The revival of the banker's *Quincecare* duty in England: accelerating claims seeking to recover losses for fraudulent misappropriation

I. Introduction

The banker's *Quincecare* duty is undergoing a revival in England. Owed by a bank to its customer in both contract and in tort, the *Quincecare* duty provides that a banker must refrain from executing a customer's order if the banker is 'put on enquiry' that it has reasonable grounds to believe that the order is an attempt to defraud the customer.[1] That is, in certain circumstances a bank must refrain from executing what it reasonably believes are fraudulent payment instructions. First recognised in *Barclays Bank v Quincecare* ("***Quincecare***") in 1988, the *Quincecare* duty lay largely dormant for several decades, until a string of recent claims in the United Kingdom that have sought to hold banks liable for losses due to fraudulent misappropriation.[2] Of those, only *Singularis Holdings Ltd v Daiwa Capital Markets Ltd* ("***Singularis***") has been successful. That trial decision was upheld by the UK Supreme Court in 2019. Most recently, in late 2022 and early 2023, the UK Supreme Court has again twice considered the *Quincecare* duty: first in the context of what counts as recoverable loss if the duty is breached, and, second on the question of whether the duty can apply outside of the agency context, *i.e.* where the customer themselves gives the fraudulent payment direction (and the instruction is not given by a director of the customer, as agent).

In mid-2022, eagerly awaited guidance on the scope of the duty was given in the high-profile trial decision of the English High Court in *The Federal Republic of Nigeria v JPMorgan Chase Bank, N.A.* ("***Nigeria v JPM***").[3] In short, the Court found that while historic payments tainted with corruption may have raised money laundering red flags, that was not enough to breach the bank's *Quincecare* duty. Instead, the focus is on the *specific* payment instructions said to be fraudulent. If those are legitimate, then no liability will lie.

This Client Note first examines the fresh scope of the *Quincecare* duty and how it applies in England & Wales. Second, we analyse the elements that are now required to successfully plead and prove a claim for breach of the *Quincecare* duty. Finally, we consider potential future developments, including: (a) the duty's application in the field of cryptocurrency (with such litigation already proceeding through the English courts); and (b) based on oral argument in the pending *Philipp* appeal, the strong indication from the UK Supreme Court that the scope of the duty should be narrowed and its juridical basis clarified.

II. What is the *Quincecare* duty?

Although the *Quincecare* case was itself only reported in 1992, the *Quincecare* duty was first recognised when that decision was handed down in 1988. In that case, Steyn J formulated the scope of the duty as follows, which still represents the core of the *Quincecare* duty:

> *"it is an implied term of the contract between the bank and the customer that the bank will observe reasonable care and skill in and about executing the customer's orders … a banker must refrain from executing an order if and for so long as the banker is 'put on inquiry' in the sense that he has reasonable*

[1] See Steyn J in *Quincecare* at 376; *RBS* at [37]; *Nigeria v JPM* at [130].
[2] [1992] 4 All ER 363
[3] [2022] EWHC 1447 (Comm).

grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company."[4]

As identified in *Quincecare* itself, the *Quincecare* duty sits in perpetual tension with a banker's primary duty owed in contract and tort, which is to promptly execute a customer's instructions under the bank's mandate.[5] As such, the question becomes *when* the bank's liability will be generated by executing its customer's instructions pursuant to its primary duty. In the absence of the bank deliberately shutting its eyes to a fraud or acting recklessly (both of which will generate liability), Steyn J held that: "*[t]he critical question is: what lesser state of knowledge on the part of the bank will oblige the bank to make inquiries as to the legitimacy of the order?*"[6] The answer to that question is now settled (in favour of the answer suggested by Steyn J in *Quincecare* itself). As held by the UK Supreme Court, liability will be generated "*if and for so long as it* [the bank] *was put on inquiry by having reasonable grounds for believing that the order was an attempt to misappropriate funds.*"[7]

Policy rationale

The policy rationale for the recognition of the *Quincecare* duty has been clearly stated by the courts: it is to guard against the facilitation of frauds on a bank's customers, in circumstances where there are indications of fraud in relation to a given payment instruction.[8] In short, it is intended to shield customers from loss. As explained by Baroness Hale in *Singularis: "[t]he purpose of that duty is to protect the company against just the sort of misappropriation of its funds as took place here."*[9] In other words, it fulfils a protective function.

