Neutral Citation Number: [2021] EWHC 10 (Comm)

Case No: CC-2020-BRS-000004

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN BRISTOL
CIRCUIT COMMERCIAL COURT (QBD)

Bristol Civil & Family Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Date: 18/01/2021

Before :

HH JUDGE RUSSEN QC

(Sitting as a Judge of the High Court)

- -

Between :

FIONA LORRAINE PHILIPP	**Claimant**
- and -	
BARCLAYS BANK UK PLC	**Defendant**

- -
- -

Hugh Sims QC (instructed by **Squire Biggs Law Limited**) for the **Claimant**
Alexia Knight (instructed by **Dentons UK and Middle East LLP**) for the **Defendant**

Hearing dates: 26th and 27th October 2020

- -

Approved Judgment

Covid19 Protocol: this judgment was handed down by the judge remotely by circulation to the parties' representatives by email and its release to Bailii at 10:00am on 18 January 2021.

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HH JUDGE RUSSEN QC

HHJ Russen QC :

Introduction

1. The claimant (**Mrs Philipp**) is the victim of a so-called "APP fraud" which was perpetrated against her in March 2018 and which has led to her losing £700,000. She made two international payments from her bank account which the fraudster (or fraudsters) deceived her into making in her belief that the monies would be safe and that she was assisting an investigation by the Financial Conduct Authority and the National Crime Agency. Her husband (**Dr Philipp**) is just as much a victim of the same fraud because the monies lost to the couple represented the greater part of a sum of £950,000 held in his investment account with Tilney Financial Services ("**Tilney**") until very shortly before the £700,000 was transferred by Mrs Philipp by payments of £400,000 and £300,000 to separate bank accounts in the United Arab Emirates. The fraud extended to inducing Dr Philipp to make the transfer of that larger sum to his wife from his account with Tilney.

2. However, Mrs Philipp is the only claimant in these proceedings because she was the sole holder of the bank account with the defendant, Barclays Bank ("**the Bank**"), into which the proceeds of Dr Philipp's financial investment were paid and out of which Mrs Philipp was induced by fraud to make the two international payments.

3. The acronym "APP" stands for "authorised push payment". As will be apparent from my analysis below of the parties' rival legal contentions, the word "authorised" has some significance in this case.

4. In its December 2016 Response to a Which? Super-complaint about "Consumer Safeguards in the Market for Push Payments", submitted to it in September 2016, the Payment Services Regulator ("**PSR**") said the following which assists in identifying the characteristics of an APP fraud:

> "2.2 *Push payments are payments where a customer instructs their bank to transfer money from their account to someone else's account. In contrast to push payments, pull payments are payments where the person who is due to receive the money instructs their bank to collect money from the payer's bank.*
>
> *2.3 Both push and pull payments can either be authorised or unauthorised. An authorised payment is one where the customer has given their consent for the payment to be made – and this can include situations where the customer has been tricked into giving that consent. An unauthorised payment is one made without the customer's consent – for example, a payment made due to bank error or one made using a stolen payment card."*

5. The PSR's Response said that push payments from one payment services provider ("**PSP**") to another were typically made by a consumer using the Faster Payment Scheme, CHAPS or "On-Us payments" (where the payer's PSP and the payee's PSP are the same entity and internal systems are used). A later paper published by the PSR in February 2018 referred to APP fraud as being the second biggest type of fraud reported by UK Finance (the trade association for the UK banking and financial services

sector) after card fraud. That paper was produced in anticipation of the banking industry developing a voluntary system for reimbursement for victims of APP fraud which became the Contingent Reimbursement Model Code for Authorised Push Payment Scams ("**the CRM Code**"). The CRM Code was introduced in late May 2019 and therefore more than a year after the two payments in this case. In any event, the code does not extend to international payments.

6. On the PSR's categorisation, the APP fraud in the present case involved a "malicious payee", operating a scam, rather than payments "maliciously misdirected" where the payer thinks he is paying a legitimate payee (such as a trade supplier) but is tricked into paying some other account.

7. The PSR had treated the focus of the Which? Super-complaint as being upon fraud cases involving consumers in the UK transferring money between two UK bank accounts and the observation about the typical methods of payment was made in that context. In this case the international transfers made by Mrs Philipp to the bank accounts in the UAE were made using "BIPS Priority", the Bank's international payments system.

8. In these proceedings Mrs Philipp seeks to hold the Bank accountable in damages for the loss she has suffered by making the two payments. In very simple terms, her position is that the Bank failed to comply with a suggested duty upon it to protect her from their financially devastating consequences. She says the Bank's observance of that duty would have led to those authorised and ostensibly freely willed transactions being questioned further by the Bank and, as a consequence, either stopped or delayed. If the international transfers had at least been delayed, she says she would have had the chance of recovering the monies before they reached the hands of the fraudster. On this basis, Mrs Philipp says she has a claim for damages in respect of the £700,000 plus interest or at least one which reflects the loss of that chance.

9. The Bank says that the claim is misconceived. It says that the alleged duty to protect Mrs Philipp from the consequences of the payments willingly made by her in reliance upon the fraudulently induced belief is one which is not recognised in law, and should not be recognised, not least because it conflicts with the established duty upon a bank to comply with its customer's mandate. The Bank also says that Mrs Philipp's willingness to make the payments, in the circumstances outlined below, is a reason why her claim must inevitably fail as a matter of causation. The alternative case based upon the loss of a chance is sought to be met by the Bank with the argument that there was no prospect of recovering the monies from the fraudster by the time Mrs Philipp became disabused of her belief. The Bank's confidence in its position on these points has led it to issue an application for the dismissal of the claim.

The Bank's Application

10. Soon after the close of pleadings in the case, on 20 August 2020, the Bank issued its application for Mrs Philipp's claim to be struck out, under CPR 3.4(2)(a), and/or that summary judgment be entered on the claim in favour of the Bank, under CPR 24.2, on the basis that that there are no reasonable grounds for bringing the claim or no real prospect of success on the claim.

11. The application is supported by the witness statement of Ms Teresa Stothard of Dentons, the Bank's solicitors. Ms Stothard identifies the absence of a legal duty of the kind alleged by Mrs Philipp and what she says is a fanciful case on causation (even if such a duty was owed and was breached) to say that the claim is without merit.

12. Exhibited to Ms Stothard's statement were notes which Dr and Mrs Philipp gave to the police ("**the Police Notes**") after they came to accept that they had been the victims of fraud.

13. The witness statement of Mr Grant Squire of Squire Biggs was served on behalf of Mrs Philipp opposing the application.

14. The Bank had objected to much of Mr Squire's statement on the grounds that it strayed into inadmissible argument, engaged in a protracted commentary on the documents and sought to give expert evidence by reference to "expert evidence" from Mr Nigel Brigden whose report ("**the Brigden Report**") was exhibited to Mr Squire's witness statement even though the court had not granted permission for expert evidence. There is considerable force in these points. Counsel for the Bank, Ms Knight, cited the decision of Mr John Kimbell QC in *Cathay Pacific Airlines Ltd v Lufthansa Technik AC* [2019] 1 WLR 5057, [4]-[7], where the deputy judge commented upon the desire of the Business and Property Courts to eliminate the service of witness statements which stray into argument and a commentary upon the documents.

15. Reading Mr Squire's witness statement certainly reinforces the impression that the outcome of his client's claim really turns upon questions of law. In saying that I do not ignore Mr Squire's point that full disclosure by the Bank is required before a trial on the evidence if Mrs Philipp's case on the law is correct or has a real prospect of being shown to be correct.

16. The Brigden Report was directed to establishing Mrs Philipp's case as to what steps the Bank's employees ought to have taken, on her separate visits to the two branches at which instructions to make each payment were given, to satisfy themselves that the payment was not part of a scam. Mr Brigden's view is that the facts I summarise below, by reference to the Police Notes, were such as to raise concerns about both money laundering and APP fraud and that a properly trained branch employee "*ought to have readily identified the risk factors involved on the basis of the information provided to them …. and escalated matters to more senior and dedicated fraud officers within the Bank*."

17. At the outset of the 2 day hearing of the Bank's application I was required to rule upon the Bank's request that the "evidence" from Mr Brigden, as adopted by Mr Squire, should be ignored entirely for the purposes of determining the application. For reasons given orally at the hearing, I decided that the proper course was to consider it *de bene esse* recognising that the Bank objected to it. In doing so, I took note of the Bank's point that, in addition to its objection based upon the late introduction of the Brigden Report without either forewarning or permission, Mr Brigden was to a large degree opining on issues of law (the extent of the Bank's duty) or fact (on matters for causation) which were solely for the court. But I also noted that the position of Mrs Philipp, expressed by Mr Hugh Sims QC on her behalf, was that there was a real prospect of her being granted permission, in due course, to rely upon such expert evidence at the trial of the claim which, she contended, ought to take place.

