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THE BANK'S DUTY OF CARE AS PAYMENT AGENT

Philipp v Barclays Bank UK Plc

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In a much-anticipated decision, the UK Supreme Court has settled a question on the scope of a bank's duty of care when processing payments authorised by a customer or their agent. The duty has been narrowly construed in this context. This comment criticizes the decision for not responding to the societal problem of scam payments, and compares it with Singapore case law on the subject which, as it stands, construes the bank's duty more broadly.

I. Introduction

In July 2023, the UK Supreme Court handed down a much-anticipated judgment in *Philipp v Barclays Bank UK Plc*,[1] concerning the scope of a bank's duty of care when making a payment on behalf of a customer. It was held that a duty of care in this context applies only where there is reason for a bank to doubt the validity of the payment instruction emanating from a person ordinarily competent to issue it.[2] The duty of care will, therefore, not apply where a customer gives a payment instruction as the result of falling for a scam by a third party. This comment disagrees with the Supreme Court's narrow construction of the duty and considers its implications in Singapore where, on current precedent, a broader approach is taken.

The duty of care in the payment context, which has come to be known as the *Quincecare* duty,[3] was first formulated in a series of cases starting in the late 1960s,[4] culminating in the decisions of *Barclays Bank plc v Quincecare Ltd*,[5] and *Lipkin Gorman v Karpnale Ltd*.[6] What these cases had in common was that they involved commercial entities acting by necessity through agents. In *Quincecare* and *Lipkin*

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1 [2023] UKSC 25; [2023] 3 WLR 284 [*Philipp* (UKSC)].

2 The decision was not concerned with the situation where the instruction is *issued* by a third party with no authority to do so. A bank is strictly liable at common law where it acts on such unauthorised instructions.

3 See *Philipp* (UKSC), *supra* note 1 at [51].

4 See *ibid* at [39]–[41].

5 [1992] 4 All ER 363 [*Quincecare*].

6 [1989] 1 WLR 1340 [*Lipkin Gorman*]. A subsequent appeal to the House of Lords did not raise the issue of a duty of care, see [1988] UKHL 12; [1991] 2 AC 548.

Gorman, the agents in question (a director and a partner, respectively) dishonestly misappropriated funds held in bank accounts belonging to their principals. The customers argued that the banks should have been suspicious about the payments, and that their duty of care required them to query the instructions. Both courts agreed that a bank owes a duty not to execute a payment instruction when it has reasonable grounds for believing that the customer is being defrauded. On the facts, the banks in *Quincecare* and *Lipkin Gorman* were found not to have breached the duties.[7]

In the years that followed, there were few cases raising the *Quincecare* duty,[8] but the alarming rise in authorised payment scams in the last decade or more[9] prompted scam victims to start pointing fingers at their banks for processing such payments. The fraudster in an authorised scam payment is typically a third party who has used deceit to persuade the payer (bank customer) to authorise a payment to an account under the fraudster's control. The most common variety of authorised scam payments involves "push" payments, giving rise to the label "authorised push payment scams" or "APP scams".[10] Such scams are now rife. For this reason, the Supreme Court's decision on the scope of the bank's duty of care is of significance to the banking industry, and to the general banking public. Reflecting these broader interests in the *Philipp* (UKSC) appeal were the interventions of both UK Finance (the banking and finance industry body in the UK) and the Consumers' Association.

II. The Facts and History of *Philipp*

In March 2018, Mrs Philipp and her husband were persuaded to transfer £700,000 in two tranches to accounts held by scammers in the United Arab Emirates, supposedly to thwart a fraud in the UK that posed a threat to them. The scam was an intricately crafted, micro-managed ploy that played out over a period of weeks. The scam payments were made from Mrs Philipp's bank account with Barclays Bank in the UK, which is why the claim was brought in her sole name, but the monies had been moved from an account in her husband's name and the Philipps can be seen as joint victims. The claim made against Barclays Bank was for damages for breach of its duty of care in various ways which, it was alleged, rendered Mrs Philipp prone to the scam and led to the processing of the payment instructions when they should have been refused. An alternative claim was that the bank had failed to adequately implement measures to recover the monies after the scam was uncovered.[11]

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7 Unlike the two earlier cases of *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555 and *Karak Rubber Co v Burden* [1972] 1 WLR 602 [*Karak*], where the banks were held liable for the losses flowing from the misappropriated funds.

