Quincecare and Dishonest Assistance: An Ongoing Retreat in Claims Against Banks?

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Massive multi-jurisdictional fraud and the almost inevitable colossal insolvencies which follow have provided fertile ground for testing the scope of banker's duties and liabilities in recent decades. Robert Allen Stanford's eye-watering Ponzi scheme has been part of this trend.

On 15 April 2009 the Antiguan-incorporated Stanford International Bank Limited ("**the Bank**") collapsed into insolvent liquidation bringing to an end one of the largest and most prolonged Ponzi schemes in history. For the depositors who lost their retirement income to the fraud it will be of little consolation that the Bank's eponymous owner is currently serving a 110-year federal prison sentence for his instrumental role. Reports 10 years later suggested that only c.US$275million had been recovered and was available to meet creditor claims in excess of US$5billion.

Stanford International Bank Ltd (in liquidation) v HSBC Bank Plc [2021] EWCA Civ 535 is the latest decision in respect of claims brought by the liquidators of the Bank in an attempt to increase recoveries on behalf of the creditors. It will provide little source of encouragement to other victims of fraud seeking to mitigate their losses with claims against the fraudulent company's bankers.

Facts

The Bank had held separate dollar, sterling, Euro and Swiss Franc accounts with HSBC Bank Plc ("**HSBC**"). These bank accounts were frozen on 17 February 2009. According to press reports, this was the day on which US federal agents raided the offices of the Bank's parent company and Mr Stanford was charged with fraud arising out of a US$8b investment scheme. At the risk of unfair comment, it is perhaps unsurprising that HSBC's decision to shut the gate only after the horse has bolted is under the court microscope.

The liquidators contended that the bank accounts in fact ought to have been frozen on 1 August 2008. But for the failure, the liquidators alleged that the £80million balance in the accounts would have been

retained in place and formed part of the recoveries in the liquidation. In fact some £118.5million was paid out of the accounts after 1 August 2008. Of these payments, all were made to discharge genuine debts except a payment of £2.4 million to the English Cricket Board which was probably in respect of sponsorship (and not in discharge of a debt to the ECB) ("**the ECB payment**").

The claims were twofold: firstly, breach of the implied contractual and/or tortious duty owed by a banker to its customer traced to *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363 ("**the Quincecare duty**"); and secondly, a claim for an account or equitable compensation in respect of HSBC's alleged dishonest assistance in the breaches of trust owed by Mr Stanford to the Bank.

HSBC sought to strike out or to obtain summary judgment against (i) the Quincecare duty claim to the extent that it was a claim for losses in respect of payments paid out to discharge debts and (ii) the dishonest assistance claim.

At first instance Mr Justice Nugee refused strike out/summary judgment on the Quincecare duty insofar as it related to certain losses but did strike out the dishonest assistance claim in its entirety. Both parties appealed.

The Quincecare Duty Claim

In *Barclays Bank plc v Quincecare Ltd* Steyn J said that "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." It was not in dispute that the factual allegations raised by the Bank against HSBC will need to be determined at trial. Rather, the focus of the strike out application was whether the losses would be recoverable in any event.

As set out above, all save the ECB payment were payments to discharge genuine debts. Further, the Bank disclaimed any argument that its net worth had decreased in the interim (although the court noted that in Ponzi schemes the company will often accrue greater debts over time). The question was whether the Bank had suffered any loss in these circumstances.

A solvent company will pay out cash in discharge of a liability but its net worth remains the same. Its assets have been reduced but its liabilities have also been reduced to an equal extent. However, an insolvent company will pay out cash in discharge of a liability and will lose something of value: cash without any corresponding benefit because it is still unable to pay its debts. At first instance this argument persuaded Mr Justice Nugee to find that the loss was the £80million which would have been an available asset in the subsequent liquidation.

The Court of Appeal disagreed. It observed that a director of an insolvent company owes a duty to the company's creditors to avert loss to the creditors (*Liquidator of West Mercia Safetywear Ltd v. Dodd* (1988) 4 BCC 30*).* However, as the Court of Appeal had already held in *Singularis Holdings Ltd (In Liquidation) v. Daiwa Capital Markets Europe Ltd* [2018] 1 WLR 2777, an insolvent company's banker owes its duty to the company, and not the creditors, whether the company is solvent or insolvent.

