DISPUTE RESOLUTION | MAY 2022

QUINCECARE DUTY: PRIVY COUNCIL RULES THAT DUTY OF CARE IS NOT OWED TO NON-CUSTOMERS OF A BANK

On 12 May 2022, the Privy Council handed down the judgment in *Royal Bank of Scotland International Ltd v JP SPC 4 and another* [2022] UKPC 18, confirming that banks do not owe a duty of care to non-customers who have been victims of fraud, even where the fraud was committed through an account with that bank.

The Background

JP SPC 4 is a Cayman Island based investment fund (the **Fund**). The Fund operated a litigation funding scheme in England and Wales (the **Scheme**). Any loans made under the Scheme were to be advanced and repaid through Synergy (Isle of Man) Ltd (**SIOM**) via their two separate bank accounts (the **Accounts**) held with Royal Bank of Scotland (the **Bank**). Any funds held within the Accounts beneficially belonged to the Fund.

Between July 2009 and October 2012, the joint owners of SIOM misapplied approximately £77.8 million of the Fund's money from the Accounts held with the Bank (of which at least £60 million was misappropriated following the Bank classifying the Accounts as "high risk").

The Fund subsequently commenced proceedings against the Bank in the Isle of Man. The Fund alleged that, notwithstanding the fact that the Fund was not a customer of the Bank, the Bank was under a duty to take reasonable care to protect the Fund from losses caused by the fraud from the date that the Bank knew that the money in the Accounts were beneficially owned by the Fund.

The Bank applied to strike out the proceedings on the basis that there was no arguable pleaded basis on which the Bank could be said to owe a duty of care, which was dismissed at first instance but allowed on appeal to the Court of Appeal. The Fund then appealed to the Privy Council.

The Issues

The Fund, *inter alia,* asserted that the claim should proceed to a full trial as the Bank owed them a duty of care on the basis that the existing authorities supported the establishment of such a duty or in the alternative, that the court should extend the duty of care to this situation as a matter of incremental development.

The Decision

The Privy Council found that the claim should be struck out on the basis that a duty of care did not arise on the facts. In reaching their conclusion, the Privy Council considered the various ways in which the Fund asserted that a duty of care arose on the facts:

The Quincecare Duty

Firstly, the Fund argued that the principles as established in Barclays Bank plc v Quincecare Ltd [1992] 4 All ER 363 (the **Quincecare Duty**) applied.

The Quincecare Duty is an implied duty owed by a bank to its customer to take reasonable care when making a payment on the instructions of the customer. Steyn J in *Quincecare* explained the scope of the duty as: *"…a banker must refrain from executing an order if and for as long as the banker is "put on enquiry" in the sense that he has reasonable grounds for believing that the order is an attempt to misappropriate the funds of the company…".*

The Fund argued that, as the Bank had actual or constructive knowledge that the monies held in the Accounts were beneficially owned by the Fund, it therefore owed (and breached) its Quincecare Duty to the Fund. In considering

the Quincecare Duty (and subsequent case law), the Privy Council concluded that the authorities did not support the argument that the Quincecare Duty extended to non-customers of the Bank.

Whilst the Privy Council acknowledged that Steyn J in *Quincecare* stated that the eponymous duty existed to also protect third parties as well as bank customers, this did not mean that the duty is owed to those third parties.

The Baden Principle

Secondly, the Fund argued that a duty of care arose on the facts from the principles established in *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509.

In *Baden,* Gibson J found that a duty of care is owed by a bank to non-customers where the bank has knowledge that the accounts are held by its customer as a fiduciary for known beneficiaries.

The Privy Council found that *Baden* could no longer be considered good law as, although it had not been expressly overruled, it was formed on the premise of the now overruled two-stage test for duty of care as stated by Lord Wilberforce in *Anns* v *Merton LBC* [1978] AC 728.

Implied Assumption of Responsibility

Thirdly, that the Bank owed a duty of care on the basis of an implied assumption of responsibility (i.e., that the circumstances show that the Bank assumed a responsibility towards the Fund as the beneficial owner of the monies).

The Privy Council considered the leading authorities on assumed responsibility, such as *N* v *Poole BC* [2019] UKSC 25, and restated that it is an objective test which focuses on the exchanges which cross the line between the defendant and the claimant.

The Privy Council emphasised that there was no express assertion of an assumed responsibility made by the Bank and there were no relevant factors to suggest that the responsibility was implied (i.e., the Bank did not take any task or service for the Fund and there were no exchanges between the Fund and the Bank).

Incremental Development?

Finally, the Fund argued that if the existing authorities do not support a duty of care in and of itself, it should be considered as an incremental development from existing case law which supports a duty of care being owed to third parties suffering pure economic loss.

The Privy Council distinguished the pre-existing authorities from the facts of this case on the basis that usually either:

(i) a legal lacuna is required (as in *White v Jones* [1995] 2 AC 207) whereby practical justice demanded a remedy; or

(ii) very exceptionally there is no legal lacuna (as in *Golden Belt v BNP Paribas [2017]* EWHC 3182) but that the purpose of the service provided was to benefit the third party.

The Privy Council found that there was not a legal lacuna, as SIOM has a potential claim against the Bank and the Fund has a potential claim against SIOM, and that the purpose of the service was not to benefit the Fund but rather SIOM. The Privy Council also stated that the Fund, in any event, did not place any direct reliance on the Bank or that (if reliance was placed) that the Bank should have known that reliance was being placed as required.

Dishonest Assistance

The Privy Council also considered whether the Bank could be deemed to have dishonestly assisted in the breach of fiduciary duty in accordance with *Royal Brunei v Tan* [1995] 2 AC 378.

However, the Privy Council determined that what was required was dishonesty and not merely negligence, which supported the decision that no duty of care was owed by the Bank to the Fund.

Commentary

This decision will be welcomed by banks, as it definitively excludes non-customers from the scope of the Quincecare Duty, even where the bank knowingly holds funds beneficially owned by a non-customer.

The approach may be considered as pragmatic, as extending the duty of care owed by banks to third parties could prove burdensome or unworkable.

Banks should still ensure that they treat with care accounts in which the money is owned by a beneficiary who is not the customer. Whilst the Privy Council may not have extended the Quincecare Duty in this case, banks should exercise caution to ensure that their conduct does not amount to "dishonesty" so as to fall foul of the principles of dishonest assistance set out in *Tan*.

The Privy Council's decision comes just a few months after the Court of Appeal overturned a strike out judgment in *Philipp v Barclays Bank UK PLC [2021] EWHC 10 (Comm)*, which revived the question as to whether the Quincecare Duty applies to individuals. For further analysis of the Quincecare Duty and its subsequent application, please see our earlier briefings.[1]

Additional research conducted by Trainee Solicitor **Annabella Ferrari.**

For more information, please contact the author(s) of this alert

RICK BROWN
Partner, London
T +44 (0)20 7264 8461
E rick.brown@hfw.com

NICOLA GARE
Professional Support Lawyer, London
T +44 (0)20 7264 8158
E nicola.gare@hfw.com

ANDREW WILLIAMS
Partner, London
T +44 (0)20 7264 8364
E andrew.williams@hfw.com

[1] HFW | Quincecare duty applied by the DIFC Courts

HFW | Quincecare Duty in the spotlight: more trouble for banks?

HFW | English high court limits quincecare duty in APP Fraud Cases

HFW | Philipp: A Quincecare lifeline to retail banking customers

hfw.com

© 2022 Holman Fenwick Willan LLP. All rights reserved. Ref:

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice. Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please email hfwenquiries@hfw.com

Americas | Europe | Middle East | Asia Pacific