8 For the recent history of the duty, see *Philipp* (UKSC), *supra* note 1 at [50]–[52].

9 One of the early cases involving a typical authorised payment scam is *Tidal Energy Ltd v Bank of Scotland plc* [2014] EWCA Civ 1107; [2014] 2 Lloyd's Rep 549, although the duty of care was not raised.

10 The payer in a "push" payment issues the payment instruction to their bank which makes its payment decision before sending the instruction for clearing. Examples of "push" payments are mobile phone or internet funds transfers. Contrast a cheque payment which is a "pull" payment – the payment instruction reaches the paying bank via the payee as a result of the clearing process.

11 The more precise particularisation of the claim can be found in the decision of the trial court: *Philipp v Barclays Bank Plc* [2021] EWHC 10 (Comm) at [75] [*Philipp* (EWHC)].

The case was summarily dismissed by HHJ Russen QC in the High Court on the grounds that the *Quincecare* duty had no scope for application as it is limited in operation to circumstances in which a customer's agent attempts to misappropriate funds,[12] as happened in *Quincecare* and *Lipkin Gorman*. The summary dismissal was overturned by the Court of Appeal, with Birss LJ giving the unanimous decision, summarised in his statement that the *Quincecare* duty "does not depend on the fact that the bank is instructed by an agent of the customer".[13] Barclays Bank, seeking to rid itself and the banking industry of the legacy of *Quincecare*,[14] unsurprisingly appealed against the decision, thus setting the stage for the UK's highest court to get its first real opportunity to pronounce on the *Quincecare* duty.[15] The questions posed for the Supreme Court's decision were basically twofold:[16] whether the *Quincecare* duty, as it stands, can apply where the payment instruction to the bank is not issued by an agent of the customer – *ie*, where the instruction is issued by the customer themselves; and, if not, whether a duty of care should be recognised in that context, as an extension of the *Quincecare* duty or otherwise.

III. The Supreme Court Decision in *Philipp*

The unanimous decision of the Supreme Court,[17] delivered by Lord Leggatt JSC, restored the summary judgment of the High Court in favour of the bank to the extent that it was based on the bank owing the customer a duty of care not to execute the payment instructions. Summary judgment was, however, refused on the alternative claim that the bank had failed to take adequate measures to retrieve the misappropriated funds once Mrs Philipp gave notice that she believed herself to be a victim of fraud. While the Supreme Court understandably considered the chances of any substantial recovery at that late stage to have been "slim",[18] that would be a question of fact requiring further evidence.

The focus in this comment is on the primary claim concerning the scope of the bank's *Quincecare* duty. The Supreme Court started with the fundamental features of the bank-customer relationship. In particular, a bank acts as its customer's agent when making payments, and the bank is bound strictly to obey a customer's payment instruction or "mandate".[19] Where an account is in credit, these two features mean that a bank must promptly execute a customer's payment instructions, and

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[12] *Ibid* at [156]. The facts were "sufficiently incontrovertible" to allow for summary dismissal, *ibid* at [123].

[13] *Philipp v Barclays Bank Plc* [2022] EWCA Civ 318 at [78] [*Philipp* (EWCA)]. See further, Booysen, "Authorised Payment Scams and the Bank's Duty of Care" [2022] LMCLQ 349; Watts, "Playing the *Quincecare* Card" (2022) 138 Law Q Rev 530.

[14] In the modern context of payment service providers which may not be banks, the scope of a paying agent's duty of care is of even broader significance.

[15] The duty was applied, but uncontentiously, in *Singularis Holdings Ltd (in Official Liquidation) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50; [2020] AC 1189. See also *Stanford International Bank Ltd v HSBC Bank plc* [2022] UKSC 34; [2023] 2 WLR 79.