This difference is significant when it comes to assessing whether loss has been suffered. Where the duty is owed to the company only, the fact that a different dividend would have been paid creditors on one date rather than on another date is not relevant to determining whether there has been any loss to a company's financial position. Put another way, the fact that there would have been more cash available to distribute in the liquidation if HSBC had frozen the bank accounts in August 2008 would benefit the creditors but is of no benefit to the company whilst trading.

Sir Geoffrey Vos, Master of the Rolls, noted that "the true distinction is between a company that is trading and a company in respect of which a winding up process has commenced, not between a solvent

trading company and an insolvent trading company. In the judge's language, if the company is trading, even insolvent, then the £100 paid to a creditor reduces its assets, but is offset by a corresponding benefit to the company in reducing its liabilities."

The Court of Appeal hinted that a claim based on consequential losses or the argument that the failure to freeze the accounts led to an increase in the Bank's net deficit might have been looked on more favourably.

The Dishonest Assistance Claim

The dishonest assistance claim raised the vexed issue of dishonesty in a corporate setting. Dishonesty claims against individuals can be challenging because of the evidential burden of proving fraud. Dishonesty claims against corporate bodies are further complicated by the need to apply that individualistic/ subjective approach to a corporate structure.

The Court of Appeal noted that it was not in dispute that the 'touchstone' of dishonest assistance is dishonesty and that 'dishonesty' is now governed by the *Ivey v Genting Casinos UK Ltd* [2018] AC 391 test. In *Ivey v Genting* the Supreme Court held that when considering if a person is dishonest, the courts had to determine the subjective actual state of the individual's knowledge or belief as to the facts; and then determine whether the conduct was honest or dishonest according to the objective standards of ordinary decent people.

It was also not in dispute that an individual may be dishonest even if she does not know there was a fraud, provided that they turned a blind eye to that fact. To establish 'blind eye knowledge', a claimant must prove:

1. The existence of a suspicion that certain facts may exist, and
2. A conscious decision to refrain from taking any step to confirm their existence

(*Group Seven Ltd v Nasir* [2019] EWCA Civ 614).

In the context of corporate defendants, it will often be the case that different people knew different things. The law does not, however, recognise any concept of 'composite fraud'. It is not permissible to 'aggregate' the knowledge and states of mind of multiple individuals in order to prove dishonesty (*Greenridge Luton One Ltd v Kempton Investments Ltd* [2016] EWHC 91 (Ch)). At least one of those individuals had to be dishonest.

Against this agreed summary of the law, the Court of Appeal then considered the Bank's pleaded case. It noted that:

1. The Bank had not pursued a case of institutional dishonesty in the sense that board members and compliance officers did not care if the bank supported fraudulent customers.
2. There was no plea that any one individual had either been dishonest or had 'blind eye' knowledge.
3. The Bank's case that the scale of HSBC's alleged neglect of good practice and its own policies and the extent of its failure to ask questions amounted to a case of negligence only.

For these reasons the appeal was not allowed and Fancourt J's decision to strike out the dishonest assistance claim was upheld.

Conclusion

Stanford International Bank Ltd (in liquidation) v HSBC Bank Plc reaffirms the recent trend towards a restrictive approach to bankers' liabilities. In confirming that the Quincecare duty is owed to the company only, the Court of Appeal has limited the effectiveness of the Quincecare duty as a tool in cases involving insolvent trading companies. In such cases, and in Ponzi scheme cases in particular, to perpetuate the fraud and prevent its discovery, it will be common for the company to continue discharging genuine debts.

The decision on dishonest assistance is a reminder of how difficult it may be to succeed in dishonest assistance cases against banks (and other corporate entities) due to the requirement for a victim of a

fraud to identify a natural person within the bank who has the requisite dishonesty.

The Court of Appeal will soon have another opportunity to consider the scope of bankers' liabilities in the knowing receipt case of *Byers, Dickson & Saad Investments Company Limited v Samba Financial Group* [2021] EWHC 230 (Ch) (discussed **here**), a case seeking redress for the victims of the huge AHAB/Al-Gosaibi/Al Sanea fraud. The learned judge in that case dismissed the claim, applying a narrow interpretation of the ingredients for knowing receipt. If the trend towards restricting bankers' liabilities continues, then the claimants will have an uphill struggle on that appeal.

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