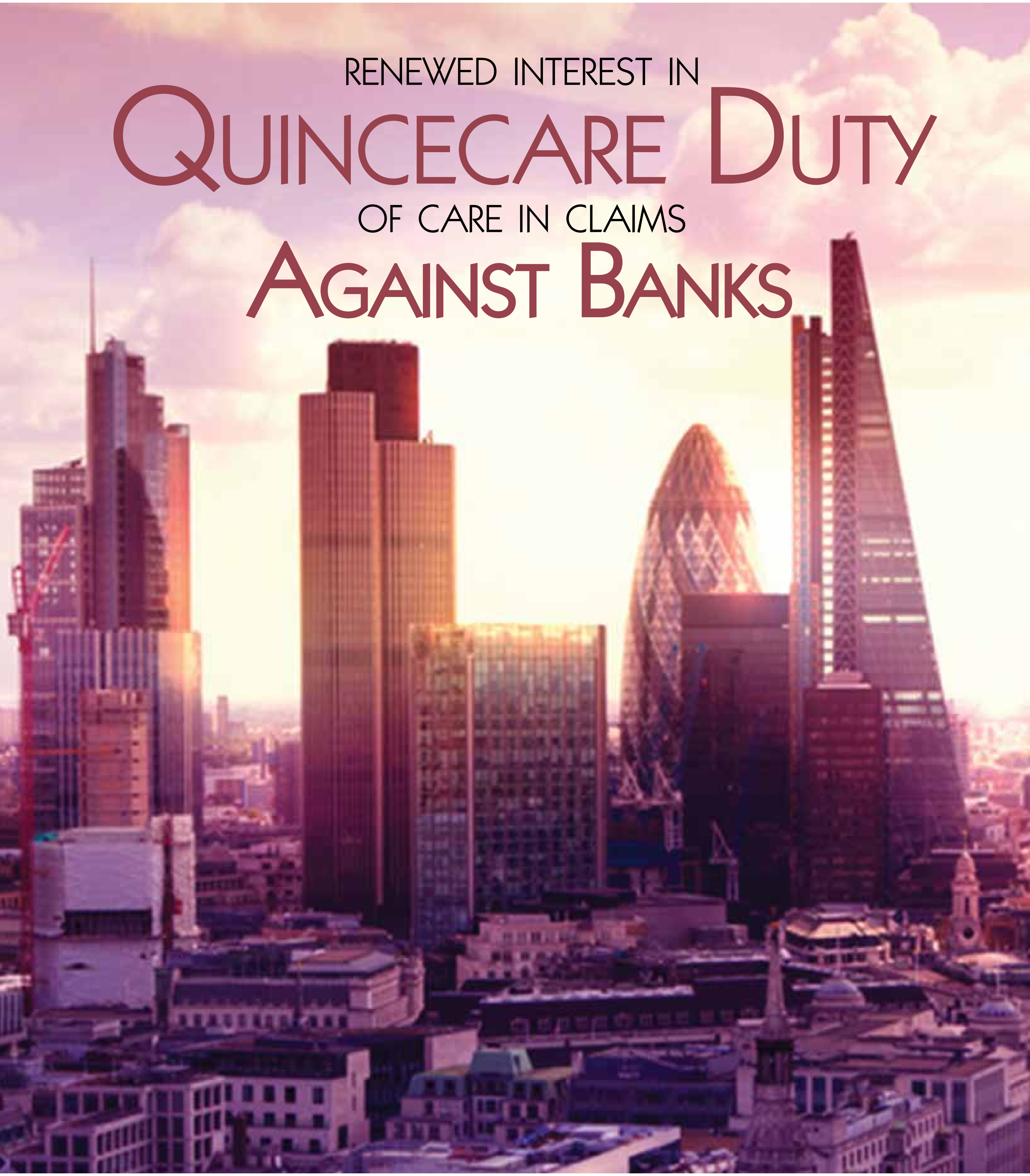
Renewed Interest in Quincecare Duty of Care in Claims Against Banks



From recent case law developments and the increase in different types of fraudulent schemes, there is clearly a renewed interest in the Quincecare duty

Despite being recognized as an implied term in the contractual relationship between a bank and its customer, there were no successful reported claims against banks for breach of the Quincecare duty from its inception 30 years ago until the Supreme Court decision in *Singularis Holdings Ltd v. Daiwa Capital Markets Europe Ltd* (Rev. 1) [2019] UKSC 50 (Singularis).

The trend in claims for breach of the Quincecare duty has given the English courts the opportunity to discuss some of the boundaries and requirements of the duty, although there is still room for further development of the law. It is interesting that the recent uptick in cases considering these legal principles is as a result of an increase in frauds of different types orchestrated by miscreants where banks are used as vehicles to perpetuate those frauds.

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This article analyzes the upshot of the latest line of judgments and draws upon the authors' recent experience of a claim, resolved in mediation, which involved allegations of a breach of Quincecare duty.

Analysis of recent cases

The Quincecare duty was first articulated by Steyn J (as he then was) in *Barclays Bank Plc v. Quincecare Limited* [1992] 4 All ER 363 (Quincecare). Steyn J held that the relationship between a bank and its customer was that of an agent and principal and that accordingly the bank owed a duty to its customer. In *Quincecare*, it was found that the bank's duty to its customer "was an implied term [...] that the bank would observe reasonable skill and care" when executing the customer's instructions. The Quincecare duty classically arises where a bank has received instructions from its customer and executed the payment where there were red flags to suggest that the payment was an attempt to misappropriate the customer's funds. A reasonable banker, therefore, owes the duty to its customer once the bank has been put "on inquiry."