18. In the event, although Mr Sims QC did later draw my attention to a number of authorities where the court had been assisted by expert evidence in relation to the relevant banking practice, for the purpose of seeking to make good his submission about there being a real prospect of later securing permission, not much reliance was placed at the hearing upon the views of Mr Brigden in resisting the Bank's application. Greater emphasis was instead placed upon the publicly available documentation about APP fraud, as at March 2018, which had fed into Mr Brigden's report and what Mr Sims said was the realistic prospect of expert evidence being admitted for the purpose of influencing the court's decision in the case following a trial.

19. That said, Mr Sims did invite me to reflect upon a section of the Brigden Report which began with his observation that by 2018 the risks associated with APP fraud were well-known within the banking industry. Mr Brigden went on to say that, although the Bank is correct to say that the CRM Code did not take effect until May 2019 (and did not apply to international payments) "*what is said in it is in my view simply a distillation of good industry practice before then*" both for domestic and international payments. Mr Brigden expressed the opinion that the highly unusual deposit into the Account (from Dr Philipp's monies) and the rapid payments to new payees in the UAE by themselves "*ought to have attracted attention and concern on the Bank's part as to whether either Mrs and Dr Philipp were involved in a fraud or a victim of a fraud*." He said that "*they ought to have been identified as highly suspicious transactions by a competent bank*" and that *"[B]oth money laundering and APP fraud concerns were raised by these facts*".

20. I return below to the implications of the Brigden Report, so far as the analysis of the legal duty owed by the Bank to Mrs Philipp is concerned, in addressing the authorities pertaining to the admission of expert evidence upon which Mr Sims QC relied.

21. The statements of case reveal there is a dispute between the parties as to what took place on the visits to the two branches of the Bank at which instructions for the payments were given. The Bank says that that Mrs Philipp was (or, perhaps in the case of the first transaction, inevitably would have been) taken through its Identification and Verification tool ("**the ID&V Tool**") for the purposes of checking the genuineness of the instruction.

22. Ms Stothard recognises that such factual issues cannot be resolved summarily. However, for the Bank, Ms Knight relied upon the following three of the well-known principles which Lewison J, as he then was, summarised in *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] as being applicable to a defendant's application for summary judgment, namely (with her emphasis):

> *ii) "A "realistic" claim is one that carries some degree of conviction.* ***This means a claim that is more than merely arguable****: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]"*
>
> *iv) [The warning against conducting a mini-trial] "....* ***does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents****: ED & F Man Liquid Products v Patel at [10]"*

> *vii) [In contrast to those cases which require a fuller investigation of facts against further potential evidence than an application for summary judgment properly permits] "……* ***it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better.*** *If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success.* ***However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction:*** *ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."*

23. For his part, and having in mind the potentially significant dispute as to what either did or should have transpired on Mrs Philipp's visits to the two branches and also the prospect of her being permitted to adduce at a trial expert evidence as to banking practice standards and practice at the relevant time, Mr Sims QC countered with reliance upon the following statements in *EasyAir* to which two of the above principles are expressly juxtaposed:

> "iii) *In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman [2001] 2 All ER 91; and*
>
> *v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*
>
> *vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63*."

24. Mr Sims QC also relied upon the observation in the Privy Council decision in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804, at [84], that it is not normally appropriate to use a summary procedure for the determination of controversial questions of law. The Board said that it is generally desirable that such issues of law are decided on the basis of actual rather than hypothetical facts and with the benefit of detailed argument and mature consideration. Mr Sims said that this guidance has particular resonance where the issue arises in a developing area of law. He stressed that his argument about the standard of care required of a bank in the context of suspected APP fraud reflected the incremental development of an established duty of care which the court should recognise as an appropriate development in the light of the prevalence (by March 2018) of that type of fraud.

25. In that regard Mr Sims also referred to the recent decision in *Benyatov v Credit Suisse Securities (Europe) Ltd* [2020] EWHC 85 (QB), at [56], as a reminder that where the case has or may have wider ramifications beyond its own particular facts then that can provide some other compelling reason for a trial for the purposes of CPR 24.2(b).

26. However, the Bank's position is that Mrs Philipp's claim can be shown to be bad in law once the established duty of care upon a bank is considered against the matters which appear from the Police Notes and therefore reflect the factual case of Mrs Philipp and her husband.

Mrs Philipp's Account of Events

27. For the purposes of determining the Bank's application, the following is a sufficient summary of uncontroversial matters. They include the events narrated in the Particulars of Claim ("**the PoC**") and by Dr and Mrs Philipp in the Police Notes in explaining how they fell victim to the sophisticated and malicious APP fraud.

28. Mrs Philipp is a longstanding customer of Barclays with whom (or its predecessor Woolwich) she has held one or more accounts since her student days. One of the accounts she held in March 2018 was an account ending "202" ("**the Account**"). Mrs Philipp had met Dr Philipp in 2013 and they were married in March 2017. Mrs Philipp worked as a music teacher and, prior to his retirement, Dr Philipp had worked as a consultant occupational and public health physician at the Bristol Royal Infirmary. Until early March 2018 the transactions on the Account were of a type one would expect in the light of Mrs Philipp's quite modest income and living expenditure.

29. In late February 2018, Mrs and Dr Philipp came into telephone contact with a man using the pseudonym "Jonathan Watts" ("**JW**") and who, it is now clear, was out to defraud them. It seems that JW was acting with at least one or two accomplices who were prepared to vouch for JW over the telephone when Dr Philipp sought on a couple of occasions to test what JW was telling him.

30. It appears from the Police Notes that Dr Philipp first made contact with JW as a result of him phoning what he thought was the Fraud Department within HSBC Bank Plc and being re-directed to JW by the person answering his call. Dr Philipp had earlier that day received a telephone call from someone who suggested that an unauthorised

payment of around £10,000 may have been made from his HSBC account and that his account was not safe.

31. Upon speaking to JW on the first occasion, JW told Dr Philipp that that he worked for the Financial Conduct Authority ("**FCA**"), and was currently based in the "Staff Investigation Department", which was operating in conjunction with the National Crime Agency ("**NCA**").

32. JW advised Dr Philipp that a fraud was being carried out by certain members of staff within HSBC (with whom Dr Philipp banked) and Tilney (with whom he held investments). Part of JW's deception involved him causing Dr Philipp to doubt the genuineness of the telephone caller who was employed by HSBC's Fraud Department, based in Leeds, and whose initial contact about suspicious account activity had caused Dr Philipp to make the return call which was re-directed to JW. In a later telephone conversation JW said that the caller in question was one of the members of HSBC staff under investigation. The Police Notes record Dr Philipp commenting that this was the start of him feeling that he was "*being squeezed in a very unpleasant vice, not knowing who to trust.*" However, JW prevailed upon the mind of Dr Philipp who very early on was persuaded by him to tell that bank's fraud department a false story about him and Mrs Philipp wishing to divide their money for personal reasons and not wanting any further investigations by the Leeds office.

33. Although Dr Philipp cannot recall whether he mentioned his investments with Tilney during the first telephone conversation with JW, he had been asked in that call whether he had any other investments which could be at risk of fraud. JW persuaded Dr Philipp that he should transfer his funds from HSBC and Tilney into "safe accounts" until the investigation was completed and arrests made. JW said Dr Philipp's cooperation was needed, indeed required by the FCA/NCA, to bring the fraudsters to justice. Dr Philipp's initial misgivings about telling JW about the amount invested with Tilney were overcome by JW arranging for another individual to phone them from what appeared to be the NCA's telephone number shown on the NCA website (which JW had encouraged Dr Philipp to look up on the internet). The caller said he had worked with JW for 9 years and that he was a senior person in the FCA who could be trusted.

34. On 5 March 2018, Dr Philipp caused £950,000 to be transferred into the Account ("**the Tilney Transfer**").

35. The reason Dr Philipp gave to his financial adviser at Tilney for making the transfer was that he and Mrs Philipp had an opportunity to buy a bigger house which had to be acted upon quickly. He said this false information was given on the instructions of JW.