[16] *Philipp* (UKSC), *supra* note 1 at [27].

[17] Summed up in the final paragraph, *ibid* at [120].

[18] *Ibid* at [119].

[19] *Ibid* at [3], [28]–[29].

it is not for the bank to question the prudence of such payments.[20] In addition to the bank's strict duty to comply with its mandate, the Supreme Court confirmed that a bank (as a professional service provider) owes its customer a duty of care.[21] However, the court said, the duty of care only has scope to apply to the extent that the bank has "any latitude" in how its service is provided,[22] and as a bank usually has very little latitude in executing a customer's payment instructions, the duty of care will generally have no scope of application in the payment context.[23] The court then reconciled this view, that the strict duty generally leaves no room for a duty of care to operate, with the line of authority recognising a payment duty of care on banks, by confining the duty of care to situations where the bank has reason to doubt the validity of the payment instructions emanating from someone who is otherwise competent to issue them.[24] The paradigm case would be a customer's agent abusing their authority; another would be an individual customer who lacks the mental capacity to give instructions.[25] If a reasonable bank would suspect that the agent is misappropriating funds or that an individual's mental capacity is absent, the duty of care requires a bank to make inquiries.[26] Another example involves joint accounts where one account holder abuses their authority to make payments.[27] In short, the answer to the first question raised on appeal was a firm "no": the bank's duty of care has no scope to apply where the "validity of the instruction is not in doubt".[28] On the facts there was no question that the instructions were valid as Mrs Philipp, although acting under the influence of a fraudster, was competent to give them.

There remained the more normative question of whether the *Quincecare* duty, or another duty, should be developed to respond to the problem posed by the authorised payment scam context. Here, too, the Supreme Court rejected the arguments in favour of a policy-driven development on the ground that it required the court to go beyond its "more modest" role of giving "effect to the presumed common intention of the contracting parties."[29] The reliance by Steyn J in *Quincecare* on policy considerations was rejected since it flowed from what the Supreme Court saw as a flaw in Steyn J's analysis that the bank's strict duty to observe the payment mandate potentially conflicted with the duty to exercise reasonable care. In the Supreme Court's view, there is no conflict between the two duties as the duty of care is limited to those cases where the bank should reasonably suspect that the instruction is

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20 *Ibid* at [30]. See also *Lipkin Gorman*, *supra* note 6 at 1356.

21 The duty arises as an implied term in the bank-customer contract, or in tort, and in the UK by virtue of legislation, namely the Supply of Goods and Services Act 1982 (c 29) (UK) s 13, see *Philipp* (UKSC) at [34]. The Consumer Rights Act 2015 (c 15) (UK) s 49 also provides that a contract to supply a service includes a term that the service will be performed with reasonable care.

22 *Philipp* (UKSC), *supra* note 1 at [35].

23 *Ibid* at [63]–[64].

24 *Ibid* at [97]. The Supreme Court was critical of Steyn J's judgment in *Quincecare*, *supra* note 5, as emanating from the 'false premise' of a potential conflict between the two duties: *Philipp* (UKSC), *supra* note 1 at [68], see also [60]–[67], [91].

25 *Philipp* (UKSC), *supra* note 1 at [99].

26 *Ibid* at [91], [97].

27 *Ibid* at [98]. The Court rejected criticism that the duty thus construed only protects corporates and other entities.

28 *Ibid* at [100].

29 *Ibid* at [67].

invalid. This conclusion was prefaced earlier in the judgment by a brief discussion on the role of the courts in a common law system, which is to be contrasted with the role of legislators and regulators.[30] In short, the latter are better suited to introduce policy-driven reform.