Legitimacy of the Quincecare duty?

The recent authorities take differing views on the legitimacy and provenance of the *Quincecare* duty. On the one hand, the Privy Council in *RBS* recently described the *Quincecare* duty as "*well-established*".[10] Moreover, the UK Supreme Court in *Singularis* strongly endorsed the trial judge's findings; the Supreme Court stated that it was "*incontrovertible*" that there had been a breach of the *Quincecare* duty on those facts.[11] On the other hand, the trial judge in *Nigeria v JPM* stated that the "*Quincecare duty is one which has developed on a somewhat slender foundation*", and went on to say that "*the existence and ambit of the Quincecare duty, even so many years after its emergence, is not entirely uncontroversial.*"[12]

Following the recent series of decisions, including the 'win' for the *Quincecare* duty in the Court of Appeal in *Philipp v Barclays Bank UK plc* ("***Philipp***"), the UK Supreme Court is widely expected to clarify the law in the now-pending *Philipp* judgment.[13] Indeed, in oral argument in the *Philipp* case, Lord Reed stated on the morning of day one that "*we are not necessarily taking for granted that the analysis in Quincecare is correct*". On the facts of *Philipp* (where the customer herself gave the order instructions), it appears that the UK Supreme Court was unpersuaded that the duty should be extended to such cases which are outside of

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[4] *Quincecare* at 376.
[5] See also *Philipp* at [34], where Birss LJ noted the "*tension*" between these two duties.
[6] *Quincecare* at 376. See also the Court of Appeal's decision in *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340, which considered the (then unreported) *Quincecare* decision.
[7] *Singularis* at [1].
[8] *Quincecare* at 376.
[9] *Singularis* at [35].
[10] *RBS* at [80].
[11] The question of liability was not live on that appeal (it concerned the defences of attribution and illegality).
[12] *Nigeria v JPM* at [145] and [146]. For an example of strong academic criticism of the nature, scope and provenance of the *Quincecare* duty, see Peter Watts QC, 'The Quincecare duty: misconceived and misdelivered', 5 *Journal of Business Law* 2020 at 403–16.
[13] [2022] EWCA Civ 318.

the traditional agency context. It is likely that in *Philipp*, in addition to narrowing the duty's scope, the Court will also clarify the juridical basis of the duty. In particular, it appears from comments made by Lord Reed that the duty is best conceptualised as an implied restriction on the bank's primary duty to execute under its contractual mandate with its customer; that is, the source of the duty may solely be an implied term in contract, and could cease to sound in tort. Moreover, Lord Leggatt suggested that the duty had gone too far, and that any alleged tortious *Quincecare* duty could not "*override*" the bank's primary contractual duty: his Lordship stated that "*that's not how the hierarchy of obligations works*". The market keenly awaits the judgment in *Philipp* and clarification on the bounds of the duty.

III. Current scope of the *Quincecare* duty

Despite those divergent views on the legitimacy of the *Quincecare* duty, it is nonetheless possible to identify the nature and scope of the duty as it stands today. As discussed further below, the recently decided cases in the United Kingdom have clarified—and arguably expanded—the scope of the *Quincecare* duty. Accordingly, the scope of the *Quincecare* duty as it currently applies may be stated as follows:

- the *Quincecare* duty places a duty on a bank not to follow a customer's payment instructions where the bank is 'put on notice' that executing those payment instructions may facilitate a fraud on the customer;[14]

- a bank will be 'put on notice' where there are reasonable grounds for believing that the payment order is an attempt to misappropriate the customer's funds;[15]

- the *Quincecare* duty is a common law duty owed by a bank to its customer coextensively in contract (as a term implied by law) and in tort (as a duty of care in the tort of negligence),[16] and it is thereby "*one aspect of a bank's overall duty to exercise reasonable skill and care in the services it provides*";[17]

- the *Quincecare* duty naturally sits in conflict with the bank's primary duty to promptly execute a customer's instructions pursuant to the bank's mandate, and, generally speaking, the *Quincecare* duty remains subordinate to that primary duty;[18]