36. The Tilney Transfer of £950,000 was credited to the Account on 8 March 2018.

37. The Tilney Transfer was made to the Account in circumstances where Dr Philipp had already, on 2 March 2018, transferred the sums of £35,000 and £37,000 from his bank account with HSBC to two allegedly safe accounts set up by the fraudster with the Yorkshire Building Society and Halifax Building Society. Dr Philipp has since been compensated by HSBC for the losses he has suffered through making those transfers. They are irrelevant to Mrs Philipp's claim save that, by 4 March 2018, Dr Philipp understood his account with HSBC had been blocked by that bank's fraud department. It was partly for that reason the Account was used for the Tilney Transfer with Mrs

Philipp's consent, though the Police Notes also indicate the adviser at Tilney suggested it might ameliorate a Capital Gains Tax charge if the money went into Mrs Philipp's account (perhaps in the event of it not being reinvested within 30 days). JW had also suggested that it might assist to have the Bank's security staff involved (when his ruse involved casting suspicion over HSBC employees). In the notes, Mrs Philipp records a conversation with JW (who had asked Dr Philipp if he could speak to Mrs Philipp) on 4 March in which she said: "*Robin trusts you and I trust Robin so, yes, you can use my account*." The two payments her husband made from the HSBC account and his rejection of the offer of assistance by the bank's Leeds office also further illustrate the extent to which the couple were deceived by JW.

38. On the same day of the Tilney Transfer, and prior to it being made, Dr and Mrs Philipp had received a visit from DC Mandy Claridge of Avon and Somerset Police who "*advised the Philipps that she believed they had been the victims of a fraud*". JW had forewarned them by phone, a matter of minutes before DC Claridge's visit, that they might get a visit from the local police and told them not to say anything about the supposedly higher-level investigation by the FCA/NCA. JW remained on the call (on Dr Philipp's non-smart mobile phone) during DC Claridge's visit so that he could listen in. DC Claridge advised the Philipps of her belief that they had been the victims of fraud. As instructed by JW, they told DC Claridge that they did not wish to discuss matters with her. DC Claridge left her contact details, but they made no further contact with her.

39. JW arranged for someone using the name Martin Finney, and claiming to be a senior officer in the NCA, to call Dr Philipp and tell him the NCA was a higher authority than the police, that they would deal with the police and that Dr Philipp should not talk further with the police about the matter. Part of the scam involved the call appearing on Dr Philipp's phone screen as if it came from DC Claridge's phone. JW had already told Dr Philipp that the so-called Mr Finney would meet DC Claridge at Bridewell Police Station, Bristol, and make the call using her phone.

40. On 9 March 2018, on the instruction of JW, Mrs Philipp and Dr Philipp visited the Thornbury branch of the Bank to cause the sum of £400,000 to be transferred from the Account to one in the name of Lambi Petroleum Limited ("**Lambi"**) at a bank in the UAE. JW had identified this as an account for safekeeping monies by saying that it would not be subject to a limit under the Financial Services Compensation Scheme and the FCA and UAE authorities would ensure the monies were safe. In the event, the Thornbury branch was unable to process the monies because of some problem with the international payment system.

41. Mrs and Dr Philipp then attended the Broadmead branch of the Bank on 10 March 2018 to make the payment of £400,000 to Lambi. Mrs Philipp gave instructions for it to be paid to an account in the name of Lambi at First Gulf Bank (now known as First Abu Dhabi Bank). As instructed by JW, Dr Philipp volunteered to the bank cashier in the presence of Mrs Philipp that he had had previous dealings with Lambi.

42. According to the Police Notes, on 12 March 2018 Mrs Philipp responded to a telephone request from JW to provide him with copies of the Bank's receipt for the Lambi payment, her passport and her driving licence. Mrs Philipp scanned these at the Central Library, Bristol and emailed them to the fraudster. Over the phone, she also gave him telephone banking security code and her mother's maiden name.

43. Later that morning, 12 March, Mrs Philipp received a missed telephone call from the Bank's Global Payments Team. They phoned the Bank back a couple of hours later using their landline, at the suggestion of JW, and this enabled JW to listen in to the conversation via Dr Philipp's mobile phone. The Bank asked Mrs Philipp to confirm that she wished to proceed with the transfer to Lambi, as authorised, and she gave that confirmation. She was told the payment would be made before 15:30 that day, as it was a priority payment, and the Bank says it was transferred out of the Account at 13:53 (timing which is presently not admitted by Mrs Philipp).

44. In the morning of 13 March 2018 Mrs and Dr Philipp attended the Westbury on Trym branch of the Bank to make a further overseas transfer of £300,000 at the suggestion of JW. On this occasion, JW was again listening in to their conversation with the Bank cashier through an open line on Dr Philipp's mobile phone. Mrs Philipp gave instructions for the £300,000 to be paid from the Account to the account of Bonito Systems Limited ("**Bonito**") held at Emirates National Bank of Dubai.

45. In the afternoon of 13 March the Bank telephoned Mrs Philipp to verify her identity and check her authorisation of the payment to Bonito. Mrs Philipp confirmed she wished to make the payment. She later scanned and emailed to JW the receipt for the payment provided by the Bank. The Bank says the £300,000 was transferred out of the Account at 14:27 that day (again not yet admitted by Mrs Philipp).

46. On 15 March 2018, DC Claridge visited the Philipps unannounced for a second time, accompanied by another uniformed officer. DC Claridge told them that more people had been affected by the suspected fraud. On the instruction of JW, Mrs and Dr Philipp again stated they did not wish to have any involvement with the police (they did not invite the police officers into their home) and that they did not want to take the matter any further.

47. On 16 March 2018 Detective Sergeant Michael Billam, a Financial Investigator at Lincolnshire Police who was involved in a large-scale fraud investigation, contacted Judith Barnes, Barclays' Police Liaison Officer, and informed her that he had received credible information that Mrs Philipp's current account with the Bank had been compromised by fraudsters in the UAE. Lambi's name was mentioned. The Bank's pre-action letter indicates that the information it received from DS Billam was not that the Account was likely to be subject to a fraudulent attack but, rather, that funds obtained by fraud would flow through the Account.

48. On 19 March 2018, Mrs Philipp sought, again on the instruction of JW, to make a further transfer to Bonito by visiting the Bank's Westbury on Trym branch. She had proposed to pay a further £250,000 representing the balance of the Tilney Transfer. JW was again listening in to what was said on this visit (including the Bank's security checks as to Mrs Philipp's identify) as he had asked Dr Philipp to keep his mobile phone on throughout. However, Mrs Philipp was not able to make the payment because, following the contact from DS Billam, the Bank had blocked the Account pending a review. She was told the Account had been under review since 16 March and it might take up to 10 days before she was contacted further.

49. At JW's suggestion, Mrs Philipp then called the Bank's Fraud Department, expressing her frustration that the further transfer could not be made and impressing upon the Bank the degree of urgency by saying that her husband needed the payment to be made under

an important contract. During that conversation Mrs Philipp was told the Account was blocked save for the purpose of making certain limited, essential payments. JW also listened in to this conversation via Dr Philipp's mobile phone and therefore would have heard Mrs Philipp responding to certain security questions (including her giving her age, her email address, place of birth, certain letters of her mother's maiden name and the last 4 digits of her long card number).

50. Although not directly relevant to the dealings between Mrs Philipp and the Bank, on the same day, 19 March, Dr and Mrs Philipp (again at JW's suggestion and with him listening to the conversation) phoned HSBC to complain that their joint account and Dr Philipp's sole account with that bank had been blocked for some 3 weeks. They had been primed by JW to say that the payments by Dr Philipp to the Yorkshire and Halifax building societies had already been dealt with.

51. On 20 and 21 March Dr Philipp visited Tilney's offices in Bristol with signed papers authorising the release of further investments separately held by him and Mrs Philipp and for the payment of their respective monies to his HSBC account. The Police Notes state that on 21 March JW phoned Dr Philipp to say that the £700,000 paid from the Account was now protected and safe in the UAE accounts.

52. The Police Notes also state that, on 21 March, Dr Philipp was visited at home by his close personal friend Peter Vallance. Although Dr Philipp had been told by JW that he must not jeopardise the supposed FCA/NCA investigation he "*confessed*" to Mr Vallance (as the notes put it) that he and Mrs Philipp were "*under duress due to a highly confidential criminal investigation they were helping with*". Mr Vallance expressed his view that they were being subjected to a scam and advised them to go to the police. Mr Vallance followed up with an email the next day. This led Dr Philipp to become concerned about the genuineness of JW and to telephone the FCA on 22 March, having read the section on its website relating to fraud. Having spoken to an FCA representative Dr Philipp was given a case reference number and asked to speak further with the FCA once he had returned from an appointment away from home. The Police Notes record Dr Philipp's concern that, even at this stage with his suspicions heightened, he felt "*caught in a vice*" not knowing whether he might be about to wreck a legitimate and important investigation by the authorities.

