being given by an agent, usually an agent of a company. If the agent's instructions are vitiated by fraud then the bank has no proper instructions at all, and that is how such a duty, to not do what the bank is apparently instructed to do, can arise. It followed that the first instance court agreed with Barclays and granted summary judgment in its favour.

Renewed scope for Quincecare

Departing from the first instance decision, the Court of Appeal rejected Barclays' submission that the *Quincecare* duty of care does not extend to cases such as Mrs Philipp's because she gave instructions to deal with her own funds. In rejecting this submission, Lord Justice Birss examined the relationship between the bank and its customer, making the following key findings:

1. In the context of an instruction to pay, the bank is the agent for the customer as principal;
2. If a banker executes instructions that they know are an attempt to misappropriate funds, then the bank would be liable for the losses flowing from that transaction;
3. What lesser state of knowledge will put the bank under a legal obligation to the principal? Following the reasoning in *Singularis* the Court held that "*if the circumstances were such that an ordinary prudent banker would be "on inquiry" then the duty arises*".
4. The duty of a banker is to not execute the order while on inquiry and to make inquiries. The purpose of this duty, the Court of Appeal held, is to protect the customer.

Crucially, the Court of Appeal found that as a matter of law the Quincecare duty:

> "*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 in on inquiry that executing the order would result in the customer's funds being misappropriated.*"

The Court of Appeal also rejected Barclay's submission that even if a bank actually knew that a customer's instruction to pay was a mistake arising from the customer having been deceived by a fraudster "*the bank's only duty to the customer would be to execute the order.*"

In rejecting this proposition, the Court of Appeal noted that the bank's duty of care to execute a customer's instruction (per the mandate) is "*not absolute*" but is subject to its duty of care owed to the customer when carrying out those instructions.

A bank's obligation to comply with its customer's instructions does not extend to "unthinkingly" executing each and every payment instruction given by that customer.

In essence, banks cannot close their eyes to instructions and the surrounding circumstances that would otherwise put them on notice.

As to Barclays' submission that such an expanded duty of care would represent an "*onerous and unworkable burden on banks*", the Court of Appeal disagreed and in doing so cited the existence of the voluntary codes of practice adopted by Barclays at the time of Mrs Philipp's losses, such as the Contingent Reimbursement Model.

Ultimately, the Court of Appeal found that the duty owed by banks to their customers (including individuals) may arise in the case of a customer directly instructing their bank to make a payment out of their personal account, when such an instruction has been induced as part of an APP fraud. This is to be contrasted with the previous line of decisions arising out of *Quincecare* claims, which followed the reasoning that a bank's duty was only engaged where an agent of a customer (typically a corporate entity) gave instructions to the bank that were fraudulent and in these circumstances should have put the bank on inquiry leading them to refuse to execute the payment instruction.

What comes next?

Barclays now faces a difficult decision – seek to appeal to the Supreme Court where (subject to permission being granted) the duty will be further clarified, or settle Mrs Philipp's claim and prevent further development of the law in this fast-developing area. In any event, it is clear that the courts expect banks to play an ever more proactive role in the fight against fraud and there was more than a hint of policy behind the Court of Appeal's decision in *Philipp*.

The proposition that banks, equipped with extensive and sophisticated software monitoring banking transactions and patterns, can simply avoid any liability by pointing to a strict compliance with payment instructions, was held to be unacceptable. No longer can banks simply say that their only obligation is to execute their client's instructions in order to discharge their duties.

Accordingly, there is a tension for banks between complying with the terms of the mandate in a timely fashion and investigating instructions potentially induced by fraud in order to protect its own position. Getting this balancing act wrong could be costly. With a reported 149,946 incidents of APP scams with gross losses of approximately £479 million in 2020 [4], the Philipp decision may mean banks are having dip into their own funds to cover the sums lost.

For now at least, there appears to be an emphasis on banks protecting their customers from themselves and in the age of such sophisticated automated security settings in the banking industry, this appears to be a modernised interpretation of the duty first set out by Lord Steyn in 1992.

4 https://www.ukfinance.org.uk/system/files/Fraud%20The%20Facts%202021-%20FINAL.pdf