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Liability for Fraudulent Payments:

An English Law Perspective

Opportunities for fraud have never been greater. Both the number of cases and the amounts at stake are vast[1] and advances in technology allow fraudsters to deploy increasingly sophisticated and tailored techniques. Moreover, a rapidly evolving payments system landscape, with increasing disruption and new entrants, is also creating new fronts in the ongoing battle against fraud.

Fraud often moves quicker than the steps that can be taken to stop it, and monies are fast dissipated. Out-of-pocket victims may therefore look to the financial institutions (whether banks or other types of payment providers) through which the tainted transfers were made as a means of redress.

Whilst the international element of payments and clearing systems is important, especially if there are different currencies in the payment chain, our focus here is on which claims may be made, and defended, under English law. The Alston & Bird team is delighted to have teamed up with Daniel Toledano KC to give our views on where the key risks for those institutions lie, how those risks can be mitigated and important action points should disputes arise.

1 Recent reports have estimated that e-commerce fraud could rise to a value of US$107 billion globally by 2029.

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Who may face claims?

Nick Brocklesby: The typical scenario involves a customer of a bank or money institution making a payment on false pretences. The underlying architecture of a typical payment is complex, particularly if it is international, and may involve a number of intermediary institutions. Increasingly, defrauded customers are seeking redress not just from paying but also from receiving institutions within the payment chain.

The challenges for paying institutions are particularly acute. Those institutions often have a mandated obligation to effect customers' payment instructions promptly. Where there are suspicions about agents giving payment instructions on behalf of a principal, the paying bank will often be between a rock and a hard place. Make the payment and risk liability for paying away money when on notice that the instruction came from a tainted agent. Refuse the payment and risk liability for breach of mandate for rejecting a genuine instruction.

Often, the claims have involved a corporate customer that has been induced to pay away a large sum of money by the actions of a fraudulent director. However, recent cases before the English courts have also considered liability within an authorised push payment (APP) fraud context, where the victims themselves authorise the wrongful payments.

What are the key claims?

Daniel Toledano KC: Claims will vary depending on who the defendant is. Against the institution that has paid out the money, the customer commonly looks to bring claims based on the *Quincecare* duty, which was for some time understood as a financial institution's duty to take reasonable care to prevent certain payments when it was on notice that those payments were suspicious.[2] A recent Supreme Court decision[3] has limited the *Quincecare* duty so that it applies only when a financial institution has reasonable grounds for believing that a payment instruction by an agent of the customer (such as a customer company's director) is an attempt to misappropriate the customer's (i.e. the company's) funds. In this scenario, the director is not acting with the company's actual or ostensible authority and the issue is whether, in processing the payment, the financial institution breached its duty of care to execute customer payment instructions with reasonable skill and care.

The case clarified that the *Quincecare* duty does not apply to transactions in which the customer itself authorises the tainted payment, i.e. authorised push payments, as the payment instruction will have come from the customer directly and not from an agent. In this scenario, there is no rogue agent and the validity of the instruction is not in doubt.

However, a recent High Court case has considered whether victims of APP fraud are able to seek redress further down the payment chain.[4] The victims, two individuals, had been induced by fraud to pay monies into a company's account, which was held in the electronic wallet of a payment services provider. The Court allowed the victims to bring a derivative claim on behalf of the company as against the payment services provider. Finding that a *Quincecare*-type duty was owed to the company on account of the relevant transactions' suspicious circumstances, the Court ordered the payment services provider to reinstate the company account. This was notwithstanding the fact that the company was itself part of the infrastructure of the fraud. This decision potentially opens the door for victims of APP fraud to pursue derivative claims, further increasing the risk that institutions will be subject to novel litigation.