53. The Police Notes relate how this uncertainty in Dr Philipp's mind led him to be reluctant in the amount of information he gave to the FCA when he called back. He had wanted the FCA to test the position by asking whether the email address JW was using was recognised by the FCA but he says the FCA would not provide such information and he was reluctant to give them the further information about his concerns which they were requesting. The FCA later telephoned Dr Philipp to say that they had concern about the genuineness of the email address he had been given by JW (the exact identity of which he had been reluctant to provide but instead said it was ""*Communication" followed by "fca" and then by two initials ending as "gmail.com*").

54. The Police Notes record that, between his two conversations with the FCA, Dr Philipp also telephoned the NCA in the afternoon of 22 March. He asked to be contacted urgently by the supposed Martin Finney, the person who had previously identified himself as a senior officer within the NCA. The Police Notes record that when that person returned Dr Philipp's call he did not sound happy and explained that he would delete the record of it as it might jeopardise the investigation and potentially affect the

amount of compensation the Philipps might be eligible to receive at its conclusion. Dr Philipp later received a telephone call from JW saying he had spoken to "Finney" that he would also delete the record of his telephone calls to the FCA. On the basis that Dr Philipp had made his outgoing calls to genuine FCA and NCA telephone numbers, it seems likely that JW was somehow monitoring his calls. During their telephone conversation that afternoon JW told Dr Philipp that his landline was being tapped.

55. On 23 March 2018, as advised by JW, Dr Philipp telephoned the FCA to say that he had now spoken to the police about his receipt of "*fraudulent emails*", that they were dealing with it and that he did not want the FCA to take it further but instead treat the case as closed. JW had also told Dr Philipp to hang up if he was further contacted by anyone from the NCA or FCA calling themselves either "Jonathan" or "Martin".

56. On 24 March, and at the suggestion of Mr Vallance, another close friend of Dr Philipp, Richard Parsons, visited Dr Philipp to express his concern about these matters and was disturbed to discover his anger based upon his conviction that he was doing the right thing on behalf of the FCA and NCA. The Police Notes record that Mr Parsons said he had never before seen Dr Philipp like that in the 33 years he had known him.

57. The notes state that Mr Vallance and Mr Parsons were so concerned that their friend was being scammed that, without Dr Philipp's knowledge at the time, they visited the Westbury on Trym branch of HSBC and Tilney's offices in Bristol to express their belief that a serious fraud was being perpetrated. They were informed at the bank of DC Claridge's involvement and they gave HSBC their telephone numbers so that she could contact them. DC Claridge phoned them whilst they were on their later visit to Tilney. She joined them at that meeting. This meeting led Tilney to block the further requested transfers from Mrs Philipp's and Dr Philipp's accounts which been authorised by them a few days before.

58. On 26 March 2018, DC Claridge made a third visit to the Philipps. As a result of her visit they came to accept that they had been the victims of JW's fraud. The next day, 27 March, they visited the Westbury on Trym branch to seek clarification from the Bank as to the steps to take in relation to the funds remaining in the Account and to notify the Bank that Mrs Philipp was a victim of a fraud and that she wished to make a complaint.

59. A later email from a representative of the Bank (sent to Mrs Philipp on 27 September 2018) indicates that the Bank sought to recall the payments to First Gulf Bank (to Lambi) and Emirates National Bank (Bonito) on 31 May 2018 and that, after the Bank had sent several chasers, each of those banks replied saying they would attempt to contact their client. The attempted recall was unsuccessful and the Bank ceased its recall efforts on 27 August 2018.

60. Although Mrs Philipp has not admitted the precise time when the international payments to Lambi and Bonito were debited to the Account, on 12 and 13 March respectively, the above is a summary of matters which are not in dispute for the purposes of the present application.

61. However, there is a dispute between the parties as to whether the Bank asked Mrs Philipp any "safeguarding questions" (as they are described in paragraph 33 of the PoC) on her visits to the two branches.

62. The Bank says Mrs Philipp was taken through certain steps prescribed by the ID&V Tool (though a truly accurate summary of its pleaded case in relation to the transfer to Lambi is that she inevitably would have been taken through that process at the Broadmead branch). Ms Stothard exhibited the Bank's internal documents, reflecting the inquiries it had subsequently made of the branch representatives. The responses from Ms Kerry Jenkins who dealt with Mrs Philipp at the Westbury on Trym branch reveal a clearer recollection of the particular transaction than that of Ms Kirsty Simpson who dealt with her at the Broadmead branch.

63. The exhibited ID&V Tool sets out a number of steps which, for payments over £10,000 include the Bank's representative reading out a number of questions aimed at safeguarding against fraud and scams (they include confirmation that the customer is certain he wishes to make the payment and has not been pressured to do so) prefaced by the following statement:

> "*In order to keep your money safe from fraud and scams, I need to ask you the purpose of this payment and if you have been asked to make this by someone else today? The bank or police would never ask you to transfer money to another account or "safe account". We recommend you check new payee details with someone you trust in person before making a payment. If you are not 100% certain that you want to make this payment then stop, rethink, and talk to someone impartial*."

64. Mr Sims QC noted that another document to which the Bank's representative was directed for further information in this respect had yet to be disclosed by the Bank: the "KIT or your Quick Reference Guide" (of which it appears the ID&V Tool may have formed part). The notes reflecting the Bank's subsequent inquiries of its branch representatives, referred to below, suggest that they did not consider it appropriate to refer to the KIT link as there was no need to do so.

65. Mr Sims QC said that on each occasion the Bank's representative should have asked Mrs Philipp a number of safeguarding questions, which Mrs Philipp says she was not asked, such as (i) why a large sum of money had suddenly appeared in her account on 8 March 2018; (ii) why she was now proposing to transfer out such large sum of money to a foreign beneficiary; (iii) who that beneficiary was; and (iv) why the monies were being paid into her account rather than being paid directly from Dr Philipp's account to that beneficiary.

66. The exhibited notes recording the responses from the branch representatives to the Bank's internal inquiries, as reflected by the terms of its Defence, contain the following hearsay statements in relation to following the procedure in the ID&V Tool and, in particular, why Mrs Philipp was making the payment:

> Ms Simpson:
>
> *"Kirsty always asks customers when making a payment where the money is going and what it is for, and although Kirsty cannot remember exact details of the customer's response, she is 100% confident that this conversation took place. Kirsty also discussed with the customer, as per the ID&V Tool*

instructions, about whether the customer is aware that sometimes they can be asked to make payments as part of a scam, Kirsty had no reason, based on the answers the customer gave, to believe this was a scam and therefore proceeded with the payment."

"Kirsty discussed with the customer, as prompted by the ID&V Tool, if they were completely happy with this payment and if they would like to proceed, alongside confirming that the customer did not have any suspicions or feel forced into making the payment. Kirsty was completing the transaction in a private office, and would have had to leave the room to retrieve the paperwork for the transaction, providing the customer with time alone to think about what they were doing. Additionally, when Kirsty needed an override to complete the payment, she would have again had to leave the customer alone in a private office for a period of time."

Ms Jenkins:

"I remember asking if happy payment was a genuine one and that the details were ok and correct and if customer was happy to proceed with payment as I usually would."

"As above, asked the customer if happy payment was genuine …. ID&V tool stated only record scams conversation if transaction was suspicious but customer was local with no fraud markers and someone had come in the day before claiming to be husband asking what details were needed to make payment so I was expecting her to come in. This payment was back in March and colleague has served countless people since."

67. The notes reflecting the outcome of the Bank's internal interrogation of its computerised records also suggest (I put it no higher than that) that certain checklists were ticked off at the Broadmead branch - e.g. "Mandate Check", "AML" (i.e. anti-money laundering) and "Fraud" - but the accuracy of those presumably rests upon the initial human input being reliable. The records of both branches record the absence of a "*VC Marker/Fraud Awareness Flag*" on the record of either payment.

68. It is obvious that the issue of fact between the parties, as to what took place within the branch and what questions were asked of Mrs Philipp, is one which lies well outside the proper scope of what might properly be summarily decided on the Bank's application and Ms Knight did not suggest otherwise. For example, Mr Sims QC said that Dr Philipp had not attended the Westbury on Trym branch they day before, 12 March 2018, as Ms Jenkins' recalled and that, if there was such a visit, it might well have been JW or an accomplice.