Singularis concerned the application of the Quincecare duty in a case of fraud by the sole director, A, of a company. A was the sole shareholder of Singularis Holdings Ltd and had sole signing powers over its bank accounts. On A's instructions, Daiwa paid out over $200million from the company's account to entities ultimately controlled by him. The joint liquidators of Singularis sought to recover these sums from Daiwa. The Supreme Court upheld the Quincecare duty claim, holding that the exact purpose of this duty is "to protect the company against just the sort of misappropriation of its funds as took place here." In her judgment, Lady Hale held that the bank should refrain from executing orders, if it is put on inquiry, by having reasonable grounds for believing that the order is an attempt to misappropriate funds. Singularis is the first case in which a bank has been held to have breached its Quincecare duty.

The next case to consider is *JP Morgan Chase Bank NA v.The Federal Republic of Nigeria* [2019] EWCA Civ. 1641. This involved a claim against JP Morgan (the bank) on the basis that it breached its Quincecare duty by executing payments totaling $875,740,000. The bank made the payments in three tranches on the instructions of persons authorized under the terms of a depository account. The bank applied for summary judgment on the basis that Nigeria's claim had no realistic prospect of success because the agreement governing the operation of the depository account had expressly excluded the Quincecare duty. The summary judgment application was unsuccessful as the judge held that none of the clauses relied on by the bank excluded the duty. The bank appealed, not as to whether the bank had breached its Quincecare duty, but only whether the decision to reject the summary judgment application was correct. The Court of Appeal found that summary

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judgment had been rightly refused, as the bank could not rely on the terms of the depository agreement to avoid liability. While it may be possible for a bank and its customer to agree to exclude the Quincecare duty, this is only possible if there is clear and obvious wording to do so.

Unlike previous Quincecare duty cases, in *Philipp v. Barclays Bank UK Plc* [2021] EWHC 10 (Comm.) the claimant validly authorized the relevant transactions herself. In 2018, Mrs. Philipp and her husband were persuaded by a fraudster to make payments from her account to various accounts in the UAE totaling £700,000. The fraudster convinced Philipp that making these payments would assist an investigation by UK regulatory bodies. Philipp argued that, in order for the bank to discharge its duty to exercise her instructions with reasonable care and skill, the bank ought to have had policies and procedures in place for the purposes of detecting the fraud. The judge granted Barclays' application for summary judgment, holding that requiring the bank to take the preventive measures suggested would result in too much doubt being cast over the effectiveness of a customer's instructions. It would also make the Quincecare duty unduly onerous for banks. As with all cases, the specific facts are important, and here the impact of the instructions being given by the accountholder herself and the need for reasonable boundaries on the duty were significant.

Stanford International Bank Ltd (In Liquidation) v. HSBC Bank Plc [2021] EWCA Civ. 535 concerned a Ponzi scheme involving the bank, SIB. HSBC froze SIB's account in February 2009, when Mr. Stanford (the ultimate beneficial owner) was charged with fraud by the U.S. authorities. SIB's liquidators brought a claim against HSBC for losses caused by breach of its Quincecare duty. SIB's liquidators argued that HSBC should have been aware of SIB's fraudulent activity by August 1, 2008 and HSBC should have frozen the account by that time. HSBC was unsuccessful at first instance. The Court of Appeal, however, allowed HSBC's appeal on the basis that Quincecare duty was owed to its customer and not directly to the customer's creditors. SIB was trading and was not in any formal insolvency process when payments were made to the holders of certificates of deposit.

Conclusions

The recent cases in this area indicate that there is a high threshold to meet for a bank to be in breach of the Quincecare duty and that cases will turn on their specific facts. The Singularis case illustrates a situation where the Quincecare duty was engaged. The JP Morgan case evidences that the duty cannot be excluded absent clear and obvious wording. The Stanford case shows that the Quincecare duty is owed to the customer alone and there must be an attendant loss. In *Philipp*, the individual customer personally gave the instructions in compliance with the mandate, so the Quincecare duty did not arise. The parameters of the principles, though, are not set in stone and there are a number of open points.

Would the Quincecare duty come into play if, say, Philipp was a victim of cyber fraud and a fraudster gave instructions to the bank without her knowledge? Besides *Philipp*, in each case cited above, the fraudulent payments made were authorized by someone who could be said to be an agent of the defrauded company. It remains to be seen what the position would be if a company accountholder was a victim of cyber fraud, given the increasing sophistication of frauds being carried out. As the duty is owed by the bank to its customer, once the bank has been put on inquiry, there might be situations where fraud was perpetrated by the acts of an imposter agent of the company. Given the increasing sophistication of banks and their internal processes, compared to 30 years ago, how much will

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ultimately be expected of them? These and a number of other scenarios have yet to be tested by the English courts and there remains room for the principles in this area to be worked out.

From the recent case law developments and the increase in different types of fraudulent schemes, there is clearly renewed interest in the Quincecare duty. This may in appropriate cases assist victims of fraud in their claims against banks, but there is also a balance to be struck as the obligations on banks when carrying out the apparent instructions of their customers need to be reasonable and proportionate.

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