Outer Temple

Cyber-Fraud, Third Party Fraudsters, and the Expansion of the Quincecare Duty

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The "Quincecare Duty", which has existed for over thirty years since being established in *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363, tells us that a bank or financial institution may be liable for processing a fraudulent transaction if the bank has reasonable grounds for believing that there has been an attempt to defraud its customer.

Remarkably, it was not until the Supreme Court handed down judgment in 2019, in *Singularis Holdings Ltd (In Official Liquidation) (A Company Incorporated in the Cayman Islands) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50, that a claimant had successfully argued a breach of the Quincecare Duty. Traditionally, the Quincecare Duty was seen as being engaged in circumstances where corporate customers were defrauded by their own agents (e.g. its employees or directors).

Even then, questions remained as to the true extent of the duty, and in particular whether Quincecare could be successfully deployed in the all too common context of customers (whether businesses or individuals) being defrauded by phishing (i.e. email compromise fraud) and other online scams. Until recently, the broadly assumed position was that the Quincecare Duty did not extend that far, but recent decisions across the common law world have challenged that view, and provide an important avenue for redress for bank customers who have been defrauded in more modern factual circumstances.

Business Email Compromise Fraud:
***Aegis Resources DMCC v Union Bank Of India (DIFC) Branch* [2020] DIFC CFI 004**

Aegis was a case in which Outer Temple (Stephen Doherty instructed by Justin Whelan, HFW) represented the company, which had been the victim of a phishing scam, giving third-party fraudsters access to the email account of the company's managing director, which in turn was used to issue a number of fraudulent payment instructions to its bank, which were duly processed.

It was contended, on behalf of Aegis, that the invoices issued by the fraudster contained numerous red flags which the bank should have spotted, and therefore refused to process the payment instructions. Aegis contended that the bank's actions constituted a breach of mandate, as well as a breach of the Quincecare Duty. The bank disputed the claim, stating that it was under no obligation to inquire as to the purpose of any payment instruction, and moreover that it was protected by a contractual indemnity.

The Judge in that case agreed with the claimant, that the Quincecare Duty could apply in the novel factual circumstances before it, and that the bank's contractual documentation and indemnities had

not been sufficiently well drafted so as to exclude the operation of the Quincecare Duty.

Instead of agreeing with the traditional formulation of Quincecare, which was historically considered in cases involving fraud by company insiders, the Judge endorsed its use where the fraudster was an unknown third-party, stating that: *""it would be an unattractive conclusion that the Bank could act on an email appearing on its face to be sent to it by [the claimant], but which it had reason to believe was an attempt to defraud [the claimant], without incurring any liability."*

Aegis v Union Bank of India is a potentially very significant case. First of all, it is only the second time in over thirty-years that a claimant has succeeded on a case premised on a breach of the Quincecare Duty, and suggests that post-*Singularis* the Courts might be increasingly confident in finding financial institutions liable when they act on notice of potential fraud. Secondly, the context is important, because of the sheer numbers of individuals and businesses that now fall victim to online scams, and the application of Quincecare in that context non-traditional applications of the Quincecare Duty.

Notwithstanding that the law of the Dubai International Financial Centre ("DIFC") is largely based on English Law, and in that case was expressly applying the English Court's formulation of the Quincecare Duty, some commentators have asked whether the DIFC decision is an outlier, and therefore unlikely to be followed by the English Courts. Supporters of that view generally cite the High Court's decision in *Philipp v Barclays Bank UK plc* [2021] EWHC 10 (Comm), which related to an authorised push payment fraud ("APP fraud") as well as the Hong Kong Court of First Instance's decision in *Luk Wing Yan v CMB Wing Lung Bank Ltd* [2021] HKCFI 279, as suggesting that the scope of the Quincecare Duty is limited to the protection of customers from their own agents and not third-parties.

APP Fraud: the Court of Appeal's Decision in *Philipp v Barclays*

However, recent developments in the English Courts appear to challenge the conventional view. *Philipp* concerned an authorised push payment or "APP" fraud. The facts of that case were that the claimant had been the victim of deception by a third party fraudster, leading to her personally (i.e. the instruction was *not* issued by the fraudster itself) transferring money from her bank account to various international bank accounts, in the belief that she was assisting an investigation by the Financial Conduct Authority and the National Crime Agency. As in *Aegis*, the claimant alleged the existence of a number of red flags to suggest that the order was an attempt to misappropriate the funds of the customer.

The High Court entered summary judgment against the claimant, on the basis that the Quincecare Duty did not apply in the context of that case, because its established boundaries were limited to protecting against the misappropriation of funds by trusted agents of customers, and that the Quincecare Duty was subordinate to the bank's duty to act on valid payment instructions.

However, on 14 March 2022, the Court of Appeal overturned the High Court's decision in *Philipp v Barclays*. In delivering judgment, Lord Justice Birss (with whom Coulson LJ and Sir Julian Flaux agreed) stated that although the conventional Quincecare cases had concerned fraud by trusted agents on the facts, *"what matters is the reasoning in these cases. That reasoning, addressed below, leads to the conclusion that despite the importance of the bank's duty to execute orders promptly, nevertheless the bank does indeed have another duty which operates in tension with that primary duty, such that the bank may be required to refrain from executing an order if and for so long as the circumstances would put an ordinary prudent banker on inquiry." (at [27]).*

Importantly (although *Aegis* was not cited), the English Court of Appeal also appears to have agreed with the DIFC's application of the Quincecare Duty, stating (at [30) that: *"Crucially the line of reasoning identified does not depend on whether the instruction is being given by an agent. It is capable of applying with equal force to a case in which the instruction to the bank is given by a customer themselves who is the unwitting victim of APP fraud provided the circumstances are such that the bank is on inquiry that executing the order would result in the customer's funds being misappropriated."*

That accords with the Judge's reasoning in *Aegis* that it would be an unsatisfactory situation

if a financial institution, who was on notice of fraud, and processed a payment instruction anyway, could escape liability solely based on the identity of the fraudster.

Conclusion

Recent developments on the Quincecare Duty suggest that Courts across the common law world have an increasing appetite for finding banks liable for the processing of fraudulent payment requests, irrespective of whether those requests are issued by a trusted agent or third party. That, in turn, opens the door to numerous potential claims arising from cyber fraud, phishing, APP fraud, and other online scams.

Find out more

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