69. There is, however, no dispute that Mrs Philipp identified herself as the Account holder (Mr Brigden notes that this was done using "PIN Sentry") with authority to make the payments to Lambi and Bonito and that she duly authorised them. So far as the statement which the ID&V Tool required to be read to the customer is concerned, Mrs

Philipp's own pleaded case supports the conclusion that she was certain she wanted the payments to be made. JW was listening into the conversations at both branches but that fact was not made known to the Bank's representatives and, as I have already noted in relation to the instructions given for the first payment, she recognises that her husband volunteered in her presence that he had had previous dealings with Lambi. Mrs Philipp's willingness to make the payments, without informing the Bank that JW (reputedly acting on behalf of the regulator) had requested it, was confirmed to the Bank when on each occasion the payments team subsequently telephoned her to seek confirmation that she wanted to do so.

70. In her oral submissions Ms Knight also drew my attention to the reference in the Police Notes to JW's statement to Dr Philipp on 5 March 2018 that, upon the successful completion of the suggested fraud investigation, he could expect to receive from the FCA compensation of between 4% to 7% of any amounts transferred to a safe account. The Police Notes also refer to £500 being sent to Dr Philipp by registered post the following day and to a promise of a further £800 (£500 for expenses and £300 as compensation) on 12 March 2018. On 10 March 2018, JW had suggested that Mrs Philipp would be paid £100 per day to compensate her for lost teaching time and inconvenience and this might be credited to the Account rather than paid in cash.

71. Whatever points the Bank might seek to make against the Philipps at any trial of the claim by reference to them, any such payment or promise of payment cannot in my judgment have any bearing upon the present application. There is no scope on this application for proceeding otherwise than on the basis that the Philipps were "*completely under the spell of the fraudster*" (to use Ms Stothard's language which was picked up by Mr Squire) which, subject to allowance for any relatively modest cash payments they may have received from JW, has presently cost them £700,000.

The Legal Issue

72. The difference between the parties arises out of the following uncontroversial statement in *Paget's Law of Banking* (15th ed) at para. 22.52:

> "*When executing the customer's instruction to make a funds transfer the bank acts as its customer's agent. Acting as agent the bank owes the customer a duty to observe reasonable care and skill in and about executing the customer's orders. The duty arises both at common law and under statute.*"

[The authorities cited for the common law position include the decision of Steyn J in *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363. The basis of the statutory duty is section 13 of the Supply of Goods and Services Act 1982.]

73. The Bank's pleaded case recognises that it had a duty:

i) to act in accordance with Mrs Philipp's mandate, and to execute reasonable care and skill in executing her instructions. Ms Knight said this duty is concerned with following the instructions (not transposing digits and so forth) and does not include a requirement to exercise a degree of care in deciding whether or not to execute an instruction which the mandate required Barclays to pay; and

ii) to execute the transfers unless an ordinary prudent banker would have had reasonable grounds for believing that the transactions were an attempt to misappropriate Mrs Philipp's funds (i.e. what is now known as the Quincecare duty).

74. The PoC (at paragraph 58) plead the Quincecare duty as "*a duty to refrain from executing an order of Mrs Philipp if and for so long as it was put on inquiry, by having reasonable grounds for believing that the order was an attempt to misappropriate funds from Mrs Philipp*."

75. The difference between the parties as to the extent of protection afforded to a customer through a bank's observance of the Quincecare duty is illustrated by me quoting in full paragraph 61 of the PoC. The Bank denies that it was under a duty to have had in place the anti-APP fraud policies and procedures alleged by Mrs Philipp in that paragraph, where it is said:

> "61. In the premises, in order to discharge its duties of reasonable skill and care as pleaded above, [the Bank] should have had the following policies and procedures in place by March 2018 which included:
>
> (a) For the purpose of detecting potential APP fraud:
>
> (i) Transactional data and customer behaviour analytics incorporating, where appropriate, the use of fraud data and typologies to identify payments that are at higher risk of being affected by an APP fraud;
>
> (ii) Training employees on how to identify indicators of circumstances around and leading to transactions that are at higher risk of facilitating APP fraud;
>
> (b) For the purpose of preventing potential APP fraud:
>
> (i) Measures to identify people who were vulnerable to APP fraud;
>
> (ii) Where an APP fraud or scam risk has been identified, reasonable steps to gather in further information in order to assess the risk, and provide their customers with impactful warnings, including additional measures whether the customer may be considered to be vulnerable;
>
> (c) For the purpose of stopping potential APP fraud:
>
> (i) Where there is or should be concern that a payment may be affected an APP fraud, take action to delay the payment while the matter is investigated;
>
> (ii) Appropriate investigative steps include, where appropriate, seeking written confirmation as to the rationale for the transaction, including from any third party professionals involved, and invoking protocols which it is inferred are in place with the Police to enable further information to be gained from the Police, and investigating recent account activity; and

(d) For the purpose of stopping or reversing or reclaiming monies the subject of a potential APP fraud:

(i) Where there is or should be concern that a payment may be affected by an APP fraud, take action to delay the payment while the matter is investigated;

(ii) Communicating and/or writing to the recipient bank seeking assurances from them that monies will be held or frozen pending any review."

76. In relation to the obligations upon the Bank, Ms Knight and Mr Sims QC each sought to draw very different conclusions from the decision of Steyn J in the *Quincecare* case.

77. What has become known as the Quincecare duty is encapsulated by what the judge said at p. 376*:*

> *"The law should not impose too burdensome an obligation on bankers, which hampers the effective transacting of banking business unnecessarily. On the other hand, 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. To hold that a bank is only liable when it has displayed a lack of probity would be much too restrictive an approach. On the other hand, to impose liability whenever speculation might suggest dishonesty would impose wholly impractical standards on bankers. In my judgment the sensible compromise, which strikes a fair balance between competing considerations, is simply to say that 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 grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate funds of the company (see proposition (3) in Lipkin Gorman v Karpnale Ltd (1986) [1992] 4 All ER 331 at 349. [1987] 1 WLR 987 at 1006). And the external standard of the likely perception of the ordinary prudent banker is the governing one."*

78. Steyn J delivered his judgment in *Quincecare* on 24 February 1988, referring to the then first instance decision of Alliott J in *Lipkin Gorman*. That decision was appealed to the Court of Appeal. The further appeal to the House of Lords in *Lipkin Gorman* did not concern the claim against the bank but only the claim against the defendant club – a casino – for money had and received. In the Court of Appeal, May LJ said he derived substantial assistance from the decision of Steyn J in *Quincecare*: see [1989] 1 W.L.R. 1340, at 1356. Addressing a bank's principal obligation to honour cheques written in accordance with its customer's mandate, May LJ expressed the opinion that a bank's duty of care in such circumstances must be limited and said it was no part of the bank's duty to consider the commercial wisdom or otherwise of the particular transaction. He referred to "exceptional circumstances" being required to qualify the bank's obligation to honour any such cheque. After noting the defendant bank's concession that there would be a duty to inquire before paying such a cheque where it knew of facts which a reasonable bank manager would think were probably dishonest, May LJ said:

> "*For my part I would hesitate to try to lay down any detailed rules in this context. In the simple case of a current account in credit the basic obligation on the banker is to pay his customer's cheques in accordance with his mandate. Having in mind the vast numbers of cheques which are presented for payment every day in this country, whether over the bank counter or through the clearing bank, it is, in my opinion, only when the circumstances are such that any reasonable cashier would hesitate to authorise payment without inquiry, that a cheque should not be paid immediately on presentation and such inquiry made*."

79. The court in *Lipkin Gorman* addressed the duty of care upon a bank in the context of the drawing and payment of its customer's cheques. The facts of *Quincecare* involved instructions for the transfer of monies being given firstly be telephone followed by confirmatory letter. I deal below with Ms Knight's submission that each was concerned with a situation where a particular signatory on behalf of the customer had abused his authority in an attempted misappropriation of the customer's funds for his own benefit. At this stage I simply note that these decisions upon the qualified extent of duty of care in the payment of cheques or acting upon oral or written instructions to transfer monies must in my judgment have equal force, at least, when a bank receives some other form of payment instruction on behalf of its customer.