IV. Discussion

The court's answer to the first question on the scope of the implied *Quincecare* duty involved the restriction of the duty so as not to conflict with the strict duty to pay. As a result, the duty of care only has scope to operate where the mandate itself is defective (because, for example, an authorised agent is abusing their authority) and the bank should reasonably have detected the defect. In reaching this conclusion, the Supreme Court endorsed much of the agency scholarship of Professor Peter Watts, including the proposition that an agent who acts outside the scope of their authority, has no authority,[31] subject to the agent's apparent or ostensible authority on which the bank may reasonably rely.[32] This approach may be doctrinally neater than Steyn J's analysis in *Quincecare*,[33] but it does mean that there is little scope for the bank's duty of care to protect customers from the prevalent scourge of authorised payment scams. The court did not deny the societal problem but did not see the solution as remediable by the common law.

However, there was precedent to support an affirmative answer to the first question posed on appeal, even if it means that the bank's *Quincecare* duty is a "special or idiosyncratic rule of law."[34] Although the earlier cases shaping the *Quincecare* duty all involved customers acting through fraudulent agents, the duty was articulated more broadly in those cases.[35] Thus, in *Quincecare*, Steyn J said: "the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties".[36] Another example comes from an earlier *Quincecare* case, *Karak Rubber Co v Burden*,[37] where Brightman J said that it was "untenable" for banks to claim to

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30 *Ibid* at [22]–[24].

31 *Ibid* at [72]–[73]. See also *PT Asuransi Tugu Pratama Indonesia TBK v Citibank NA* [2023] HKCFA 3 at [16], noted by Watts, "*Quincecare* in the Hong Kong Court of Final Appeal" [2023] LMCLQ 365.

32 *Philipp* (UKSC), *supra* note 1 at [72]–[73], [86]–[89], [94].

33 The Supreme Court did not agree (*ibid* at [92]–[93]) with Prof Watts' argument that the validity of a bank's authority (as an agent) to act on instructions issued by another agent, is free-standing and does not depend on the agent acting within their authority, but simply on whether the bank actually knows that the agent is acting dishonestly. Thus, Prof Watts sees little scope for the duty of care to play a role in determining the legitimacy of payments processed by a bank in response to a dishonest agent. See also Chua, "The *Quincecare* duty: an unnecessary gloss?" [2023] 3 J Bus L 161.

34 *Philipp* (UKSC), *supra* note 1 at [97]. One might explain this view by partially accepting Prof Watts's position at *supra* note 33, that the bank's authority is not undermined by the agent's incapacity, but then departing from his view and recognizing that it is subject to a duty to act reasonably in acting on the agent's instructions.

35 See *Philipp* (EWCA), *supra* note 13 at [27], [30], [48].

36 *Quincecare*, *supra* note 5 at 376. See also *Nigeria v JP Morgan Chase* [2019] EWHC 347 (Comm) at [30].

37 *Karak*, *supra* note 7 at 629.

be "an automatic cash dispenser, whatever the circumstances". A similar sentiment was expressed by Birss LJ in the Court of Appeal in *Philipp* (EWCA). His Lordship noted that a failure to recognise a general duty of care on a bank when processing payments means that even where a bank has actual knowledge that a payment is the product of a scam, the bank's only duty at common law is to proceed to pay.[38] In this regard, the Supreme Court commented that it might be arguable that there was a limitation on the bank's strict duty to pay where the bank has "reliable information" of a fraud on the customer of which the customer is ignorant.[39] But if that concession is made, there does not seem to be any insurmountable obstacle to recognising a duty of care.

The second question on appeal, assuming a negative answer to the first, involved the development of the law for policy reasons. Undoubtedly, there is a limit to judicial lawmaking,[40] and the point at which policy-motivated reform must be left to the superior powers of Parliament and regulators is a question of judgment on which there is always likely to be disagreement. In this case, however, the scale of the authorised payment scam problem and the extensive regulatory measures that have been introduced in the UK to tackle authorised payment scams leave no doubt as to the policy that should inform any development of the law. The detailed risk allocation rules in the regulatory framework could not have been introduced by the common law. But the claimant in *Philipp* was arguing for a more modest contribution from the common law, one which does not seem outside the scope of incremental judicial development, given existing precedent and the regulatory context.

