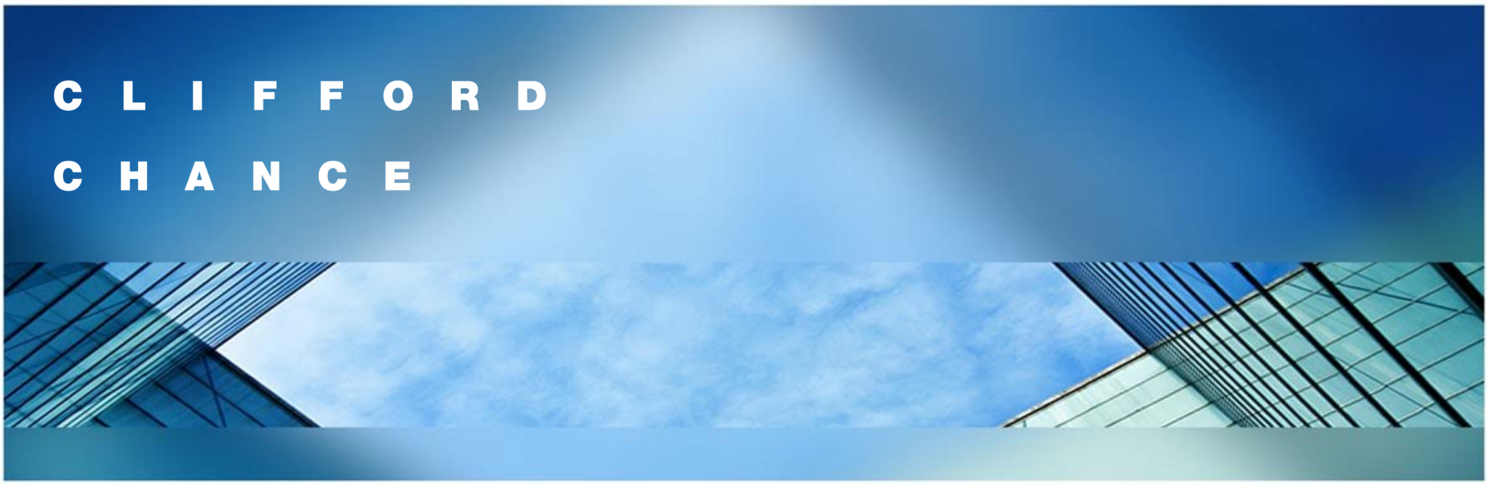

PHILIPP V BARCLAYS – UK SUPREME COURT OVERRULES COURT OF APPEAL ON *QUINCECARE* IN LANDMARK RETURN TO BASICS OF BANKING AND AGENCY LAW

In a hotly-anticipated judgment, the Supreme Court has reversed a controversial decision of the Court of Appeal, which significantly expanded the scope of the "Quincecare duty of care". The decision should prompt widespread relief across the banking industry, but the substance of the duty remains and questions linger around exactly what banks need to do to comply with it. As well as being a landmark banking law case, the case should be considered a key new authority in the law of agency.

Speed read

- The UKSC rejected an attempt to expand significantly the scope of the *Quincecare* duty.
- This duty was originally formulated as a bank duty to refuse customer instructions if there are reasonable grounds for believing that the instruction is an attempt to misappropriate funds.
- Although traditionally understood as only applying in situations where instructions were provided by an agent on behalf of a principal, the claimant had argued the duty should extend to natural persons and the Court of Appeal agreed.
- The UKSC reversed this decision.
- The UKSC restated the Quincecare duty in the following terms: "*The duty of care requires the bank, if put on enquiry, not to act without checking that the order is indeed a valid order of the customer to transfer money*".
- *Philipp* will come as a relief to the banking industry, but there are still questions that remain on what banks need to do to comply with the duty, and regulatory obligations may well supersede the *Quincecare* common law duty in any event.

Recap: what is *Quincecare* and why does it matter?

In the 1988 case of *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363, Mr Justice Steyn (as he then was) held that banks owe a duty to refuse to execute an instruction from customers if there are reasonable grounds for believing that the instruction is an attempt to misappropriate funds – this became known as the *Quincecare* duty.

The *Quincecare* judgment, unreported at the time, was approved in *Lipkin Gorman v Karpnale* [1989] 1 WLR 1340 a year later, but there was little case law dealing with the duty until the case of *Singularis v Daiwa* reached the Supreme Court in 2019. This shone a spotlight on the duty and led to a flurry of cases before the higher courts in recent years, including a number of attempts by claimants to broaden the scope of the duty. *Philipp* was one such case and in the Court of Appeal last year the claimant succeeded in arguing that the duty should be extended to capture natural persons – a significant expansion in scope of a duty hitherto only owed in agency-type situations.

