Complex Commercial Litigation

The Quincecare duty - not to be easily excluded

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Two recent decisions in the Supreme Court and Court of Appeal underline the significance of the Quincecare duty for financial institutions, a duty which hitherto has been given little judicial airtime. As previously reported, Jenner & Block's London office recently secured victory for Singluaris Holdings when the Supreme Court affirmed Daiwa's liability (for c.US$200 million) for breach of its Quincecare duty for facilitating the misappropriation of funds out of Singularis' account. This was the first case in which damages have been awarded for a breach of the Quincecare duty. ("The Supreme Court Rules on the Quincecare Duty and Corporate Attribution," Jenner & Block) In addition, the Court of Appeal has handed down judgment in *JPMorgan Chase Bank, N.A. v. The Federal Republic of Nigeria* [2019] EWCA Civ 1641, highlighting the difficulty financial institutions will face in excluding the application of the Quincecare duty. The Court of Appeal unanimously upheld the decision of the High Court in dismissing JP Morgan Chase Bank, N.A.'s (**JPM**) application for reverse summary judgment and / or strike out of the claim, holding that the Quincecare duty was not excluded by the express terms governing JPM's depository agreement with the Federal Republic of Nigeria (**FRN**). Consequently, FRN's claim for US$875,740,000 for breach of the Quincecare duty looks set to proceed to trial.

The duty

The Quincecare duty arises either by operation of an implied contractual term or under the tort of negligence; it requires financial institutions to take reasonable care and skill in executing customer orders. As classically articulated, the Quincecare duty is a negative duty requiring a banker to *'refrain from executing an order if and for so long as the banker is "put on inquiry" in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company' [Barclays Bank plc v. Quincecare Ltd* [1992] 4 All ER 363]. The Quincecare duty is objective, judged by the standard of an ordinary prudent banker. A question was raised before the Court of Appeal in JPM v FRN as to whether the Quincecare duty also encompasses a positive obligation, i.e. a duty of enquiry, as well as a duty not to pay. The court went no further than to say that in most cases reconciling the conflicting duties the bank owes (that is the duty to execute customer payment instructions and the Quincecare duty) will require "something more" than simply deciding not to pay. However what "something more" amounts to in this case will be a matter for the trial judge.

The most pertinent point to come out of the decision was the guidance the Court of Appeal gave as to the clear language in any account terms which would be required to exclude the Quincecare duty (see further below). The potential formulations of exclusionary wording which arise from the Court of Appeal's observations are likely to be commercially unattractive for financial institutions to try to obtain.

Facts

The FRN's claim concerns transfers made by JPM of US$875,740,000 from a depository account opened by the FRN pursuant to instructions from authorised signatories of the depository agreement.

The FRN alleged that these payment instructions formed part of a fraudulent scheme which permeated the highest levels of the Nigerian government (although there is no allegation that JPM knew about or was in any way involved in the alleged fraud). The FRN alleged that, as a result of the Quincecare duty, JPM should have realised that it could not trust the senior Nigerian officials from whom it took instructions and should not have made the payments it was instructed to make. Consequently, the FRN asserts that JPM is liable to pay damages to Nigeria in the amount of the sums transferred by the bank.

JPM applied for reverse summary judgment and/or strike out, arguing that (i) the Quincecare duty did not necessarily apply to the depositary account given that (unlike current accounts) it was a single purpose account with detailed and narrow release conditions; and (ii) in any event, the Quincecare duty was excluded by the express terms of the depository agreement.

The High Court Decision

The High Court held that the Quincecare duty could apply to a depositary account in the same way as a current account, and the express terms of the depository agreement between the bank and the FRN did not exclude the Quincecare duty. While the depositary agreement contained an express term that JPM *'shall be under no duty to enquire into or investigate the validity, accuracy or content of any instruction or other communication'*, the Court interpreted that term to mean that there was no duty to enquire or investigate **prior** to the point at which the bank had the relevant reasonable grounds for belief that the payment mandate may be an attempt to misappropriate funds.

The Court of Appeal Decision

The Court of Appeal upheld the High Court's judgment, agreeing with the High Court's interpretation of the relevant clauses in the depository agreement, and stated that the clauses were consistent with the Quincecare duty. The Court of Appeal considered that it was not impossible for a bank and its client to agree to exclude the *Quincecare* duty provided sufficiently clear words were used (and subject to statutory restrictions like the Unfair Contract Terms Act 1977). However, such exclusion would need to make clear *'…that the bank should be entitled to pay out on instruction of the authorised signatory even if it suspects the payment is in furtherance of a fraud which that signatory is seeking to perpetrate on its client'*. This is a seemingly unattractive exclusion for a bank to try to negotiate.

As regards the scope of the Quincecare duty, as noted above, the Court of Appeal went further than the High Court: it considered that, in most cases, the *Quincecare* duty will require "something more" from the bank than simply refusing to comply with a payment instruction when it is on notice that a payment instruction might be an attempt to misappropriate funds. The Court of Appeal was clear that this duty to do "something more" was part and parcel of the Quincecare duty and disagreed with the trial judge's characterisation of it as something subsidiary to the core duty to refrain from making payment. Should the trial judge find in due course that the Quincecare duty was engaged on the facts, the question as to what else JPM should have done in the circumstances will need to be assessed.

Where do we go from here?

While the Court of Appeal has made clear that it is possible to exclude the Quincecare duty, the decision may not result in financial institutions seeking to amend the standard terms and conditions of client account agreements given the high bar which was set for the clear wording that would be required.

Financial institutions should review their existing protocol in relation to payment processing. Increased scrutiny should be given to the precise processes (including reporting and communication lines), investigations and record keeping undertaken once the institution suspects that a payment mandate might be an attempt to misappropriate funds. It is hoped that in due course the trial judge will give clearer guidance as to what positive action the "something more" aspect of the Quincecare duty requires. Notably, JPM filed six suspicious activity reports and obtained consent from the National Crime Agency to make the payments. Any clarification of the duty will be important given the decision in *Singularis* has provided the highest judicial confirmation that the Quincecare duty has a public policy value, and banks should be robust in their attempts to stymie fraudulent payments.

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