

Insights

SUPREME COURT NARROWS THE SCOPE OF THE QUINCECARE DUTY IN PHILIPP V BARCLAYS BANK

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SUMMARY

We are defending financial institutions from multiple claims for breach of the so called Quincecare duty and have seen claimant law firms increasingly seek to expand the scope of the duty to try to make financial institutions liable for any frauds taking place through their accounts.

Where a bank is unknowingly or innocently “mixed up” in a fraud as a result of duly complying with the customer’s instructions (who are not themselves complicit in or aware of the fraud), the question is in what circumstances should the bank be held liable for any loss suffered on the basis of its purported greater ability to detect fraud. The answer to this question, eagerly awaited by many, has finally come from the Supreme Court in its judgment in [Philipp v Barclays Bank UK PLC \[2023\] UKSC 25](#).

THE QUINCECARE DUTY

The case involved a claim for a breach of the so-called “Quincecare duty” named after Barclays Bank plc v Quincecare Ltd. The duty requires a bank to refrain from carrying out its customer’s instructions if it is “put on inquiry” that the instructions are the result of a fraud and would result in the customer’s funds being misappropriated. Originally, the duty was limited to rogue directors or other agents acting dishonestly and often misappropriating the principal’s funds. However, in an unexpected twist, the Court of Appeal in Philipp found the duty may arise in circumstances where the instructions were received from an individual customer as opposed to where instructions were received by the person on the mandate for a corporate.

THE PHILIPP CLAIM

The facts of the case are a typical example of the authorised push payment (“APP”) fraud – Mrs Philipp was deceived into transferring £700,000 from her Barclays current account to two bank accounts in the UAE by a fraudster purporting to be an operative working for the Financial Conduct

Authority in conjunction with the National Crime Agency. Mrs Philipp attended the branch of Barclays in person in order to authorise international transfers. On each occasion, before making the transfer, Barclays telephoned Mrs Philipp to seek her confirmation, which she duly provided, that she had made the transfer request and wished to proceed with it.

Mrs Philipp argued that Barclays should not have executed her payment instructions if it had reasonable grounds for believing that the instructions were an attempt to defraud her. Barclays made a summary application and was successful at first instance. However, the Court of Appeal allowed Mrs Philipp's appeal and held that the Quincecare duty was not limited to agents but applied in any case in which the bank was on inquiry that the instruction from its customer is part of an attempt to misappropriate funds, i.e. it could apply. Barclays appealed the decision to the Supreme Court seeking a determination of two key issues:

- Does the Quincecare duty have any application in a case where the relevant payment instruction was not issued to the bank by an agent of the bank's customer?
- If not, should either (i) the Quincecare duty be extended so as to include the obligations contended for by Mrs Philipp in relation to APP fraud, or (ii) the law recognise or impose such obligations on a paying bank as incidents of its duty to exercise reasonable skill and care in and about executing an instruction?

THE SUPREME COURT'S DECISION

The Supreme Court unanimously allowed Barclays's appeal reverting to the previous understanding that the Quincecare duty arises only where the bank receives the payment instructions from an agent of the customer and has reasonable grounds for believing that the agent is attempting to misappropriate the customer's funds. The Court noted that the duty is not limited to corporate customers and applies wherever one person is given authority to sign cheques or give other payment instructions to a bank on behalf of another, e.g. where under the mandate for a joint account either account holder has power to bind the other.

The Quincecare reasoning did not apply to cases such as Mrs Philipp's where there is no agent involved and the instructions come directly from the customer. A key part of the reasoning behind the Quincecare duty had been that the bank's duty to execute its customer's payment instructions conflicts with its duty to exercise reasonable skill and care. However, the Court held 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 discretion about how to carry out the instruction. Otherwise, the contract between a bank and its customer means that the bank is under a strict duty to make payments from the account in compliance with the customer's instructions. Where a customer has authorised and instructed the bank to make a payment, the bank must carry out the instruction promptly and not concern itself with the wisdom or risks of its customer's payment decisions.

WHAT HAPPENS NEXT?

The decision provides much needed clarification of the position in relation to instructions received from the principal and will be welcomed by financial institutions. However, the landscape in relation to APP fraud will change again before long with the passing of the new Financial Services and Markets Act. This will lead to the introduction of the mandatory requirement for payment institutions to reimburse customers who fall victim of APP fraud (subject to a maximum threshold still to be determined) where payments are made through the Faster Payments Scheme, with international payments being expressly excluded. Indeed, the Court made clear that it was for the regulators and political process to decide whether and how banks should reimburse customers who were the victims of fraud. In anticipation of the mandatory requirement coming into force, banks are already expected to implement policies and procedures to take into account the future added burden imposed upon them and take greater steps to prevent APP fraud and to protect their customers from financial loss. These measures could include the following:

- Probing the purpose behind the transaction where it appears unusual or exceeds prescribed levels and being conscious of the risk of fraud;
- Asking for supporting documents behind a transaction where concerns over the purpose of a transaction persist;
- Carrying out additional due diligence searches on the recipients of funds;
- Issuing targeted warnings to customers more susceptible to frauds; and
- Maintaining clear records of the checks applied to verify the transaction.

Effective implementation of the above measures will limit the exposure to potential Quincecare claims, but also mitigate the risk of the APP fraud being perpetrated in the first place. With the mandatory reimbursement requirement coming into force in 2024, it will be more important than ever for the payment services providers to ensure that their systems and controls are fit to deliver on the latter objective.

Andrew Tuson, Joseph Ninan and Joanna Munro regularly defend claims against financial institutions arising out of frauds and advise on the related regulatory and POCA issues. If you would like to discuss any of these issues please do not hesitate to reach out via their details below.

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