What happened in the *Philipp* case?

Dr Philipp had been phoned by someone who claimed to be from the FCA, working in conjunction with the National Crime Agency. This individual had said that the Philipps were at risk of being targeted by fraudsters, and that they should therefore transfer their life savings from their account at Barclays to a third-party account in the UAE to keep the money safe. The Philipps made the transfers. In fact, this was an authorised push payment (or "APP" fraud) involving prolonged and elaborate contact between the fraudster and the Philipps using various means, including an email address that appeared to be from an FCA email domain and a phone number that appeared to be the police. The Philipps were held by the first instance judge to have been "*completely under the spell of the fraudster*". The Philipps were so convinced by the fraudster that they were even persuaded not to cooperate with the police when they received a house visit warning them of the fraud.

Importantly, *Philipp* was different from other *Quincecare* cases because it was not a case where an agent of the customer (such as a director of a company) dealt with the bank, so the question of authority did not arise in the same way. However misguided it ultimately proved to be, Mrs Philipp plainly intended to make the payments.

The Bank was successful in striking out the claim at first instance on this basis, with Judge Russen QC holding that the *Quincecare* duty could not be owed to natural persons. The decision was appealed and last year Birss LJ held in the Court of Appeal that the *Quincecare* duty did not depend on the bank being instructed by an agent of the customer and therefore set aside the summary judgment in the bank's favour.

What did the UK Supreme Court decide?

The Court allowed the Bank's appeal and restored the summary judgment in its favour. It did, however, refuse summary judgment on Mrs Philipp's alternative case that the Bank was in breach of duty in not taking adequate steps to recover the money transferred, on the basis that this was not a matter that could be determined at the summary stage.

The Supreme Court concluded that the *Quincecare* duty was not a special or idiosyncratic rule of law and is instead an application of the general duty of care owed by a bank to interpret, ascertain and act on its customer's instructions. The Court restated the Quincecare duty in the following terms: "*The duty of care requires the bank, if put on enquiry, not to act without checking that the order is indeed a valid order of the customer to transfer money*". The duty is not limited to corporate customers, but it will only apply where one person is given authority to give instructions on behalf of another. In this context, the Court gave the example of a joint bank account.

The Court reached this decision for the following key reasons:

- The common defining characteristic of the "Quincecare duty" that emerged from the cases was a payment instruction given by an agent who was an authorised signatory of the customer's account, but was acting in fraud of the customer. The duty has its roots in concepts of agency law. The *Philipp* case was different because the Philipps had themselves given clear and unequivocal payment instructions.
- Expanding the *Quincecare* duty to cover this type of APP fraud such was a matter that was ultimately beyond the role of courts to decide. Legislators and regulators were in the best position to act in relation to APP fraud and consider an appropriate policy response and there was at the time of judgment relevant new legislation already on foot in the form of the Financial Services and Markets Act 2023.
- The Court of Appeal had reached the wrong outcome because there were flaws in the reasoning of the original *Quincecare* judgment itself. It was wrong in identifying a conflict between the bank's duty to execute valid orders to transfer money promptly and the bank's duty of care to verify the agent's authority.
- The perceived conflict had led to uncertainty in the cases that followed *Quincecare* and an application of policy considerations in interpreting what was, in essence, a duty in the performance of a contract. It had also involved a mistaken assumption about the effect of dishonesty on an agent's authority

Actual and apparent authority

- At paragraphs 69 to 89, the *Philipp* judgment contains a detailed analysis of the law in relation to dishonest agents.
- The scope of an agent's authority is a matter of agreement between the agent and the principal and its precise extent therefore involves interpretation of the agreement.
- It is inconceivable that an agent would be given authority to bind the principal where the agent is acting to defraud the principal.
- **Actual authority** depends solely on what has been agreed between the principal and the agent. Third parties cannot be expected to be privy to these agreements and it is for this reason that the doctrine of **apparent authority** exists.
- **Apparent authority** provides protection for third parties dealing with agents, as they are entitled to reasonably rely on representations by the principal that the agent has authority. That reliance must be **reasonable**.
- An agent cannot have **apparent** authority where the third party is on notice that the agent is acting without **actual** authority because it could not **reasonably** rely on the authority in those circumstances.
- The Court restated the test for reliance on the apparent authority of an agent: "*a third party cannot rely on the apparent authority of an agent if it failed to make the inquiries that a reasonable person would have made in all the circumstances to verify that the agent had that authority*".

and, in particular, a conflation of the principles of apparent and actual authority.