- the *Quincecare* duty arises in relation to the *specific* payment instruction given to the bank, and the focus is squarely on whether the matters of which the bank has notice vitiate that *specific* instruction;[19]

- noting that this aspect of the duty is currently heavily subject to the pending UK Supreme Court judgment in *Philipp*, the *Quincecare* duty may apply where the bank is instructed by persons *other than* an agent of its customer, *i.e.* the application of the *Quincecare* duty is not

[14] *Nigeria v JPM* at [2].
[15] *Nigeria v JPM* at [152] citing Rose LJ at [127] in the Court of Appeal earlier in that litigation. Rose LJ in turn cited Lady Hale in *Singularis* at [1].
[16] *RBS* at [38], citing *Quincecare* at 376 which in turn cited *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp (a firm)* [1978] 3 All ER 571. See also *RBS* at [39].
[17] *Nigeria v JPM* at [134] citing Rose LJ at [40] in the Court of Appeal.
[18] *Quincecare* at 376, cited in *RBS* at [38].
[19] *Nigeria v JPM* at [158].

limited to the so-called 'internal fraud' cases whereby a rogue director of a company (thereby acting as agent of the company) is attempting to misappropriate company funds;[20]

- the *Quincecare* duty of care is owed only to a bank's customers, and is not owed to any third parties;[21] and

- finally, both within and outside of an insolvency context, claimants must clearly identify the loss suffered, which does not include payment of existing debts.[22]

IV.Status of the duty in England

Since being reported in 1992, the *Quincecare* duty lay dormant for several decades, and was only referred to a handful of times before 2017 in the United Kingdom. Following the successful trial decision in *Singularis* and the UK Supreme Court's emphatic endorsement of that trial decision, the number of *Quincecare* claims has accelerated. There has been mixed success for claimants alleging breach of the *Quincecare* duty:

- *Singularis* itself was successful on establishing liability. The defendant was an investment bank which paid out US$204 million from a segregated client account its customer held with the investment bank, on the instructions of its customer's sole (and rogue) active director, who was an authorised signatory on the account. The bank was sued by the liquidators of its defrauded customer. The ultimate appeal to the UK Supreme Court (which only concerned live questions on potential defences) upheld the trial judge's clear finding that these payments were a misappropriation, essentially because they were made for the purposes of supporting that director's other personal business ventures, in circumstances where there were "*glaring*" indicators of fraud.[23] That included US$80 million appearing in the client account after the bank learned the director's accounts at other banks had been frozen by Saudi authorities, and the production of a strange agreement said to justify vast payments out of the account.[24]

- *Philipp* was a successful appeal by the defrauded customer from summary judgment in favour of Barclays. On the live issue, the Court of Appeal found that the scope of *Quincecare* duty may theoretically extend to cases of authorised push payment ("**APP**") fraud. APP fraud occurs where it is the *customer themselves* who has been deceived by a fraudster, and the customer instructs the bank to pay out—or 'push'—money to the fraudster. As the Court of Appeal in *Philipp* noted, it is 'authorised' because "*from the bank's point of view, the payment is authorised by the customer*".[25] Here, the defrauded customer was persuaded by the fraudster to transfer over £700,000 from her Barclays account to accounts in the UAE. The customer had been deceived to such an extent that she even persuaded Barclays to remove an internal block on the account in relation to the transactions; yet, her claim is that the fraud visited upon her vitiated her payment instruction (as per the Court of Appeal's finding). APP fraud

[20] *Philipp* at [78], cited by *Nigeria v JPM* at [149] and [150].
[21] *RBS* at [40].
[22] *Stanford*.
[23] *Singularis* at [4].
[24] See *Singularis Holdings Ltd (In Official Liquidation) v Daiwa Capital Markets Europe Ltd* [2017] 2 All E.R. (Comm) 445 at [193]–[205] ("***Singularis Trial***").
[25] *Philipp* at [1].

is contrasted with the more traditional type of 'internal fraud' case, as in *Singularis*, where the director of the company 'internally' perpetrates the fraud against the company (and, importantly, does so by acting as an agent of the company). As noted, *Philipp* is now pending judgment by the UK Supreme Court, and (to the extent what, if any, claim survives) will otherwise be remitted to trial to determine whether breach of the *Quincecare* duty can be established on the facts.