The UK's ongoing legislative and regulatory response to authorised payment scams in recent years[41] was noted by the Supreme Court in *Philipp*.[42] The two most recent developments, which came to fruition in 2023, warrant mention. The first is a mandatory reimbursement requirement on banks and other payment service providers in "qualifying cases" which was introduced by the Financial Services and Markets Act 2023.[43] A provision in the Act requires the payments regulator to develop a reimbursement framework and specify the scope of its application. That framework is pending. The second is the new "Consumer Duty" which was introduced by the financial regulator, the Financial Conduct Authority (FCA), effective from 31 July 2023. This broad duty, which extends to payment services and beyond, forms part of the FCA's regulatory *Handbook*.[44] The expectation is that "firms should conduct their business to a standard which ensures an appropriate level of protection for retail customers."[45] As drafted, the duty includes an obligation to act

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[38] Subject to regulatory rules preventing payment from being made, see *Philipp* (EWCA), *supra* note 13 at [31]–[32].

[39] *Philipp* (UKSC), *supra* note 1 at [109].

[40] See *ibid* at [22]–[24]. See also Baroness Hale, "Legislation or judicial law reform: where should judges fear to tread?", at Society of Legal Scholars Conference 2016 (7 September 2016), https://www.supremecourt.uk/docs/speech-160907.pdf (accessed 9 January 2024).

[41] Particularly authorised *push* payment scams, see text at *supra*, note 10 above.

[42] *Philipp* (UKSC), *supra* note 1 at [19]–[21].

[43] (c 29) (UK) s 72. "Qualifying cases" are payments prompted by fraud and made using the UK's Faster Payment System.

[44] FCA *Handbook*, Principle 12: https://www.handbook.fca.org.uk/handbook. The Principles are enforceable by the FCA and can lead to disciplinary measures.

[45] *Ibid* at PRIN 2A.1.8.

in good faith and to avoid foreseeable harm to retail customers, basically individuals acting outside a business or professional context. It seems clear that this "consumer duty" requires banks to protect consumer customers from authorised payment fraud.

What is striking, therefore, is the gulf that now lies between UK regulatory expectations and those of the common law in this context. Admittedly, these developments focus on consumers, and it might be said that they do not reflect a broader policy stance of protecting all customers, while any common law development cannot discriminate in this way. There have, however, been other regulatory interventions, which do not distinguish between different types of customer, in particular the "confirmation of payee" initiative which requires most UK payment providers to implement a system that matches any new payee's account details with their name before making the payment.[46] Confirmation of payee, which is effective at detecting misdirected payments, reflects the need to protect all customers from authorised payment scams.

Another reason given by the Supreme Court for rejecting a "policy response" to the Philipps' claim was that the claim was a contractual one, and hence had to be based on the governing contract terms and not on the court's view of what the parties should have agreed.[47] While the court accepted that the strict duty was subject to some implied limitations, including that the bank was not obliged to make a payment where it would be unlawful, and that the bank would "act honestly towards its customer",[48] it did not think there was scope to imply the *Quincecare* duty into the contract in question.[49] Even if one accepts that such a term could not be implied in fact, based on the parties' presumed intention ascertained at the time of contracting,[50] the more normative term implied in law could surely accommodate such a duty.[51]

V. The *Quincecare* Duty in Singapore

Singapore's common law has English roots, which raises questions about the possible effect of *Philipp* on the scope of the bank's payment duty of care in Singapore. The Supreme Court's decision, while not binding in Singapore, will be given careful consideration by the Singapore courts should the issue arise for determination in the future. Singapore law recognises that a bank owes a duty to exercise care in rendering banking services to its customers. The duty would normally arise as an implied term in the contract for the relevant account.[52] The duty has also been recognised in the context of executing payment instructions, although it seems that no claims

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46 The system applies to payments made via the Faster Payments and CHAPS systems.

47 *Philipp* (UKSC), *supra* note 1 at [25]–[26].

48 *Ibid* at [106].

49 *Ibid* at [4], [6].

