

DISPUTE RESOLUTION | JUNE 2022

## IS UNJUST ENRICHMENT THE ANSWER WHEN THE QUINCECARE DUTY DOES NOT APPLY?

We have previously produced a series of briefings reviewing recent judgments<sup>1</sup> regarding the renewed focus on the Quincecare Duty and claims brought by victims of fraud involving the execution by a bank of a payment order.

The recent case of *Tecnimont Arabia Limited v National Westminster Bank Plc*<sup>2</sup> highlights an alternative avenue through which victims of fraud may seek redress when the Quincecare Duty does not apply.

### Development of the Quincecare Duty

When we published our original briefing in March 2020 regarding a flurry of new cases on the Quincecare Duty, we suggested that the most significant consequence of the underlying judgments could be an increased awareness of the Quincecare Duty and the willingness of the courts to award damages for its breach. Such an awareness was, we thought, likely to result in an increased number of claims being brought against banks by victims of fraud seeking to recover or minimise their losses.

What has followed is a series of notable judgments in which victims of fraud have sought to increase the scope of the Quincecare Duty and where, on occasion, the courts have highlighted and reiterated the boundaries of the Quincecare Duty. In particular:

- the Quincecare Duty has been considered and applied in the Dubai International Financial Centre Courts to the benefit of the claimant advised by HFW<sup>3</sup>;
- the Court of Appeal decided that the Quincecare Duty can apply to individuals<sup>4</sup>; and
- of particular relevance for the purposes of this briefing, the Privy Council held that banks do not owe a Quincecare Duty to non-customers<sup>5</sup>.

### Limitations of the Quincecare Duty

However, whilst the Quincecare Duty has brought a renewed focus and an increased number of claims against banks by victims of fraud, the options available to a victim of fraud can often be very limited, particularly where the victim is unable to:

- make a recovery from a potentially unknown fraudster;
- bring a claim against its own bank as it has not acted in breach of the Quincecare Duty; and
- bring a claim against the recipient bank for breach of the Quincecare Duty following the decision of the Privy Council in *Royal Bank of Scotland v JP SPC*.

The recent *Tecnimont* judgment may afford a victim of fraud an alternative route in order for it to claim against the recipient bank for the misappropriated sums on the basis that it has been unjustly enriched.

### Alternative Claim

In *Tecnimont v NatWest* the claimant (*Tecnimont*) brought a claim for restitution of its misappropriated monies against the recipient bank (*NatWest*) on the basis that *NatWest* was unjustly enriched as a result of the fraud.

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<sup>1</sup> *Singularis Holdings Ltd (In Official Liquidation) (A Company Incorporated in the Cayman Islands) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50 and *JP Morgan Chase Bank N.A. v The Federal Republic of Nigeria* [2019] EWCA Civ 164

<sup>2</sup> [2022] EWHC 1172 (Comm)

<sup>3</sup> *Aegis Resources DMCC v Union Bank of India (DIFC) Branch* [2020] DIFC CFI 004

<sup>4</sup> *Philipp v Barclays Bank UK Plc* [2022] EWCA Civ 318

<sup>5</sup> *Royal Bank of Scotland International Ltd v JP SPC 4 and another* [2022] UKPC 18

Tecnimont was deceived by an unknown fraudster into instructing its bank to transfer USD 5 million to an account operated and held by the fraudster with NatWest (the **Account**). Despite various internal alerts being triggered, NatWest actioned requests by the fraudster to make numerous transfers out of the Account, which resulted in Tecnimont only being able to recover a little in excess of USD 600,000 of the original USD 5 million.

Tecnimont's bank did not act in breach of the Quincecare Duty as it had not been put on enquiry as to the existence of the fraud and did not know / had no reasonable grounds for suspecting that a fraud was being committed. Consequently, it did not act recklessly in executing the payment instructions.

Instead, Tecnimont claimed that NatWest had been unjustly enriched or had knowingly received property that was subject to a trust. In its defence, NatWest denied that any enrichment had been at Tecnimont's expense; alternatively, that if there had been unjust enrichment at the expense of Tecnimont, then NatWest had a defence, namely that it had changed its position in good faith.

In respect of the unjust enrichment claim, the court was required to consider whether:

- NatWest was enriched;
- the enrichment was at the expense of Tecnimont;
- the enrichment was unjust; and
- NatWest could rely on any defences.

The issue that was most hotly argued and which will be of wide interest is the argument around whether NatWest was enriched at the expense of Tecnimont. Ultimately, the court held that NatWest had not been enriched at the expense of Tecnimont as, in this case, Tecnimont had not dealt directly with NatWest and Tecnimont and NatWest had not dealt with one another's property.

The reasoning being that was that Tecnimont's payment instruction was actioned by its bank (rather than Tecnimont), and this resulted in funds being transferred into the Account. In particular, the transfer of value flowed from Tecnimont's bank to an intermediary bank in New York and then in a second transaction from the intermediary bank in New York to NatWest in London. Whilst the economic reality of those two transactions was that USD 5 million left Tecnimont's bank account and was credited to the Account, that economic reality was the result of two separate transactions involving the intermediary bank and various layers of international banking system.

Whilst the unjust enrichment claim was unsuccessful, the court separately considered whether NatWest was able to rely on the *change of position* defence, or whether such a defence was unavailable on the basis that NatWest should have known of the fraud at the time that the funds were being dissipated out of the Account. There were three opportunities when NatWest could have frozen the funds, two from anti-fraud alerts triggered by NatWest's anti-fraud systems and the third when NatWest was actually notified of the fraud. Unfortunately, further sums were transferred out of the Account after NatWest was actually notified of the fraud.

In summary, the court found that the *change of position* defence was available to NatWest because it operated adequate and properly designed systems to deal with frauds on and by its customers. The first two alerts were aimed at protecting NatWest's own customer. In respect of the third opportunity, the court held that NatWest could rely on the *change of position* defence as: (i) the delay in NatWest freezing the Account, which permitted a payment to be made out of the Account, was "*relatively short*"; and (ii) NatWest was taking steps during that period of delay to recover monies that had already been dissipated out of the Account.

## Commentary

On its face, the decision in *Tecnimont v NatWest* appears to give some comfort to banks and limit the avenues by which a victim of a fraud can seek recourse. However, it also leaves scope for a successful claim of unjust enrichment by a victim of fraud against a recipient bank where:

- the victim's bank transacted directly with the recipient bank rather than through an intermediary bank with the consequence that the recipient bank is deemed to have been enriched at the expense of the victim; and
- the conduct of the recipient bank is such that it is unable to rely on the *change of position* or any other defence e.g., if the recipient bank knew of the fraud, did not have the requisite systems in place to identify and / or prevent the fraud or did not act in a timely and appropriate manner following it being notified of the fraud.

Whilst the requisite ingredients for such a claim are seldom found in one case and are, on account of the nature of international banking transactions, more likely to be found in national rather than international transactions, it does give victims of fraud another potential option to seek a recovery from recipient banks if they are unable to pursue the fraudster or benefit from a breach of the Quincecare Duty by their own bank.

## Additional Protection

The court in *Tecnimont v NatWest* noted that, whilst Tecnimont had adequate internal procedures and protocols, the fraudsters were able to perpetrate the fraud because those procedures and protocols were not followed. Care should therefore be taken to ensure that the requisite procedure and protocols are in place and that the relevant people that execute the vulnerable payment instructions receive regular training on those procedures and protocols.

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