- *Nigeria v JPM* was not successful at trial, despite an intermediate win for the Federal Republic of Nigeria ("**FRN**") at the Court of Appeal level along the way.[26] This important trial decision is discussed below.

- The bank won in *Royal Bank of Scotland International Ltd v JP SPC 4*[27] ("***RBS***"). There, the Privy Council confirmed that the duty is owed only to a bank's customers, not to any third parties. On the facts, there was (a) an investment fund, which had been defrauded over £65 million (one legal entity, the claimant); and (b) its manager (a different legal entity, run by fraudsters). It was however the manager, not the investment fund, who held the relevant bank accounts with RBS (although the claimant alleged the funds in the bank accounts were beneficially owned by the investment fund). Given that the claimant did not hold the relevant bank accounts at RBS, it was not a customer of the bank.[28] The third-party claimant failed for that reason; the bank held no duty towards the investment fund.

- Finally, the bank also prevailed in the latest judgment from the UK Supreme Court: *Stanford International Bank Ltd v HSBC Bank Plc*[29] ("***Stanford***"). That decision assumed, for the purposes of a strike out application by HSBC against SIB's liquidators, that the *Quincecare* duty applied and had been breached by the payment out of £116 million to SIB's creditors, notwithstanding that SIB was hopelessly insolvent at the time of the payments. In short, the UK Supreme Court found that, by majority, there was no recoverable loss suffered by SIB in contract or in tort pursuant to the *Quincecare* duty, because it already owed that money to its creditors. There was no net loss by the bank's customer.[30] Lord Sales gave a strong dissenting judgment, arguing that the loss of the £116 million fund constituted a loss to SIB, as it disabled SIB from performing its duty to creditors (that duty owing due to the impending insolvency) to safeguard the fund, so that a higher dividend could be paid to all creditors, rather than just to those who fortuitously received early payments from SIB.[31]

The next section of this Client Alert examines one of the emerging themes in the *Quincecare* case law at the liability stage—the laser focus on the specific payment instruction said to be vitiated by fraud—in the most substantial English trial to date related to an alleged breach of the *Quincecare* duty.

V. *Nigeria v JPM*

In this case, the English High Court found that payments of over US$875 million out of a depository account held at JPM that were authorised by officers of the FRN were not made in breach of

[26] See *JP Morgan Chase Bank v The Federal Republic of Nigeria* [2019] EWCA Civ 1641 ("***Nigeria Appeal***").
[27] [2022] UKPC 18.
[28] *RBS* at [44].
[29] [2022] UKSC 34.
[30] *Stanford* at [30] (per Lady Rose, Lord Hodge and Lord Kitchin) and [55] per Lord Leggatt (concurring).
[31] *Stanford* at [117] per Lord Sales.

JPM's *Quincecare* duty, notwithstanding that the payments were made to a company associated with a former oil minister of Nigeria accused of corruption.

Negligence versus gross negligence

There is an important preliminary point on *Nigeria v JPM.* Here, the applicable legal standard was that JPM would only be liable for breach of its *Quincecare* duty if it was found to have committed *gross* negligence, as opposed to (mere) negligence. This was because the contractual terms of the deposit account as between Nigeria and JPM excluded JPM being liable in respect of negligence, but those contractual terms contained a carve-out for gross negligence. In other words, a higher standard than normal applied due to the contractual terms.

Under English law, the standard for proving gross negligence is significantly higher than that required to prove mere negligence. Indeed, the Court found in *Nigeria v JPM* that while the test for gross negligence under English law has always been a "*notoriously slippery concept*", it is reserved for only those mistakes "*which have a very serious and often a shocking or startling (cf. "jawdropping") quality to them*."[32] It confirmed that the test is whether the defendant was facing an obvious risk, and, if so, whether the relevant conduct showed a serious disregard for that risk.[33] Accordingly, the case's precedential value is arguably limited regarding cases where banking customers are considering bringing *Quincecare* claims for (mere) negligence that are not limited by the applicable terms of a banking contract.

