CLEARY GOTTLIEB

ALERT MEMORANDUM

The Quincecare Duty: Supreme Court Closes the Door on APP Fraud Recovery

14 July 2023

The Supreme Court handed down judgment on 12 July 2023 in the case of *Philipp v Barclays Bank*[1] providing much anticipated clarity on the scope of the so-called *Quincecare* duty and a bank's general duty of care to its customers in respect of payment instructions. The case arose in the context of an authorised push payment (APP) fraud, where a customer had given payment instructions to a bank after being defrauded into doing so. The Supreme Court held that the Bank was not under a duty of care to protect the Claimant, Mrs Philipp, from loss suffered as a result of the fraud that was perpetrated against her and her husband by third parties.

The key issue was the scope of the Bank's *Quincecare* duty, being the duty not to execute payment instructions given by an agent of a customer if the bank has reasonable grounds to believe that the instruction is an attempt to misappropriate customer funds, and whether the duty had a wider application to cover instances of APP fraud where the instruction is given by the customer themselves.

The Supreme Court declined to recognise a similar duty in cases of APP fraud. The Court found that the *Quincecare* duty arises from a bank's general duty of care to ensure that the payment instructions have been validly given by a person who has authority to do so. The *Quincecare* duty applies therefore only in circumstances where payment instructions are given by a customer or by an agent purportedly on behalf of the customer, and the bank has notice of certain matters which should cause it to question the authority of that person to give those instructions (e.g. where the bank is aware that the payment instruction may be an attempt by the agent to misappropriate funds).

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

LONDON

James Brady
+44 20 7614 2364
jbradybanzet@cgsh.com

Hannah Veitch
+44 20 7614 2378
hveitch@cgsh.com

George Bumpus
+44 20 7614 2235
gbumpus@cgsh.com

[1] [2023] UKSC 25

clearygottlieb.com

© Cleary Gottlieb Steen & Hamilton LLP, 2023. All rights reserved.

This memorandum was prepared as a service to clients and other friends of Cleary Gottlieb to report on recent developments that may be of interest to them. The information in it is therefore general, and should not be considered or relied on as legal advice. Throughout this memorandum, "Cleary Gottlieb" and the "firm" refer to Cleary Gottlieb Steen & Hamilton LLP and its affiliated entities in certain jurisdictions, and the term "offices" includes offices of those affiliated entities.

The Supreme Court held that where no question arises as to the validity of the instruction itself (such as is generally the case in APP fraud), the bank is under a duty to execute the payment in accordance with the instructions given. Mrs Philipp gave the payment instructions directly and there was no obligation on the bank to look behind those instructions or 'concern itself with the wisdom or risks of its customer's payment decisions'.

The Court did suggest that there may be circumstances where a bank is under a duty to refrain from carrying out the instructions if it has reliable information (which the customer is not privy to) that the customer's instructions have been procured by fraud. It will be a question of 'watch this space' to see if any successful claims are brought on this basis.

Authorised Push Payment Fraud

In 2018 Mr and Mrs Philipp became victims of APP fraud, where they were tricked into sending money to an account held by the fraudster. APP fraud is one of the most prevalent types of fraud in the UK. The perpetrator will often pose as an authority figure who is contacting a customer with the purpose of protecting their account from a supposed fraud that is being committed elsewhere. In this instance, Mr and Mrs Philipp had been contacted by an individual posing as an employee of the Financial Conduct Authority who claimed to be investigating a fraud within HSBC (where Mr Philipp had an account) and an investment firm where the couple had substantial savings. Mr Philipp was persuaded that his savings needed to be transferred to 'safe accounts' while the authorities completed their investigation to bring the 'fraudsters' to justice.

Despite warnings from the police, the couple transferred their savings into a current account at Barclays and subsequently instructed the Bank to make payments totalling £950,000 to an account in the UAE. £700,000 was transferred per Mrs Philipp's instructions. A final transfer of £250,000 was blocked by Barclays after the Bank was alerted to the fraud by the police and Mrs Philipp's bank account was frozen.

By the time Mr and Mrs Philipp realised that they were the victims of fraud, £700,000 had been lost to the UAE bank account and, despite attempts by Barclays to recall the funds, could not be recovered.

