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Bank to basics: a return to orthodoxy for the *Quincecare* duty?

If a bank is "put on enquiry" that a customer's instruction is in fact an attempt to defraud that customer, the bank has a duty to refrain from executing it. In a nutshell, this is the *Quincecare* duty, named for the case of *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363.

This duty is an important aspect of English banking law, and a potentially promising tool for victims to recover against banks who facilitate frauds against them. It is perhaps because of this utility that many claimants have sought to test the precise parameters of the duty. Two recent cases – one in the Court of Appeal and one in the Privy Council – are instructive examples of this type of argument. They provide useful discussion and clarification about the precise scope of the *Quincecare* duty.

The law

Before turning to the recent cases, it will be helpful briefly to go over *Quincecare* itself.

Quincecare

In the *Quincecare* case, the bank had agreed to provide a loan facility of £400,000 to the company. Using that facility, the company chairman instructed the bank to transfer £340,000 to a firm of solicitors, who in turn funnelled the money to the chairman's personal account in the United States. Acting under the guise of giving a valid instruction on the company's behalf to the bank, he in fact personally pocketed the cash. In other words, the chairman defrauded the company.

The bank sued the company for repayment of the loan, and the company counterclaimed against the bank for breaching its duty of care to it.

In giving judgment, Steyn J set out the bank's duty of care to the customer in essentially the terms of the first sentence of this article. In deciding that the duty would be engaged if the bank were "put on enquiry", the judge explained that this would be the case where the bank had reasonable grounds (although not necessarily proof) for believing that the order was an attempt to misappropriate

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funds.

On the evidence in *Quincecare*, the bank had not been "put on enquiry" about the chairman's fraud. It did not have the requisite level of knowledge or suspicion of the fraud. The bank was therefore not liable to the company, and the company's counterclaim failed. Despite this failure, however, *Quincecare* was the first time the bank's duty to a defrauded party had been defined in these terms.

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The first broadly concerns which kinds of instructions to a bank will engage the duty, and was discussed by the Court of Appeal in *Philipp v Barclays Bank UK plc* [2022] 2 WLR 872 (CA). The second concerns who is protected by the duty, and whether parties other than the bank's immediate customer are covered. This was discussed by the Privy Council in *Royal Bank of Scotland Ltd v JP SPC 4 (Isle of Man)* [2022] UKPC 18.

Philipp

In *Philipp*, a husband and wife unwittingly transferred their life savings to a fraudster. They claimed against the bank on the basis that it should have been put on enquiry and stopped the transaction from going ahead.

At first instance, the bank had successfully applied for summary judgment. It had argued that the *Quincecare* duty was only engaged when a fraudulent agent of the company sought to instruct the bank. This was the case in *Quincecare* itself, and also in other successful cases, notably including the Supreme Court case of *Singularis Holdings Ltd (in liq) v Daiwa Capital Markets Europe Ltd* [2020] AC 1189 (SC). In light of these authorities and others, the bank argued that the duty did not apply where there had been no fraudulent agent (e.g. where the customer themselves had given the instruction, as the Philipps had done).

On appeal, however, the Court of Appeal found that the judge had misdirected himself.

Birss LJ analysed *Quincecare* and the later authorities to clarify the basis upon which the duty had been expressed to be engaged.

It went without saying that the relationship between a bank and a customer is one of agent and principal. The primary duty of the bank is to execute the customer's orders. However, it was also trite that the primary duty would be vitiated if the bank **positively knew** that the instruction was an attempt to misappropriate funds from the customer. This is because of the bank's further duty (described as being "in tension with" the primary duty) to act with reasonable care and skill.

So far, these were straightforward questions. What *Quincecare* and subsequent cases had dealt with, however, was whether a lesser level of knowledge would also suffice to incur liability on the bank's part. Birss LJ found at [28] that, uniformly, these cases had decided that liability would indeed be incurred where the bank had merely been put on enquiry about a potential misappropriation.

If this was the reasoning which had led to the development of the *Quincecare* duty, it was clear to Birss LJ at [30] that nowhere in this reasoning did the engagement of the duty rely upon the existence of a fraudulent agent giving instructions to the bank. While *Quincecare* and *Singularis* had involved such a scenario, it was not necessarily the case that it was the only situation in which the duty could arise. All that appeared to be required was the requisite level of knowledge, i.e. that the bank be put on enquiry about a potential misappropriation.