Focus on the specific payment instruction

The Court examined the history of the *Quincecare* duty and concluded that it is narrow in focus. In particular, the Court found that:

- the duty on the bank arises in relation to the payment instruction;
- there needs to be a clear focus on what it is the bank is said to be 'on notice of'; and
- the duty does not arise unless the bank is on notice that the instruction in question may be vitiated by fraud because it is an attempt to misappropriate the customer's funds.[34]

In other words, the clear focus is on the *specific* payment instruction to the bank which is said to be vitiated in light of the wider factual matrix.

Facts of Nigeria v JPM

The facts of *Nigeria v JPM* are complex, spanning several decades and involving a significant number of parties. The case concerned payments said to have been made pursuant to settlement agreements that were intended to resolve a long-running dispute about the rights to oil fields in Nigeria, the original grant of which was likely tainted with historic political corruption.

In short, following the grant of oil rights in 1998, there were sustained allegations of corruption levelled against the oil minister at the time of the grant, who was allegedly a shareholder in the entity awarded the grant. The grant was revoked and later re-issued. Over several years, litigation ensued between various parties, and, ultimately in 2011, fresh settlement agreements were reached, whereby (essentially) the

[32] *Nigeria v JPM* at [326] and [334], applying the test from *The Hellespont Ardent* [1997] 2 Lloyd's Rep 547, 587, per Mance J.
[33] *Nigeria v JPM* at [327] and [337].
[34] *Nigeria v JPM* at [158].

grantee surrendered the oil rights in exchange for payment of US$1.092 billion. The FRN was the customer of JPM under a depository account agreement, pursuant to which the FRN directed the US$1.092 payment be made.

Over a period of several months in 2011, the Nigerian government gave repeated instructions to JPM to pay out the bulk of the US$1.092 billion. During this period, no less than eight sets of payment instructions were received by JPM, and which JPM declined to execute, essentially because of the high corruption risk associated with large payments in the Nigerian oil industry. Notwithstanding that risk, in the end over US$800 million was then paid out in several tranches. Later investigations showed that the funds flowed into an intermediate account, and then almost immediately were spent on (a) a US$54 million purchase of a Bombardier private jet, (b) a French money laundering fine and (c) a US$333 million cash withdrawal. Two years later, in 2013, the FRN gave JPM instructions to pay out a further US$75 million. Payment was made despite significant press attention between 2011 and 2013 which made allegations of corruptions against key persons involved, including the FRN's Attorney General in 2011 (who was said to be ultimately linked to both to the grantee and the original fraud).

<u>The trial decision in Nigeria v JPM</u>

The Court found that neither payment was grossly negligent on the bank's part, and therefore neither payment gave rise to a breach of JPM's *Quincecare* duty owed to the FRN. In essence, this was because the specific payment instructions in 2011 and 2013 were properly authorised in the context of the FRN legitimately seeking to settle the long-running dispute, and crucially, the Court found any earlier fraud from 1998 could not be traced through to the payment instructions given pursuant to the 2011 settlement.

The key reasons why the Court came to this conclusion were:

- The 2011 settlement agreements were concluded over a number of months, and approximately 27 Nigerian ministers and senior officials gave input on drafts.

- While the Attorney General was involved, he was only one person and there was no plausible explanation as to how he had 'outmaneuvered' over 25 other people physically present at the meeting where the settlement was reached.

- Although the grantee may have had a complex and murky shareholder structure, only (impermissible) double hearsay linked it to the Attorney General.

- The payment instructions were not issued by the Attorney General, but rather by <u>the</u> two individuals who were authorised as officers of the Nigerian government to issue payment instructions to JPM under the relevant terms of the banking depository agreement (and the two individuals gave those instructions at their own behest).

Given that the Court found that the settlement agreements were not infected by fraud, this meant that the payment instructions in 2011 and 2013 to JPM were legitimate. JPM could not therefore have been on notice of any attempted misappropriation. For that reason, the claim failed.

The Court made *obiter* comments about what the position would have been for the payments *even if* they had been infected by a fraud in 2011. Interestingly, the Court stated that the risk of the fraud in those circumstances would not have been 'obvious', even when considered holistically. Here, the Court emphasised that there is an important, and fundamental distinction between indicia of money-laundering and the relevant private law conditions that will give rise to a breach of the (narrower) *Quincecare* duty. Cockerill J stated: *"[t]e red flags for money laundering and past financial crime might well be said to be 'many, glaring*

and obvious'. What there was not, however, was a serious or real possibility that in relation to this transaction FRN might be being defrauded".[35] Accordingly, there was no basis for *Quincecare* negligence (whether gross or otherwise).

