SELBORNE CHAMBERS

Philipp v Barclays Bank PLC [2023] UKSC 25

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On 12 July 2023 the Supreme Court handed down judgment in Philipp v Barclays Bank which concerned the nature and extent of the duty of a bank (whether within the wider "Quincecare" duty or in addition to that duty) to protect a customer against falling victim to an Authorised Push Payment (APP) fraud. The outcome was a resounding victory for the Bank on the main issue accompanied by a robust (and largely unfavourable) analysis of the bases on which the "Quincecare" duty had been set up 30 years ago; adopted on various occasions since then, and extended by the Court of Appeal in the instant case.

The Facts

In March 2018 the customer lost £700,000 which she had (on the basis of false statements made to her by a sophisticated fraudster) transferred to two bank accounts in the UAE. Attempts to recall the sums when the fraud had been recognised were unsuccessful.

She sued the Bank for not refraining from following her instructions in circumstances when it had reasonable grounds to believe that she gave those instructions on the basis of a fraud being perpetrated on her, and for not taking adequate steps to recover the money once the fraud had been discovered. The judge gave summary judgment for the Bank (on the basis that the "Quincecare" duty set the limits of it's duties and that the claim went outside those limits). The Court of Appeal disagreed and re-instated the claim. The Bank appealed.

The Decision

The 5 judge panel unanimously allowed the appeal. Lord Leggatt gave the single judgment. At [3] he dismissed the submission that a bank owes an implied duty to a customer not to follow a properly authorised instruction given by that customer. On the contrary, there is a "strict" duty to follow such instructions and "it is not for the bank to concern itself with the wisdom or risks" of the decisions underlying those instructions. At [4] he pointed out that the relationship between a bank and a customer is contractual and that

whilst an obligation NOT to honour instructions in given circumstances could be expressly agreed, absent such express agreement, implying such a duty "would be inconsistent with the normal contractual basis on which banking transactions are conducted."

Lord Leggatt spent some time analysing the cases in which the "Quincecare" duty had been applied. At [63-67] he identified a fundamental flaw in the reasoning underlying those cases, namely the setting up of two distinct and (potentially) conflicting duties owed by a bank (1) to honour instructions whilst (2) not honouring certain instructions. Having wrongly decided that a bank had conflicting duties, the "Quincecare" duty was decided upon as a way of balancing the conflict. Lord Leggatt dismissed this approach, on the basis that there was no duty beyond that to honour instructions and hence no conflict that needed to be balanced. However, at [68] he observed that simply because the reasoning had "gone down a wrong track" and needed to be rejected this "should not…lead to rejecting the conclusion" in those cases (which in some instances had involved the award of compensation to the customer.

At [90-91] he set out that, properly understood, the decisions in "Quincecare" and subsequent cases involved the (unexpressed) application of principles dealing with the extent of the actual and apparent authority of a customer's agent.

In essence, a customer's agent will not have actual authority to act dishonestly in his own interests or to defraud the customer. Such an agent will probably still have apparent authority to give instructions BUT the bank would not be entitled to rely upon that apparent authority if "there are circumstances suggestive of dishonesty apparent to the bank which would cause a reasonable banker before executing an instruction to make inquiries to verify the

Absent reasonable steps taken in response to such a situation the bank would, if it executed the instruction, be liable to the customer, not based on some duty owed to it, but because the instruction was not actually that of the customer. The liability (or potential liability) in the "Quincecare" cases reflected (and should now be recognised as reflecting) this agency-based principle rather than some implied duty. There was no conflict for a bank in such circumstances; the obligation to make enquiries served its obligations to follow properly given (but only properly given) instructions.

As the APP involved no issue of agency (because the instruction was given by the customer, albeit under a dishonestly induced state of mind), on a proper application of this principle, the "Quincecare" approach could not assist the customer.

<u>Conclusion</u>

This decision must be seen as a clear return to the fundamentals of a contractual relationship and one which is likely to influence attempts to imply obligations into other contracts. A raft of other actions in the financial sector will need to be re-assessed; it is extremely likely that the vast majority will be severely weakened.

One crumb of comfort for the customer was the Supreme Court's decision to allow the claim for failing to take adequate steps to recover the money to proceed. This did not impose any novel obligations on the Bank and whilst the issue of causation was clearly difficult, as the Judge had not felt it was sufficiently weak to justify summary dismissal, the Supreme Court did not consider it right to overturn that decision.

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