As a result, it was at the very least properly arguable that the duty included the situation in which the Philipps had found themselves, where the customers themselves had given the instruction. Summary judgment was set aside accordingly, and the matter remitted for trial.

RBS

In the *RBS* case, an investment fund ("**the Fund**") claimed to be the beneficial owner of funds held in a bank account.

However, the account was in the name of another party, SIOM. The complication in this case was therefore that the bank's customer, strictly speaking, was SIOM. The Fund was merely a third party beneficiary of the account.

The bank applied for summary judgment partly on the ground that it owed no *Quincecare* duty to the Fund as a non-customer. At first instance, the bank was denied summary judgment, but this was overturned on appeal. The Fund in turn appealed to the Privy Council on the ground that the *Quincecare* duty ought to extend beyond customers alone to those beneficially interested in an account.

The Fund pointed to the well-known case of *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509. Although *Baden* is far better known for its discussion of standards of knowledge, it also decided that, where a bank was on notice that an accountholder was a fiduciary for another, the bank owed a duty of care to the persons beneficially interested in the money. The Fund argued that this decision was good authority for the expansion of the *Quincecare* duty it sought.

Lord Hamblen and Lord Burrows, however, rejected this argument in the Privy Council. The principal reason for doing so was that the decision in *Baden* pertaining to tort was expressly based on Lord Wilberforce's two-stage approach to imposing duties of care as discussed first in *Anns v Merton London Borough Council* [1978] AC 728 (HL). As is well-known, that approach was overturned, and has now been deprecated by a string of authorities in the House of Lords and Supreme Court over the past forty years. As a result, Peter Gibson J's decision in *Baden* as it concerns duties of care can no longer stand as good law.

The Fund was therefore left without an argument on this point. The Privy Council determined that the *Quincecare* duty does not extend beyond immediate customers to third-party beneficiaries of bank accounts.

Key takeaways

Other than the judgments themselves and their implications for who is and is not protected by the duty, what are the practitioner lessons to be learned from the two recent cases?

First, the courts are taking a careful approach to expanding the duty, and relying on a somewhat restrained jurisprudence in dealing with cases. While in one case, the scope of the duty was arguably expanded, and in another, it was confined, both decisions based themselves squarely on an analysis of Steyn J's judgment in the original *Quincecare* case. Indeed, in *Philipp*, Birss LJ poured cold water that his *prima facie* duty-extending decision did constitute an extension at all. And the Privy Council's decision in *RBS* constituted a strong confirmation of the orthodox approach. Practitioners should therefore be aware that running novel points on the duty which are not firmly rooted in the reasoning of the *Quincecare* decision itself may be treated with scepticism by the courts.

Second, both decisions demonstrate that the courts have not forgotten the important question of whether expansions in the duty might overburden banks. In *Philipp*, there were indications in the decision that the Court of Appeal did not think that the Philipps' contention would be overburdensome in this case (and indeed the court overturned a first-instance finding to the contrary on the grounds that it ought not to have been decided on a summary basis). But the issue as a whole was clearly an important one, and received much discussion in the judgment. In *RBS*, the burden

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which would be imposed upon banks by expanding the duty to protect third party beneficiaries was also a reason the Privy Council rejected such a widening of the duty. Practitioners should therefore be aware that (a) the question of burden will be an important point for evidence at trial on novel applications of the duty, and (b) the courts will likely refrain from extending the duty in a way which overburdens banks or which is divorced from the commercial reality of how modern banking takes place.

Overall, the recent cases are clear in their emphasis of orthodox principle. Despite one appearing more claimant-friendly and the other more bank-friendly, both the Court of Appeal and the Privy Council have rooted themselves in detailed (and arguably conservative) analysis of the decision in *Quincecare* itself. While further decisions on the duty are expected – in particular in the remitted *Philipp* trial, and in the trial of *JP Morgan Chase Bank NA v Federal Republic of Nigeria* – practitioners can expect that the courts will continue to adopt a back-to-basics approach to the duty, and will be reluctant to make any major expansions to it without orthodox justification.

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