VI. Pleading and proving a *Quincecare* claim

In light of the recent case law, successfully pleading and proving a *Quincecare* claim in England therefore requires a carefully calibrated approach, as follows:

- The claim must plead that the relevant contract is a banker-customer contract into which the *Quincecare* will be a contractual term implied by law.

- Subject to any specific contractual modifications to the scope of *Quincecare* duty, a claim should also contain a plea of negligence, setting out the elements of a duty of care and particularising the breaches of that duty.

- In particular, the plea of negligence should particularise the undertaking from the bank to the customer where it assumed the duty of care.

- A core focus should be on pleading out precisely which facts put the bank on notice that the *specific* impugned payment instruction was fraudulent.

- Claimants should plead out how and why the bank failed to conform to the applicable standards of modern banking practice that require maintenance of adequate controls to prevent such fraud.[36]

- In addition to appropriate pleas, proving why the bank has failed to meet the applicable standards of modern banking practice will require expert evidence of applicable banking practice (and, following the *JPM v Nigeria* decision, claimants should not, generally speaking, adduce evidence about applicable money laundering safeguards – the focus is on prevention of fraudulent payments, not proceeds of crime).[37]

- Following the UK Supreme Court's decision in *Stanford*, both within and outside of an insolvency context, claimants must clearly particularise the loss suffered by the customer.

VII. Future potential developments

The revival of the *Quincecare* duty in England has, unsurprisingly, already led to attempts to expand its scope.

Cryptocurrency

Foremost is a recent attempt to expand the duty to apply to Bitcoin software developers in *Tulip Trading Ltd v Bitcoin Association for BSV* ("***Tulip Trading***").[38] In that case, the self-proclaimed 'inventor' of bitcoin, and owner of substantial bitcoin assets, is attempting to hold certain bitcoin software developers

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[35] *Nigeria v JPM* at [364].
[36] *Philipp* at [39]. For example, in *Philipp*, at trial Barclays' conduct would fall to be judged against the standard expected of a bank employee in a local branch faced with a request by a customer to transfer significant sums to an overseas payee.
[37] *Philipp* at [39].
[38] [2022] EWHC 667 (Ch).

liable for a fraudulent hacking by parties unknown which led to the loss of significant cryptocurrency assets. In essence, the claim in tort asserts that developers of digital cryptocurrency networks owe a duty of care to owners of digital assets who have lost their private keys to assist them to regain control of their assets.[39] As regards the *Quincecare* element, the claimant argued that the software developers could be equated with financial institutions (i.e. banks) because they retained control of the cryptocurrency networks, despite there being no contractual relationship as between the developers and the end bitcoin owner.

At first instance, the claim failed. Simply put, as regards the *Quincecare* claim, this was because there no relevant contract between a banker and a customer: "*the duty is owed only to the bank's customer, and not to any wider class*".[40] More widely, the duty that the claimant sought to assert was argued as being part of a wider incremental step in both the law of tort and fiduciary law: to recognise a new, novel duty owed by the developer towards an owner, in circumstances where the bitcoin networks retain control over the network. At first instance, the claimant's argument failed essentially because "*[b]y definition the potential class in this case is unknown and potentially unlimited".* [41]

The Court of Appeal has, however, recently overturned that decision. In short, the Court of Appeal found that a novel fiduciary duty could in theory be owed by the network developers to the users of bitcoin software, on the basis that the developers are an identified class have undertaken a role "*which involves making discretionary decisions and exercising power for and behalf of other people, in relation to property owned by those people*", and where the "*property has been entrusted into the care of the developers*".[42] The Court of Appeal found that, if the claim on the fiduciary duty point moves forward, then the claim in tort should also move forward. While any trial decision is not expected to re-open the *Quincecare* point, as no contract exists between the developers and the end user, nonetheless the potential development of tort law to include such a species of protective duty at common law would accord with *Quincecare's* rationale.

