STEPHENSON HARWOOD

FINANCE LITIGATION GROUP PODCAST SERIES 2021

The Quincecare duty of care

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In this podcast, we examine the Quincecare duty and highlight the key issues for financial institutions.

What is the Quincecare duty?

The Quincecare duty is perhaps best defined as the duty placed on financial institutions not to follow their customer's instructions when they are "*put on enquiry"* that doing what their customer asks them to do might facilitate a fraud on their customer.

Although the *Quincecare* duty was first established in a 1992 case, (*Barclays Bank plc v Quincecare Limited*[1]), it was not until 2019 that a bank was first held liable for breach. Since then, the courts have struggled to apply it in the modern banking context, as the nature of fraudulent activity has evolved.

The *Quincecare* duty was originally framed as a negative duty (i.e. the duty to refrain from following a customer's instructions). However, the Court of Appeal in the 2019 case of *Federal Republic of Nigeria v JP Morgan Chase*[2] found that the *Quincecare* duty will require "*something more*" from a bank than simply deciding not to comply with a payment instruction. Quite what that something more is, however, is an elusive concept.

Key points from recent case law

There have been 4 significant cases arising in recent years relating to the Quincecare duty which shed some light on its parameters.

Federal Republic of Nigeria v JP Morgan Chase

This case considered the scope of the action which a bank should take when "on notice" of a possible fraud. Although the Court of Appeal did not make any finding on the facts, (upholding the first instance decision not to grant strike out or summary judgment in the bank's favour), it raises some important issues. Here, the bank had complied with payment instructions made by authorised signatories. However, the Republic of Nigeria later alleged that the bank (which had submitted suspicious activity reports due to various red flags being raised) should have realised that it could not trust the senior Nigerian officials from whom it took instructions and should not have made the payments it was instructed to make. Precisely what the bank should

[1] [1992] 4 All ER 363
[2] [2019] EWCA Civ

have done instead of following its customer's instructions was deemed to be a matter for the trial judge.

The current position, therefore, is that there remains a distinct lack of clarity surrounding what a bank's so-called duty of enquiry means in practical terms and how this ought to be reconciled with a bank's duty to follow its customers' instructions. Further commentary on this decision is available in our article here.

Singularis Holdings Ltd (in Official Liquidation) v Daiwa Capital Markets Europe Ltd[3]

The next case to consider the duty was the Supreme Court's judgment in *Singularis Holdings Ltd (in Official Liquidation) v Daiwa Capital Markets Europe Ltd*, which was handed down just days after the judgment in *Nigeria*. Detailed commentary on the judgment in *Singularis* is available in our article here.

This case was brought by the liquidator of Singularis. Mr Al Sanea (Singularis' sole shareholder (and a director)) had instructed Daiwa to transfer US$204 million to accounts in the names of other group companies. At first instance, Daiwa was held to have breached the Quincecare duty as this was a particularly obvious fraud – and it did not appeal that finding. It instead appealed on the basis that Singularis was effectively a one-man company controlled by Mr Al Sanea and that the claim should fail for illegality, lack of causation or deceit. In dismissing Daiwa's appeal, the Supreme Court (again) did not address the steps that Daiwa ought to have taken to comply with its duty because the breach was such an obvious one. However, it made it clear that the Quincecare duty is not an easily escapable one, observing that if the appellant's argument had been accepted "*there would in reality be no Quincecare duty of care or its breach would cease to have consequences*", something the court described as being a "*retrograde step*". The question of what practical steps a bank should take when on notice that following its customers' instructions might result in facilitating a fraud on that customer was not therefore answered in this judgment.

Philipp v Barclays Bank plc [2021] EWHC 10 (Comm)

One area where the scope of the Quincecare duty has been clarified is in relation to payment instructions from individual account holders. In *Philipp v Barclays Bank plc*, the High Court held that financial institutions do not owe a *Quincecare* duty when an individual customer makes a payment instruction as a result of an "authorised push payment" (APP) fraud. The duty is instead limited to situations where payment instructions are not properly authorised i.e. they are made by a customer's agent in an attempt to misappropriate funds (such as in *Singularis*).

[3] [2019] UKSC 50

Although the court's decision was in the specific context of APP fraud, it is useful for its wider discussion of the scope of the *Quincecare* duty. The court emphasised that the Quincecare duty is subordinate to a bank's primary duty to act on its customers' instructions. It also makes it clear that the standard to which a bank will be held is that of an ordinary prudent banker based on market practice at the relevant time. Further, the court held that although in Singularis it was confirmed that even a sole shareholder can steal from a company for whom they are a signatory, an individual cannot steal from themselves.

Stanford International Bank Ltd (in liquidation) v HSBC Bank Plc [2021] EWCA Civ 535

The final case to be considered was also brought by liquidators, in this case of Stanford, against HSBC for breach of the Quincecare duty and dishonest assistance. The payments in this case were effected by HSBC back in 2008 when, it was alleged, HSBC knew or should have known that Mr Stanford was using his company to operate a massive Ponzi scheme. Stanford went into insolvent liquidation shortly afterwards. Of the £118.5 million paid out by HSBC, all but £2.4 million were payments to genuine creditors and the judgment here turned on whether or not any loss had been sustained. Overturning the decision of the lower court, the Court of Appeal held that the fact that the payments reduced the dividend to creditors was not a loss attributable to any breach of the Quincecare duty because HSBC owed its Quincecare duty to the company (its client) not its creditors. This contrasted with the position of Stanford's directors, who did owe a duty to their creditors during the relevant period.

Because it found there had been no loss, once again the Court of Appeal was not required to consider any further whether or not there had been a breach of the Quincecare duty, confirming only that the Quincecare duty is not owed to creditors. However, the Supreme Court has recently granted permission to appeal this decision and it therefore remains to be seen whether there will be any further modification of the duty as it applies to insolvent companies.

Practical points arising from case law

As can be seen from this summary of recent case law, the current scope of the Quincecare duty is somewhat nebulous. Because of this, it is key from a practical perspective that financial institutions ensure that whenever a red flag is raised in relation to a customer's instructions, the process by which those instructions are dealt with is properly documented and a fully reasoned decision is taken.

At the same time, banks need to bear in mind that the disclosure of documents relating to these kinds of decisions is a developing area in case law. In *IFT SAL Offshore v Barclays Bank plc [2020] EWHC 3125 (Comm)*, the court granted permission for information obtained in a Norwich Pharmacal disclosure application to be used, potentially, to bring proceedings against the bank who had provided the information in its capacity as a "neutral" third party. Further, in the latest decision in the *Nigeria* case, (Federal Republic of Nigeria v JP Morgan Chase Bank [2021] EWHC 1192 (Comm)), the court ordered the bank to disclose documents from its compliance and AML teams which Nigeria argued were necessary to establish whether or not JP Morgan had breached its duty to take reasonable care in executing payment instructions. In particular, Nigeria requested (and was granted) disclosure of documents relating to alleged concerns held by the US compliance team.

In this case, the court appeared willing to accept that a broad scope of disclosure is required from banks in Quincecare cases and that the seniority of custodians is a relevant consideration. Documentation is therefore likely to be a key battleground in evidencing whether or not the duty has been breached.

In conclusion, further judicial clarification on the scope of the Quincecare duty is required to allow financial institutions to understand the standard against which they are to be judged. A decision following trial in the *Nigeria* case is eagerly awaited, as is any eventual judgment by the Supreme Court on the scope of the duty as it applies to insolvent companies in the *Stanford* case.