80. Steyn J described the Quincecare duty as subordinate to the bank's contractual duty to act upon a valid instruction. The same must be true where the customer's instructions are given under modern and substantially automated bank payment methods. Ms Knight cited the decision of the Court of Appeal in *Tidal Energy Ltd v Bank of Scotland Plc* [2014] EWCA Civ 1107 [62]. That case concerned the extent of a bank's obligations when processing a CHAPS payment request and the court made observations upon the critical importance of the speed of transaction and the need to lean against any construction of the contract which involved imposing a requirement on the bank which would frustrate the customer's wish to have the money transferred within a given time frame. Although the court was addressing the position of the receiving bank, I accept Ms Knight's point that the same principle should apply for the imposition of any duty of care on the sending bank. I also note that the *Singularis* case addressed next involved payments made following instructions received by SWIFT.

81. Ms Knight and Mr Sims QC also relied upon what had been said about the Quincecare duty by Lady Hale PSC (with whom all the Supreme Court Justices agreed) in *Singularis Holdings Ltd (in liq) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50; [2019] 3 W.L.R. 997. The facts of *Singularis* involved the payment of monies out of a segregated client account with the defendant investment bank and broker. Lady Hale referred to the decision in *Quincecare* in saying, at [1]:

> *"…. it was an implied term of the contract between a bank and its customer that the bank would use reasonable skill and care in and about executing the customer's orders; this was subject to the conflicting duty to execute those orders promptly so as to avoid causing financial loss to the customer; but there would be liability if the bank executed the order knowing it to be dishonestly given, or shut its eyes to the obvious fact of the dishonesty, or acted recklessly in failing to make such inquiries as an honest and reasonable man would make; and the bank should refrain from executing an order if and for so long as it was put on inquiry by having*

reasonable grounds for believing that the order was an attempt to misappropriate funds."

82. Consistent with the defendant's concession in the Court of Appeal in *Lipkin Gorman* and what Steyn J had been at pains to make clear, the judgment in *Singularis* therefore clarified that the operative standard of the ordinary prudent banker enables a claimant customer to hold a defendant bank to objective (or industry) standards of honesty. I note that Lady Hale in fact used language which is (or certainly was) familiar in constructive trust claims involving an allegation of knowing receipt or dishonest (or knowing) assistance and which precludes a defendant from resisting liability unless guilty of subjective dishonesty or, for present purposes, what Steyn J described as a "lack of probity" on the bank's part. This is not surprising when, in identifying the duty, Steyn J referred to the third proposition accepted by Alliott J in *Lipkin Gorman*. In addressing and accepting all five propositions put to him in that earlier decision, Alliott J expressly noted he was doing so because the bank was alleged to have been guilty of knowing assistance and *"[w]hen, as in this case, the alleged constructive trustee is a bank, the court's approach must reflect the established contractual duties of a bank.*"

83. In a section of her judgment headed "*Causation*" and addressing the defendant bank's argument that its customer had inflicted the harm upon itself (because the fraud of its sole shareholder and only active director should be attributed to the company), Lady Hale commented on the purpose of the duty as follows, at [23]:

"…. the purpose of the Quincecare duty is to protect a bank's customers from the harm caused by people for whom the customer is, one way or another, responsible."

And later in her judgment (dealing with the argument that the fraudulent conduct of the director should be attributed to the company) she said, at [35]:

"The context of this case is the breach by the company's investment bank and broker of its Quincecare duty of care towards the company. The purpose of that duty is to protect the company against just the sort of misappropriation of funds as took place here. By definition, this is done by a trusted agent of the company who is authorised to withdraw its money from the account."

The Bank's Argument

84. Through Ms Knight, the Bank argues that the Quincecare duty does not extend to a duty to protect Mrs Philipp against the consequences of her own decisions, where (as between herself and the Bank) her payment instructions were valid ones and not in and of themselves fraudulently given.

85. Ms Knight observed that the Quincecare duty has only been applied in cases where there was some doubt over the motives of a signatory acting on behalf of a corporate customer of the bank (or, in the case of *Lipkin Gorman*, a firm of solicitors whose mandate extended to the relevant signatory). In other words, the situation was one of attempted misappropriation of the customer's funds by an agent of the customer where the instruction itself was fraudulent in nature. Ms Knight referred to the above-quoted passages from the judgment of Lady Hale in *Singularis* about the purpose of the duty. She said there is no reported case of it being applied to cases such as the present, where the transfer itself was properly and lawfully authorised by the customer herself and where the intended payee was the person misappropriating the funds.

86. In short, the Bank's position is that the Quincecare duty does not extend to protect Mrs Philipp from her own actions. The extension suggested by Mrs Philipp so as to support the obligations alleged in paragraph 61 of the PoC would be anything but of the incremental kind that the courts are sometimes persuaded to recognise in the common law development of tortious duties.

87. In support of her submission that the Bank should not be made an insurer of last resort for fraud perpetrated against customers, by an extension of the Quincecare duty beyond the established cases of an agent's misuse of his authority, Ms Knight pointed to the primary contractual duty of a bank to act upon its customer's payment instruction by making the payment. She emphasised that any tortious duty of care will be framed by reference to that primary duty and that the decision in *Quincecare* showed that the circumstances in which a bank can deviate from its customer's mandate are limited. She cited another passage from the judgment of Steyn J (at 376): "*Ex hypothesi one is considering a case where the bank received a valid and proper order which it is prima facie bound to execute promptly on pain of incurring liability for consequential loss to the customer*."

88. Ms Knight also said it is fanciful for Mrs Philipp to suggest that, had the Bank asked further "safeguarding questions" in relation to the payments to Lambi and Bonito, that she would have divulged they were being made at the request of someone purporting to act on behalf of the FCA. The Bank points to Tilney being misinformed about the reason behind Dr Philipp's withdrawal of the £950,000 and to the fact that Mrs Philipp was not even prepared to engage with the police when DC Claridge expressly raised concerns about her being a victim of fraud.

89. Ms Knight referred to Mrs Philipp's conduct in her dealings with the Bank in submitting that it involved clear breaches of the Bank's Terms and Conditions for Personal Customers of January 2018 ("**the Bank's T&Cs**"). Mrs Philipp had disclosed her bank security details (or "payment tools") to JW in breach of them. The Bank's T&C's also required the customer to let the bank know promptly if there was concern that account security had been compromised, stated that the Bank would never ask the customer to transfer money into an entirely new account, and further stated that "*if someone persuades you to pay them money and you feel you've been cheated or should not have agreed to pay them, we are unlikely to be able to refund the money*."

90. Anticipating Mrs Philipp's reliance upon the doctrine of undue influence in the banking context (see below) Ms Knight observed that the pleaded basis for Mrs Philipp's case on this aspect was rather thin, possibly non-existent, as it was only in one paragraph in the Reply that the phrase "undue influence" had been used. That was in support of the

suggestion that, where a bank is on notice of a person being potentially under fraud or undue influence, the same steps in recommending and ensuring that independent legal advice is taken should apply to the problem of APP fraud as for any transaction between customer and bank. Paragraph 63(b) of the PoC does allege that the Bank should have considered whether the scam warning should have been given in the presence of Mrs Philipp, without Dr Philipp present, and whether to recommend she should seek independent legal advice or attend a meeting with the police.

91. In any event, Ms Knight submitted that the principles of undue influence were of no relevance to a claim in damages against the Bank. They were concerned with the situation where a bank is itself a party to the impugned transaction or seeking to take some security in respect of it.

Mrs Philipp's Argument

92. The submissions of Mr Sims QC on behalf of Mrs Philipp emphasised the following points which arose out of the parties' pleaded cases:

i) the Bank's admission of the duty to act with reasonable skill and care when acting upon Mrs Philipp's payment instructions (subject to the Bank's T&Cs); and

ii) the Bank's admission of the Quincecare duty pleaded in paragraph 58 of the PoC "*in so far as the test is whether an ordinary and reasonable banker would have had reasonable grounds for believing that the order was an attempt to misappropriate Mrs Philipp's funds. It is denied, if it is alleged, that there was an absolute obligation, even in those circumstances not to execute the Transfers.*" (per para. 49 of the Defence).

93. Mr Sims said the Bank's position that the Quincecare duty only arose in circumstances of attempted misappropriation of the customer's funds by an agent of the customer (rather than by a third party perpetrating a fraud on the customer which induces the payment) did not clearly emerge in the Defence as a qualification to the Bank's admission of the Quincecare duty.