Mrs Philipp, as the account holder, brought a claim against Barclays for breach of its duty of care to protect her from the fraud in circumstances which, Mrs Philipp contended, should have put the Bank on inquiry that a fraud was being perpetrated against her. The Bank applied for summary judgment on the grounds that there was no legal basis for the duty alleged by Mrs Philipp and summary judgment was granted by the High Court[2]. The Court of Appeal subsequently allowed an appeal by Mrs Philipp but that decision was further appealed by Barclays to the Supreme Court.[3]

The Supreme Court re-examines the rationale behind Quincecare

The Supreme Court took the opportunity to re-examine the 1988 High Court judgment given in *Barclays Bank plc v Quincecare Ltd*[4] and the rationale behind the *Quincecare* duty, as well as the cases that followed. Those cases generally involved a payment instruction given to a bank by an authorised agent of the customer for the purpose of committing fraud against the customer.

The Court's starting premise was that a bank is under a strict duty to make payments from a current account in line with the customer's instructions and there are limited circumstances in which the bank may not follow those instructions (most notably, where it would be unlawful to do so). A bank is also under a duty to take reasonable care in carrying out those instructions. This will include taking care to ensure that clear and valid instructions have been given and that the person giving the instruction had the authority to do so.

An agent will not have actual authority to give payment instructions where in doing so it is acting dishonestly or fraudulently in an attempt to misappropriate funds. A bank may however rely on an agent's apparent authority to avoid liability for carrying out those instructions, but only where they are not aware of any circumstances which should cause them to make inquiries to verify the agent's authority. Where such circumstances do exist, the

[2] [2021] EWHC 10 (Comm).
[3] [2022] EWCA Civ 318
[4] [1992] 4 All E.R. 363

bank is under a duty (the *Quincecare* duty) not to carry out those instructions until it has made the necessary inquiries to ensure it is not acting outside its mandate in doing so.

Lord Leggatt in his judgment drew a clear distinction between those circumstances where an agent, acting fraudulently, is making a payment instruction, and those in *Philipp*, where the payment instruction is given to the bank by the customer who wishes to make the transfer (albeit without knowledge that those instructions would cause their funds to be misappropriated).

The duty does not arise in the latter circumstance where the customer is providing a direct payment instruction since there is no question of the customer's authority (except in limited circumstances such as where a customer lacks the mental capacity to give those instructions). A bank is under no obligation to look behind such instruction to make an assessment as to the judgment and intention of the customer in giving those instructions. Given the legal basis of the *Quincecare* duty as set out by the Supreme Court in its judgment, it is clear that it could not be extended to apply to circumstances of APP fraud.

That is not, however, quite the end of the issue. Lord Leggatt made certain *obiter* comments suggesting that where a bank does have reasonable grounds to suspect that a customer's payment instruction has been procured by fraud, the bank may refrain from carrying out those instructions as part of its duty to act honestly towards its customer. The Court did not put this as highly as an obligation upon the bank to refrain from executing the instruction but, while closing the door on the application of the *Quincecare* duty in cases of APP fraud, it may have opened a window for claims where the bank had knowledge of the fraud that the customer did not. The Supreme Court was clear however that circumstances such as the destination and size of the intended payment were not sufficient to impose an obligation on a bank where the customer is already aware of these facts and wishes to go ahead with the payment.

Mrs Philipp's alternative claim that the Bank did not take adequate steps to attempt to recover the lost funds was allowed to proceed to trial, leaving open another possible route by which victims may seek to claim against a bank for losses arising out of third party fraud.

The future of APP fraud claims

Although victims will have direct claims against the fraudster, in practice they are likely to face a significant uphill battle in identifying the location of the funds and the identity of the fraudsters. More often victims of APP fraud will try to claim against their own bank (as in *Philipp*) or against the recipient bank as in the recent case of *Tecnimont Arabia Limited v National Westminster Bank Plc*[5] in which the victim's claims for knowing receipt and unjust enrichment against the receiving bank were also dismissed by the Court.

The Supreme Court has left it to regulators and lawmakers to address APP fraud and legislative and regulatory reforms are already underway.

The recently-passed Financial Services and Markets Act 2023 enables the UK's Payment Services Regulator (PSR) to introduce a new reimbursement requirement that will require payment service providers to reimburse eligible customers who fall victim to APP fraud when making payments via the UK's Faster Payments System (FPS). The FPS processes most internet and telephone banking payments in the UK, and as noted by the PSR, APP fraud most commonly occurs in relation to Faster Payments. The reimbursement requirement will apply to payment service providers that support Faster Payments (which includes most high-street banks and building societies), and in most circumstances the cost of reimbursement will be shared 50:50 between the sending and receiving payment service providers. Customers eligible for reimbursement will include consumers, microenterprises and charities. The PSR is now consulting on certain aspects of the new reimbursement requirement, which is due to come into force in 2024.

…

CLEARY GOTTLIEB

[5] [2022] EWHC 1172 (Comm)