Given the May 2022 crash in cryptocurrency markets, and the ensuing litigation as regards the assets of various leading cryptocurrency exchanges, there is scope in this space for the appropriate expansion of the *Quincecare* duty. For example, a bank, financial intermediary or cryptocurrency exchange may hold some form of cryptocurrency assets for a customer and fail properly to guard against the fraudulent release of those assets, or make payments in respect of underlying cryptocurrency positions as part of a fraud visited on the exchange's customer. Although the *Quincecare* duty has thus far been pleaded as applying specifically to banks, the underlying rationale of the duty would plainly suggest that it could well apply to other financial institutions, intermediaries and cryptocurrency providers who have *undertaken* to their customers to hold or transfer assets, or to provide payment services.[43]

<u>A positive duty?</u>

More broadly, the Court of Appeal's decision in *Philipp* has squarely raised the question of whether the *Quincecare* duty can—and should—be cast as a positive duty of enquiry on the bank, instead of a negative duty (as it had previously been understood in the traditional *Quincecare* cases). Birss J reiterated that the touchstone of liability is whether the ordinary prudent bank is "*on enquiry*", as per the test affirmed in *Singularis.*[44] If so, "*[t]he duty is not to execute the order while on inquiry, <u>and to make inquiries</u>.*"[45]

[39] *Tulip Trading* at [91].
[40] *Tulip Trading* at [103].
[41] *Tulip Trading* at [104].
[42] *Tulip Trading Limited v Bitcoin Association for BSV* [2023] EWCA Civ 83 at [86] (per Birss J).
[43] See, e.g., *Hamblin v World First* [2020] EWHC 2383, where it was assumed that the *Quincecare* duty applied to a payment services provider.
[44] *Philipp* at [28].
[45] *Philipp* at [28]. Underline emphasis added.

Casting the duty in positive terms plainly has serious ramifications for banks, who are required under their primary duty to execute many thousands of high frequency transactions every day for their customers. Nonetheless, in appropriate circumstances, indicia of fraud should, arguably, be investigated, and the transaction in question stopped if the payment instruction is found not to be legitimate. As Rose J found in *Singularis Trial*: "*the Quincecare duty does require a bank to do something more than accept at face value whatever strange documents and implausible explanations are proffered by the officers of a company facing serious financial difficulties.*"[46] Moreover, as per Lord Sales' recent dissent in *Stanford*: "*[i]t is inherent in the Quincecare duty that some element of uncertainty is introduced into the relationship between a bank and a corporate customer.*"[47] Other areas of private law are capable of effectively balancing competing rights. As such, where the threshold to establish notice of the fraud on the bank will be almost certainly always be a high standard (and may well be increased by the pending *Philipp* decision), why should the (arguably) narrow circumstances of the *Quincecare* duty be treated any differently?

In *Philipp*, following argument in early February 2023, we now await the decision of the UK Supreme Court, in a decision widely expected to confirm the rationale, scope and boundaries of the *Quincecare* duty.

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Following the events of the coronavirus pandemic, subsequent economic recovery and ongoing instability in the financial markets, the English courts have experienced an increase in the number of civil fraud cases. As the financial tide goes out, frauds are naturally uncovered. Indeed, this experience reflects the marked increase in fraudulent behaviour in society at large. In the King's Bench Division and the Chancery Division (i.e. the Courts where the most high-value claims are issued), there has been a 95% increase in the number of fraud claims filed between 2018 and the end of 2022 (with a 147% increase to the 2021 peak).[48] That is based on tort claims categorised by data-provider Solomonic as concerning 'fraud'.[49]

As shown in this Client Alert, a banking customer who considers they may have been the victim of a fraud may have legitimate claims for breach of the *Quincecare* duty available to them.

If you have any questions about the issues addressed in this Client Alert, or would like to explore the validity of and/or scope for claims in relation to failures by banks towards you (or in relation to suspected fraudulent conduct more generally), please do not hesitate to reach out to us.

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[46] *Singlaris Trial* at [198].
[47] *Stanford* at [138], emphasis in original.
[48] Those Courts include including the Commercial Court, Technology and Construction Court and the Chancery Business List).
[49] This statistic is kindly re-produced with Solomonic's express permission, based on its litigation analytics data: https://www.solomonic.co.uk/