94. However, I note the Defence (at paragraph 4) does make clear the Bank's position in denying that "*it had any obligation to protect Mrs Philipp from her own actions*" and that it is "*not an insurer of last resort for fraud perpetrated against customers*." When coupled with the denial (at paragraphs 4(a)-(b) and 48 of the Defence) that the Bank would be in breach of duty in executing the order of Mrs Philipp without having made such inquiries as an honest and reasonable man would make, or to consider the commercial wisdom or otherwise of Mrs Philipp's instruction, I think it can be said that the Bank's pleading does indeed seek to contain the Quincecare duty within the bounds suggested by Ms Knight.

95. Mrs Philipp's case proceeds on the assumption that the duty is not so confined and that the Bank's contrary position meant that the Quincecare duty owed to her was really non-existent.

96. Mr Sims QC illustrated his client's position with a Venn diagram. This encapsulated his client's position that the Quincecare duty should be regarded as one element of the wider duty of reasonable skill and care owed by a bank as a PSP. Moreover, the Quincecare duty was triggered by reasonable grounds for suspecting fraud and, for these purposes, no distinction should be drawn between misuse of authority (as in *Quincecare, Lipkin Gorman* and *Singularis*), money laundering or APP fraud. Mr Sims said that second point held good even of the Quincecare duty was treated as falling outside the wider "set" of a common law duty requiring the exercise of reasonable skill and care.

97. On this basis, Mr Sims QC submitted that real dispute was as to the *standard* of care and the court could not in the circumstances properly reach a conclusion on that standard on an application for summary judgment. He said the Bank had (in Ms Stothard's evidence) failed to address the question which the application begged, namely the standards which the Bank should have observed for the purpose of any trigger of a reasonable belief that the transfers were an attempt to misappropriate Mrs Philipp's monies, and that meant that its application must fail. That must follow, he said, before one even begins to consider the impact that expert evidence of the kind contained in Mr Brigden's report might have at the trial.

98. Challenging the Bank's reliance upon the seventh proposition in *Easyair* (see paragraph 22 above) Mr Sims QC submitted that the Bank's own analysis of the Quincecare duty, and the suggested limitations upon it, meant that the case raised consideration of novel points of law. I have already noted his submission that determination of these points would benefit from detailed argument and mature consideration following findings of fact.

99. He also said that, similarly, the Bank's position on causation proceeded on the flawed basis that the issue involved no real or substantial disputes of fact when, on the contrary, a decision as to the cause of his client's loss would require evidence (potentially including expert opinion) as to what the Bank should have done, what Mrs Philipp would have done in response (including her on-the-spot reactions) and what, objectively, should in turn then have been the Bank's own responsive reactions. He also submitted that the Bank had also overlooked consideration of Mrs Philipp's secondary and alternative case on causation, including a loss of a chance of her recovering the monies on the basis that the Bank should have taken steps to halt payment out by the receiving banks in the UAE at an earlier point in time than 31 May 2018 (most obviously 16 March 2018 when DS Billam contacted the Bank).

100. These arguments on behalf of Mrs Philipp chime with the third, fifth and sixth propositions in *Easyair* (see paragraph 23 above).

101. Mr Sims QC countered Ms Knight's point about a bank's potential exposure for consequential losses if it failed to act promptly on a payment instruction by citing a passage in *Paget* (at para. 22.51) for the proposition that the bank will only be held liable in such circumstances if it has acted negligently. A later passage in the textbook (at para. 22.54) referred to a bank not being held liable in respect of a fraud upon the customer if it had followed established banking practice in making the relevant payment. The authority of *Tidal Energy* is cited in *Paget* in support of that proposition but, in my judgment, it is important to note that the case concerned the standards to be observed by a bank in *acting upon and implementing* a CHAPS payment. Again,

therefore, one comes back to the question of whether or not there existed relevant banking standards in relation to APP fraud which can be brought within the scope of the Quincecare duty and which, if observed, would have led to the payment instruction given by the customer not being implemented by the Bank or at least not being implemented as quickly as instructed.

102. I have already noted the reliance placed by Mr Sims upon the publicly available documentation which culminated in the CRM Code (effective from 28 May 2019 for domestic payments) when addressing above the preliminary dispute at the hearing about the present status and significance of the Brigden Report. This included the Which? Super-complaint of September 2016; the PSR's Response of December 2016; a press release by UK Finance in February 2017 about the scale of APP frauds and action being taken by the banking industry to combat it; and the PSR's Consultation Paper (CP 17/2) of November 2017. He noted that the Bank had been consulted by the PSR before its Response in December 2016. Reference was also made to a "Dear CEO" letter 31 January 2018 written by Mr Andrew Bailey, then Chief Executive of the FCA, to chief executives of PSP's.

103. Mr Sims said these published documents demonstrated that, by the time of the payments in issue in these proceedings, APP fraud was a recognised problem for banks and their customers. He said that the "Dear CEO" letter (referred to in paragraph 60 of the PoC) really marked the end of the story. With its focus upon tackling APP fraud within the context of the FCA's Senior Managers and Certification Regime, the letter asked PSPs to consider whether their senior managers were ensuring that adequate steps were being taken to address APP fraud.

104. In looking at various passages in the published material available to the Bank by March 2018, the submissions on behalf of Mrs Philipp focussed upon their references to the reasonably extensive measures that sending PSPs had developed to prevent customers falling victim to APP fraud and in assisting them in attempting to recover funds (eg. para. 1.11 of the PSR's Response of December 2016) and to the anti-money laundering requirements under the then Money Laundering Regulations 2007 (eg. at para. 12.13 of that Response). Mr Sims said that the steps which Banks were required to take to combat money laundering (including due diligence checks for "occasional transactions" worth £15,000 or more) showed that the Bank should have exercised greater caution in relation to the payments to Lambi and Bonito than (it is to be assumed on the present application) it in fact did. He also referred to what was later said in the CRM Code (at para. 1(5) of "SF (i.e. Standards for Firms) that: "*[w]here a Firm has sufficient concern that a payment maybe an APP scam, it should take appropriate action to delay the payment while it investigates*."

105. I remarked at the hearing that the PSR, as the regulator, appeared to be proceeding on the assumption that the duties owed by a bank at common law did not provide adequate protection to a customer who falls victim to an APP fraud. In particular, section 4 of the PSR's Response of December 2016 stated that "*PSPs are not liable for APP scams since APPs are payments that the customer has authorised (that is, the customers have given their consent for the payments for the purposes of the Payment Services Regulations 2009).*" The section went on to list four legal and regulatory obligations upon PSPs, the last of which was "*under common law, a PSP is obliged not to exercise a payment instruction where it is on notice that its customer's agent is attempting to misappropriate funds*" (see also paragraph 12.18 where *Quincecare* and *Lipkin Gorman*

were cited in support of that proposition). The PSR therefore appeared to be endorsing the narrower scope of the Quincecare duty advocated by the Bank.

106. The same can be said about the trade association's press release of February 2017. It stated that "*[i]f a customer authorises the payment themselves, current legislation means that they have no legal protection to cover them for losses – unlike other financial frauds where the criminal makes a payment without the customer's consent*."

107. Mr Sims QC countered my observation by relying upon the decision of the Court of Appeal in *Gorham v British Telecommunications Plc* [2000] 1 W.L.R 2129, 2141E-F, where the court said that silence within a detailed regulatory code, upon the existence or otherwise of the duty alleged by the claimant, "*does not exclude the power of the court to consider whether a duty of care exists*." I recognise and accept the force of that, though it raises the question as to whether the duty has already been established by earlier authority (as the court in that case found by reference to the principle in *White v Jones*) or, if not, whether it can be established through a process of appropriate incremental development of the common law by reference to circumstances not addressed in earlier cases.

108. Mr Sims QC pointed to what he described as the following "red flags" in relation to Mrs Philipp's payments to Lambi and Bonito which were sufficient to put the Bank on inquiry in relation to a suspected fraud:

i) the routing of the payments through the Account (of Mrs Philipp) when the £950,000 had come from Dr Philipp and, in relation to the payment to Lambi, that he (as a third party to the banker-customer relationship) had volunteered the information about previous dealings with that payee;

ii) the speed of the transaction relative to the recent substantial crediting of £950,000 to the Account;

iii) the sums of money involved when compared with the routine credits and debits to the Account which reflected Mrs Philipp's modest income and lifestyle;

iv) the fact that Lambi and Bonito were new payees with whom Mrs Philipp's bank records revealed no connection; and

v) the use by Mrs Philipp of branches that were not local to her address.

109. I note that these suggested red flags resonate with the type of safeguarding questions which Mrs Philipp says (at paragraph 27 of the PoC) she ought to have been asked on her visits to the Bank but, she says, were not asked.