What key questions remain after the judgment?

The primary question that remains after the judgment is: what exactly do banks have to do in order to comply with the duty? The Court held that the standard was ultimately one of reasonableness, which it expressly noted provided the necessary flexibility to adapt the principle to different practices, expectations and transaction types. That means there is no hard and fast rule that banks can apply in order to have certainty that they are compliant with the duty; as Steyn J had said in the original Quincecare judgment, "*everything will no doubt depend the particular facts of each case*".

The Court considered the Australian case of *Ryan v Bank of New South Wales* [1978] VR 555 (which had been the subject of argument at the hearing), in which McGarvie J held that a bank should not comply with an instruction "*if a reasonable banker properly applying his mind to the situation would know that the* [account holders] *would not desire their orders to be carried out if they were aware of the circumstances known to the bank*". The Court declined to express a view on whether this was the correct test to apply, on the basis that the Court did not hear full argument on it.

Payments made in breach of the *Quincecare* duty are outside the scope of the customer mandate, such that the bank is not entitled to debit the customer's account. The Court acknowledged at paragraph 96 of the judgment that this would limit what claimants would need to establish in circumstances where they were not claiming consequential loss and the logic of this finding may mean that certain defences are no longer be available to banks.

In discussing the *Ryan* case, the Court drew a distinction between circumstances known only to the bank and circumstances known to both bank and customer. It said that if, unbeknownst to the customer, the bank receives information from a reliable source (such as the police) suggesting that a customer's payment instruction has been procured by fraud, then it "*may be right*" for the bank to refrain from executing the instruction without checking with the customer first. This begs the question of exactly what constitutes a "*reliable source*", as well as what exactly could be said to be within a bank's knowledge (could information known to them in another capacity be applicable, for example).

What are the key practical takeaways?

Our initial recommendations in the wake of the decision are as follows:

1. **Revisit your terms of business and ensure they contain appropriate protections**. Counsel for the claimant had accepted that warning language contained in the Bank's terms of business indicated that ordinarily a bank will not attract liability for APP fraud. This was expressly noted by the Court in the judgment.

2. **Don't forget contractual duties to process payments quickly and consider whether you have appropriate carve-outs to any such obligations**. In the context of discussing the bank's terms, the Court noted that, had the terms not included a carve-out in relation to fraud or criminal activity, the Philipps could potentially have sued the bank if the result of the failure to process the payments promptly had been to cause them a loss.

3. **Continue to train customer-facing staff on *Quincecare* issues**. In a world where the question of compliance depends entirely on the facts of particular cases, the onus is really on the staff engaging with customers to be alive to the issues and spot potential red flags. If staff are alive to the risks, then it ought to be possible to limit the number of *Quincecare* issues that arise in practice.

4. **If you discover a fraud, take action as soon as reasonably possible to seek to recover the funds**. Having been informed of the fraud by the customer on 27 March 2018, the Bank did not take any action to recover the funds until 31 March 2018. The Court did not summarily dismiss the claimant's alternative case that the bank did not take adequate steps to recover the funds, stating that it was "*arguable*" that the Bank should have taken the customer's instructions to seek to recover the funds on 27 March 2018.

5. **Keep in mind the broader regulatory and legislative context**. It is now clear that the *Quincecare* duty will not cover APP fraud, but (to name but a few) the Payment Services Regulations 2017, the Contingent Reimbursement Model Code and the Financial Services and Markets Act 2023 may all apply in these scenarios. The FCA's consumer duty also comes into effect at the end of this month. It requires firms to deliver good outcomes for consumers. APP fraud is a growing problem and is a focal point for regulators, including the new Payment Systems Regulator. You should actively consider your broader obligations and ensure you have the proper protections in place.

6. **Be aware that, unless Quincecare claimants are claiming consequential losses, they now have a more limited case to prove (albeit within the confines of a narrower duty)**. Except where claiming for consequential losses, *Quincecare* claimants will no longer need to prove that, if reasonable inquiries had been made, the agent's dishonesty would have been revealed and the loss avoided. This is because payments made in breach of the *Quincecare* duty are outside the scope of the customer mandate, such that the bank is not entitled to debit the customer's account.

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