50 The leading modern case is *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742.

51 See, *eg*, *Liverpool City Council v Irwin* [1977] AC 239.

52 The duty may also arise in tort based on the trio of foreseeability, proximity and policy considerations, or an assumption of responsibility. Singapore does not have a statute making provision for such a duty in the rendering of services.

have succeeded on the facts.[53] While the duty in these cases has not been labelled the "*Quincecare* duty", that label will continue to be used here for consistency. The focus will be on the most recent of Singapore's *Quincecare* cases, the Court of Appeal's decision in *Hsu Ann Mei Amy v Oversea-Chinese Banking Corp Ltd*.[54] This case is particularly pertinent since Singapore's highest court considered the *Quincecare* duty in relation to an individual customer not acting through an agent. The case was also briefly referred to by the Supreme Court in *Philipp*.

Most *Quincecare* cases involve banks being sued for making payments, but *Hsu Ann Mei* is an example of a bank being sued for declining to follow a payment instruction. The facts were that an elderly customer, who suffered from some level of dementia, signed forms at a bank branch initially to open a new account jointly with her daughter and transfer the substantial balance in her existing account into the joint account. At that meeting, the bank had doubts about whether the customer understood and intended the consequences of a joint account, which doubts were reinforced after a visit to her home. When the bank refrained from carrying out the instruction, the customer once again visited the bank's premises with her daughter, this time to give instructions to close her account. During that meeting, the bank became concerned about the customer's mental capacity and whether the closure instructions reflected the customer's wishes or those of her daughter, whose manner towards the customer and the bank officers had been forceful throughout. As a result, the bank declined to close the account and the customer, through her daughter, duly sued the bank for not acting as instructed. Both the High Court and the Court of Appeal found that there were reasonable doubts as to whether the instructions reflected the customer's genuine intentions, and the bank was exonerated.[55]

The instructions given were essentially to pay moneys to a joint account, later revised to repaying the customer upon the account's closure, and both courts relied on the seminal duty of care decisions in this context, including *Quincecare* and *Lipkin Gorman*. The issues were framed by the Court of Appeal as whether the events which transpired put the bank on notice that the instructions it received did not represent the customer's "true wishes", and whether the bank acted reasonably in declining to execute them.[56] In *Philipp*,[57] the Supreme Court referred to *Hsu Ann Mei* in pointing out that the *Quincecare* duty may protect an individual customer where the bank has reasonable grounds to doubt the customer's mental capacity to operate the account. However, the Singapore Court of Appeal did not rest its decision in *Hsu Ann Mei* on the customer's suspected mental incapacity.[58] It found that

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[53] See *Yogambikai Nagarajah v Indian Overseas Bank* [1997] 1 SLR 258 at [53]: the duty to observe instructions "co-exists" with the duty of care; *Banque Indosuez v Madam Sumilan Awal also known as Aw Kim Lan and Others* [1998] SGHC 22. A bank was found to be in breach of its duty of care in *Bank of America National Trust and Savings Association v Herman Iskandar* [1998] 1 SLR (R) 848 but the case did not involve a payment.

[54] [2011] 2 SLR 178 [*Hsu Ann Mei*].

[55] The irony behind the result is that the customer died before the end of the litigation, and her daughter was her sole heir. These facts led the court to express regret that the matter had not been resolved more sensibly by the parties, *ibid* at [39].

[56] *Ibid* at [28].

[57] *Philipp* (UKSC), *supra* note 1 at [99].

[58] *Hsu Ann Mei*, *supra* note 54 at [33].

the bank was put on notice that the instructions did not represent the customers "real intentions" in the sense that they represented the daughter's wishes; *alternatively* that the customer lacked the mental capacity to understand the consequences of her instructions.[59] The court did not find it necessary to make a finding on the customer's mental capacity but indicated that, had that been necessary, it would have found that she did have capacity to issue instructions. It went on to say that "this appeared to be a classic case of undue influence".[60]