NB: The *Quincecare* line of cases continues to develop. The latest case to emerge from the High Court (Arena Television)[5] has seen financial institutions defending *Quincecare* claims on the basis that the relevant payment instructions given by the directors of the (bank customer) companies were given with actual authority, notwithstanding that the instructions were alleged to be part of an attempt to defraud third parties. The *Philipp v Barclays Bank* case had considered that a customer can only authorise an agent director to act honestly and in pursuit of the interests of the customer (thereby precluding the director from having actual authority to defraud his or her own company). The *Arena Television* case (when it proceeds to full trial) will consider whether a director can act with the actual authority of the corporate customer to defraud a third party (as opposed to the corporate customer itself). If successful, the argument of the defendant banks will be that the *Quincecare*

2 So-called following the decision in *Barclays Bank Plc v Quincecare Ltd* [1992] 4 All ER 363.

3 *Philipp v Barclays Bank UK PLC* [2023] UKSC 25.

4 *Hamblin & Anor v Moorwand Ltd & Anor* [2025] EWHC 817 (Ch).

5 *Arena Television Ltd (in liquidation) and another v Bank of Scotland plc and another* [2025] EWHC 3036.

claims must fail because the payment instructions were given by directors acting within the actual authority of the corporate customer.

What are the main claims that can be brought against receiving institutions?

Alex Shattock: The narrowing of the *Quincecare* duty has led claimants to look at potential claims against receiving institutions as an alternative means of redress. The key difficulty for fraud victims in claims against institutions that received their monies is that there is no contractual relationship between the parties. It has also been established that, ordinarily, a recipient institution does not owe a defrauded third party a tortious duty of care.[6]

Claims for unjust enrichment, dishonest assistance and/or knowing receipt are potentially attractive because they may provide a valid claim against recipient banks where a contractual or tortious duty of care would otherwise not apply.

AS: Taking unjust enrichment first, a claimant will need to establish, among other things, that the defendant has been enriched and that the enrichment was at the claimant's expense. Recent cases have considered how these elements apply as against financial institutions and the judgments have not always been consistent. In one case,[7] it was found that the channelling of payments through a number of intermediary correspondent banks was fatal to the argument that the recipient institution was 'enriched' and 'at the expense of the claimant'. As a result, the unjust enrichment claim failed.

However, a more recent High Court case[8] has expressly doubted this restrictive view. It found (i) that the receiving institution could have been 'enriched', notwithstanding the issuance of a corresponding credit to a customer's account, and (ii) that the enrichment could have been 'at the expense of' the claimant, notwithstanding that there were correspondent intermediaries facilitating the payment between the claimant and the defendant. In short, if those correspondent banks acted as agents of the claimant and defendant, or there could be said to have been a series of coordinated transactions, then these elements of an unjust enrichment claim might be established.

DT: One of the key defences to a claim in unjust enrichment is that a recipient of funds changed its position in good faith. Usually this will mean that once funds are received by a financial institution, if they are then paid away to a third party in good faith, that will be a defence to the claim. However, the defence is not available where the defendant has reason to believe that there is an issue with a specific payment or client account but does nothing to address it.

The issue of good faith was recently considered in a cryptocurrency fraud case in the High Court.[9] The High Court found that the cryptocurrency exchange had sufficient notice of the tainted monies to mean that it could not rely on the defence of good-faith change of position. The Court held that the specifics of the fraud do not have to be known; all that is needed is good reason to believe that the sums received are tainted. In that case, there was suspicious account activity, which was then flagged by the exchange's own systems, and there was a breach of internal policies put in place to address money laundering as the warnings were not followed.

NB: A knowing receipt claim operates differently. It requires a defendant to receive assets held on trust or by a fiduciary, which the defendant knows were received in breach of that trust or fiduciary relationship. Once again, a bank or institution's level of awareness is central to its liability.

NB: For a dishonest assistance claim, the culpability threshold is raised: a recipient must not only assist in the breach of trust or fiduciary relationship but must also, in some capacity, act dishonestly in its facilitation of the breach.

What are the red flags?

DT: In the context of *Quincecare* claims, disputes often arise when a director of a company, which is the corporate client of the financial institution, has acted without authority when making payment instructions. As directors are agents of their companies, complex legal questions of actual or ostensible authority emerge. As a general rule, payment institutions cannot rely on the ostensible authority of a director to execute a payment if they have been 'put on inquiry'—i.e. that there is good reason to believe that the director no longer acts with authority.