These statements indicate that in Singapore a bank should decline instructions emanating directly from a customer where there are concerns about the influence of a third party. Scammers who have groomed their victims to make payments they would not otherwise make are, in essence, exerting undue influence on their victims. For example, the Philipps were described in the High Court judgment as having fallen "under the spell" of the fraudsters.[61] For the avoidance of doubt, it should be added that the daughter in *Hsu Ann Mei* could not be said to have been abusing her authority to operate the account as she had no such authority.[62] Further evidence of a different approach to the scope of a bank's *Quincecare* duty in Singapore is the statement by the Court of Appeal that the duty to obey a customer's instruction "is subject to the bank's duty to take reasonable care in all the circumstances".[63] The court added that the bank was entitled to refuse to implement a customer's instructions where it had good reason to believe they "may not be genuine or may not represent his or her true intention".[64]

Such an approach to the bank's duty of care, which adds to other, regulatory, safeguards for customers against authorised payment fraud, is supportable since it gives banks the right incentives to take measures to thwart authorised payment scams. The few cases on the subject suggest that the *Quincecare* duty does not pose a floodgate risk to banks in Singapore, nor does it disrupt the fast processing of vast numbers of payments daily.[65] The expectations of the duty are sensitive to the environment in which it operates and meritorious claims can be sifted by the courts from the unmeritorious claims at the stage of deciding whether a bank was put on inquiry at all, and, if so, whether it met the standards of a reasonably prudent bank.[66]

A final point of interest is that, in *Hsu Ann Mei*, the Court of Appeal said that the law does not require the bank to prove that the customer's consent to the payment was defective (in this case, as a result of undue influence); it suffices that the bank can show that it had reasonable grounds for believing that the customer's consent to the transaction was defective.[67] In other words, since the bank is required to act as a reasonable bank in delaying or declining payment, provided the bank has acted

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59 *Ibid* at [31].
60 *Ibid* at [35].
61 *Philipp* (EWHC), supra note 11 at [71], [177].
62 Steps were taken after the dispute arose to appoint her as an agent: *Hsu Ann Mei*, *supra* note 54 at [14].
63 *Ibid* at [23].
64 *Ibid*.
65 See the concerns raised in *Philipp* (EWHC), *supra* note 11 at [170]–[172].
66 See, *eg*, *Philipp* (UKSC), *supra* note 1 at [94].
67 *Hsu Ann Mei*, *supra* note 54 at [35].

reasonably, it should not matter that it subsequently transpires that there was no cause for concern and the instruction was binding.[68]

VI. Conclusion

The Supreme Court's decision in *Philipp* clarifies the scope of a bank's payment duty of care in the United Kingdom and settles the debate about the potential for the duty to operate in the context of authorised payment scams. Regrettably the result of the case is that the duty will not assist the victims of such fraud. For consumers, legislative and regulatory obligations on banks in the UK will assist in most cases. It is those customers not qualifying for regulatory protection that are left vulnerable by the decision, primarily corporates and other business entities. In Singapore, the regulatory protections for consumers from authorised payment scams are not as extensive as in the UK.[69] However, based on the Court of Appeal decision in *Hsu Ann Mei*, the bank's *Quincecare* duty operates more broadly, not only where the instructions are invalid, but also where the consent to an instruction is elicited by fraud, and the bank should reasonably be aware of the defect. It is submitted that the optimal approach to dealing with the authorised payment scam onslaught is a combined approach with both regulatory and common law obligations on banks to act reasonably in protecting their customers from scams.

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[68] Contrast *Philipp* (UKSC), *supra* note 1 at [32], citing *Westpac New Zealand Ltd v MAP & Associates Ltd* [2011] NZSC 89; [2011] 3 NZLR 751.

[69] See the "Consultation Paper on Proposed Shared Responsibility Framework" issued jointly by the Monetary Authority of Singapore and the Infocomm Media Development Authority, P016-2023, October 2023, which proposes a framework for how losses from phishing scams resulting in *unauthorised* transactions should be shared between financial institutions (FIs), telecommunication operators (Telcos), and consumers. Pursuant to the proposal, consumers bear the losses unless the relevant FIs or Telcos breached certain duties set out in the proposal. *Authorised* payment scams are excluded from the framework.