NB: When an entity is 'put on inquiry' will, therefore, be very fact dependent. Relatively few cases have considered these warning signs but in one *Quincecare* case, the Court placed weight on the following factors:[10]

- The volume of transactions that the payment institution transacts. If the institution handles relatively few payments, it may be expected to apply greater scrutiny than institutions handling many thousands of payments each day.
- The financial condition of the customer. In that case, the precariousness of the customer's financial position was obvious ahead of the payment instructions for the removal of significant amounts coming in.
- The sudden appearance of eight figure deposits in an account, shortly after the customer's other accounts had been frozen, followed by payments then being made to individuals connected with the customer.
- Reasons being given for payments to be made which were not consistent with earlier information about the customer's affairs.[11]

AS: A more recent *Quincecare* case also considered whether the relevant warning signs were sufficient for liability to attach, again in the context of liability of a paying bank.[12] In that case, the agreed contractual standard was gross negligence, the threshold for which was whether there was an "obvious risk of fraud" coupled with a "serious disregard" for that risk.

Two broad points stood out: (i) there is a distinction between general risk factors that make a transaction uncomfortable and the specific, heightened awareness that gives rise to liability—namely, whether there is a real possibility of fraud in the particular transaction[13]; and (ii) the distinction to be drawn between historic and current issues—an awareness of past corruption involving certain parties may not be sufficient to connote a risk in respect of a current transaction.

Is there now a 'duty to retrieve' under English law?

DT: A newer and increasingly common cause of action centres on a potential 'duty to retrieve': the so-called duty on a bank to take adequate steps to recover transferred monies once it has been informed that a payment was fraudulently made. Whilst the Supreme Court in *Philipp*[14] left open the possibility of such a duty, it is far from an established cause of action. The Supreme Court simply found that the first instance judge, at an interlocutory stage, was justified in not striking out the claim brought on the basis of such a duty. A recent High Court authority similarly acknowledged that a claim founded on the 'duty to retrieve' was at least arguable to the strike-out standard, though it held that such a claim would be limited to the loss of a chance of recovering the monies paid out as a result of the breach.[15] These proceedings were, however, discontinued, and a full assessment of the duty remains to be considered.

DT: In a recent High Court decision,[16] the Court held that a retrieval duty, if it exists at all, has no application to the duties a recipient bank owes to the defrauded customer of a different, paying bank. Such a duty would be contrary to a recipient bank's duty to its own customer to act in accordance with its payment instructions—effectively, it would elevate a third party's notice to the bank above the recipient bank customer's instruction, putting the bank in an impossible position.

Will account terms and conditions be relevant?

NB: Case law recognises that contractual terms can impact the scope of duties that arise as between the victim and its own bank or payment provider. The starting point is that clear and specific terms are required for valuable legal rights to be validly excluded—general language in entire agreement clauses will not, for example, be sufficient[17]. It has been suggested that, to exclude the *Quincecare* duty, an effective exclusion clause would need to expressly provide that the bank should be

6 *Royal Bank of Scotland International Ltd (Respondent) v JP SPC 4* [2022] UKPC 18 and *Abou-Rahmah v Abacha* [2005] EWHC 26662.

7 *Tecnimont Arabia Ltd v National Westminster Bank plc* [2022] EWHC 1172 (Comm).

8 *Terna Energy Trading doo v Revolut Ltd* [2024] EWHC 1419 (Comm).

9 *D'Aloia v Bitkub Online Co Ltd and others* [2024] EWHC 2342 (Ch).

10 *Singularis Holdings Limited (in official liquidation) v Daiwa Capital Markets Europe Limited* [2017] EWHC 257 at [191].

11 This latter flag was also an important factor in the recent case of *Hamblin v Moorwand* [2025] EWHC 817(Ch) at [20] where the discrepancies between the stated business of the corporate customer and the nature of the transactions invited further scrutiny.

12 *Republic of Nigeria* [2022] EWHC 1447 (Comm).

13 Ibid at [365].

14 *Philipp v Barclays Bank* [2023] UKSC 25 at [115] to [119].

15 *Dawn Barclay-Ross v Starling Bank Limited* [2025] EWHC 2158 (KB).

16 *Santander UK Plc v CCP Graduate School Limited* [2025] EWHC 667 (KB).

17 *The Republic of Nigeria* [2019] EWCA Civ 1641.

entitled to pay out even if it suspects that the payment is in furtherance of fraud.[18] It is rare to see exclusion clauses which go that far.

AS: That is right, although in the same case the *Quincecare* duty was confined to actions that would amount to gross negligence—that was because of the applicable contractual terms which limited liability save for losses caused by fraud, gross negligence, or wilful misconduct[19]. Raising the standard had a material impact on what was required to be proven by the claimant—i.e. not simply that a bad mistake was made, but one that was "very serious" and "shocking or "startling"[20].

In a recent High Court decision, it was held that an exclusion clause precluding claims for 'damages' did not exclude a *Quincecare* claim which sought an order for reinstatement of the transferred monies, because that was not a claim for damages.[21]

What should institutions do if a problem with a payment arises?

NB: Each situation will have its own specific nuances and institutions will have protocols for how to respond. However, in our experience, there are common pitfalls to avoid in these often high-pressure situations:

- First, it can be the case that knowledge of a problem within one part of an institution does not filter through to other parts which may have control over the release of payments. It is important to ensure that procedures are in place that allow flags to be raised and, importantly, communicated to the right decision-makers.
- Second, it will be important to have ready access to the applicable terms and conditions of the impacted account; these will often specify an institution's powers to refuse to process a payment in the event of fraud.
- Third, it is important to keep in mind what has been, or should be, communicated to the institution's client. For example, if clear and repeated warnings have been given to a defrauded customer that may strengthen an the institution's position subsequently. Conversely, if internal flags are raised but no clarification was sought from the client, this may present challenges later on.
- Fourth, if a payment has been wrongfully made, should anything be communicated to institutions along the payment chain to retrieve funds? Whilst recent cases have questioned the existence of a duty to retrieve on recipient institutions, there remains a degree of uncertainty on whether such a duty applies to a paying bank.
- Fifth, the key decision will often be whether to lock down the affected account. This may require difficult calls to be made on limited facts, and in short order.

When a claim is threatened, what are the key considerations?

NB: There will be important early steps to take. For example, preservation of documents that may be relevant to the dispute is critical. This will include locating the applicable account terms and conditions and customer onboarding records. It may also be necessary to ensure that any agents of the defendant institution in the payment chain also take steps to preserve potentially relevant documents. Relevant employees and former employees will also need to be contacted; particular challenges may arise when the people with the best knowledge of the situation have left the institution.

DT: Establishing the precise payment flow will also be critical. Many of the types of claims that we have discussed will be impacted by the path by which monies were sent, whether correspondent intermediaries were involved and the jurisdictions through which the payments were routed.

AS: Care should also be taken when investigating the position to avoid creating damaging, non-privileged documents. This can be a particular issue if internal fact-finding is undertaken without the involvement of lawyers.

18 *Ibid* at [40].

19 *The Republic of Nigeria* [2022] EWHC 1447.

20 *Ibid* at [334]

21 *Hamblin & Anor v Moorwand Ltd & Anor* [2025] EWHC 817 (Ch).

What is the regulatory position?

NB: Whilst outside the scope of this discussion, there is an important regulatory context to the question of compensation for fraudulent payments. In the United Kingdom, as of 7 October 2024, certain qualifying payment services providers must reimburse customers who have fallen victim to APP fraud when using Faster Payments. There is a cap of £85,000 on such compensation and it is only be available to consumers, charities, and micro-enterprises. Claims may be disputed on the basis of a consumer's gross negligence, which may include a failure to heed warnings or report the matter promptly. This regulatory route is, of course, quite different from the prospect of civil claims by customers and/or victims, which are the focus of this discussion.

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