110. Mr Sims QC also submitted that an analogous basis for the case advanced in paragraph 61 of the PoC lay in the approach of the courts to the principles of undue influence and constructive notice in the context of banking transactions. To quote from paragraph 98 of his skeleton argument:

> "Transactions induced by undue influence may be set aside in circumstances where the bank is on constructive notice of such undue influence. This may lead to nothing

> more than a restatement of the Quincecare duty, as already articulated above. But this is nevertheless illuminating, since it shows the Bank cannot always simply state it has to follow the instructions of the customer, and there may be certain circumstances, where it is put on notice of fraud or undue influence, where it may be required to take further steps in order to free itself from notice."

111. He went on to refer to *Royal Bank of Scotland plc v Etridge* (No 2) [2002] 2 AC 773 for the proposition that, in the context of a husband and wife relationship, where it is established that the wife reposed trust and confidence in the husband in relation to their financial affairs and the contemplated transaction is one which "*calls for an explanation*", then there is a presumption in favour of the transaction having been procured by undue influence. A bank will be put on inquiry by a combination of two things: a non-commercial relationship and a transaction which on its face is to the disadvantage of the wife. Mr Sims had particularly in mind that JW's fraud was one which operated most directly upon Dr Philipp, as most of the telephone conversations took place between them, and it was Dr Philipp's mobile phone which provided the means for JW to listen in to the instructions given at the Bank's branches. He referred to the judgment of Lord Nicholls in *Etridge*, at [50], who said a bank could take steps to avoid being fixed with constructive notice, and will satisfy the requirements as to reasonable steps to take in that respect, if it insists that the wife attend a private meeting with a representative of the bank (away from the husband) at which she is told of the extent of her liability, is warned of the risk she is running and is urged to take independent legal advice.

112. This reliance upon the doctrine of undue influence in the banking context was given less prominence in Mr Sims' oral submissions.

Analysis and Conclusions

113. The Bank's success on its application turns upon it persuading me that, consistent with the seventh proposition in *Easyair* and by reference to a factual platform which is sufficiently clear and stable even though not to be tested at a trial, Mrs Philipp's interpretation of the Bank's duty of care and its suggested protective application to those facts is bad in law. The basic issue between the parties, which Mr Sims says can only properly be decided after a trial on full evidence which would include disclosure of the Bank's internal policies and procedures, is whether or not the Bank should in March 2018 have had in place a system for detecting and preventing the APP fraud perpetrated upon Mrs Philipp, as pleaded in paragraph 61 of the PoC.

114. I consider the facts which emerge from the Police Notes (prepared by the Philipps) are sufficiently comprehensive and uncontroversial to enable me to summarily determine whether or not Mrs Philipp's case on the interpretation and suggested application of the Bank's duty is sound in law. That nettle should be grasped now before the costs of this litigation increase further.

115. The Bank's application rests upon what the Philipps were prepared to tell its branch employees about how she wished to spend monies recently received from her husband's

account with Tilney for their mutual investment, without revealing the remote presence and influence of JW. There is no suggestion by either party that the Philipps' account of what they did and said on the branch visits is one that might change or be judged differently at a trial.

116. The question of law is whether or not the circumstances revealed by that account were such that the Bank came under a legal duty to take steps to ensure (or at least attempt to ensure) that the outcome of each visit was different in that either no immediate payment was made or, if made, was one that the Bank would, on reflection, seek to recoup.

117. The authorities show that the Quincecare duty forms an integral part of a bank's duty to act on its customer's instructions. It is both ancillary and subject to that primary duty. In *Singularis*, Lady Hale described the duty as arising under an implied term of the contract that the bank would use reasonable skill and care "*in and about executing the customer's orders*." That is the language in the quote from Paget in paragraph 72 above. The substance of the Quincecare duty, where the circumstances for observance of it arise to qualify the primary duty, shows that it is actually a duty to *refrain* from acting on those orders.

118. That it is a duty to take care in that regard (albeit one created by an implied term of the bank's agency) is illustrated by the finding of the trial judge in *Singularis* that the customer's successful claim should be reduced by 25% for its own contributory negligence.

119. The quote from Paget embraces both the discrete Quincecare duty and the reasonable skill and care required of a bank when executing a transaction whose genuineness is not in doubt when viewed either from the perspective of the payor or the intended payee. I accept the Bank's point (see paragraph 73 above) that the duty upon a bank to act carefully when acting on the customer's instruction to make a particular payment, when there are no grounds for present or later doubt in the mind of either that it should be made to the intended payee (cf. *Tidal Energy*), has no real significance in this case. So much is clear, in my view, when considering the substance of the obligations alleged in paragraph 61 of the PoC. They build up to a case for suggesting circumstances where the customer's instructions should *not* be acted upon.

120. I have already mentioned that Steyn J in Quincecare drew upon the first instance decision of Alliott J in *Lipkin Gorman*. In my judgment it is important to note that, in the relevant passage in *Quincecare* quoted in paragraph 77 above, the court talked about a bank being "*put on inquiry*". It is clear from the same passage that a bank is not to be held liable where the doubt about the genuineness of the instruction is merely speculative. Steyn J invoked the third proposition in *Lipkin Gorman* which Alliott J expressed in conditionally positive terms by reference to the primary obligation upon a bank to treat its customer's mandate at face value: "*if the bank does not have reasonable grounds for believing that there is fraud, it must pay*." In that earlier decision the judge also accepted as correct the fifth proposition put to him by counsel which was "*a bank is not required to act as an amateur detective*". In the Court of Appeal, as noted above, May LJ was reluctant to lay down any detailed rules that might qualify a bank's basic obligation to act upon the mandate. The Quincecare duty requires prudence in being alert to circumstances which qualify that obligation.

121. The above quote from *Singularis* (at [23]) reveals that the nature and the purpose of the Quincecare duty, once triggered and found to have been breached, informs the court's decision as to the true cause of the customer's loss. It is not the fraud itself but the bank's established breach of the duty in failing to exercise care in protecting the customer against that fraud which is treated as the cause of the loss. It almost goes without saying that if, however, the circumstances show it was too late for the Bank to provide such protection by the time it was put on inquiry then there will have been no breach of duty which can be treated as causative of the customer's loss. Lady Hale went on to refer to the situation where, for the purposes of analysing causation, a defendant's breach of duty is superseded by the later action of the claimant which, in law, is the cause of his harm. In the case of a bank payment procured by fraudulent conduct, there may be cases where actions of the customer vis-à-vis the bank obviate the grounds for suggesting there to have been any actionable breach in the first place.

122. Therefore, if it is the case that the Bank was under no legal obligation to second guess what Mrs Philipp was telling it about her willingness to make the payments to the UAE (by assuming the role of amateur detective in questioning her motives for wanting to make them) then the absence of reasonable grounds for believing they might be affected by fraud will have persisted until she gave the Bank cause to reconsider its position. In other words, the Bank would be able to say that, until the Philipps' visit to the Westbury on Trym branch on 27 March 2018, its customer had given it no reasonable grounds for believing the genuineness of the payments might be in doubt. The two payments had reached the UAE a fortnight before that date.

123. A finding that the only duty owed by the Bank (in relation to the two payments and by reference to facts sufficiently incontrovertible to support a summary determination) was the duty to process the payments – unqualified, on those facts, by any meaningful Quincecare duty – will therefore dispense with any further point about causation; just as the finding in *Singularis* of a breach of the duty led to the issue of causation being resolved in favour of the claimant in that case.

124. However, I mention this point, about the nature of the duty informing the court's decision as to the cause of the loss, because of the particular duty alleged by Mrs Philipp at paragraph 61(c) of the PoC. The allegation in that sub-paragraph is that the Bank's duty of care extended in time beyond the payment transactions so as to cover steps for reversing the transaction and reclaiming the monies. If such an obligation can be established by her, but it could not be shown the Bank was guilty of any prior breach in and about making the payments, there would appear to arise a real question over the cause of the loss. This has been recognised by Mrs Philipp through her pleading of a loss of a chance claim (at paragraph 66 of the PoC). Against that, the Bank's Defence (at paragraph 74) raises the defence of contributory negligence on her part.

125. Reminding myself that this judgment follows an application for summary judgment rather than a trial, I have strong doubts about whether there is any realistic basis for Mrs Philipp to claim she lost substantial chance of successfully countermanding her instructions at the end of the fortnight, with the consequence that the Bank should be held accountable for not (it is presently to be assumed) seeking to reclaim the money before the end of May 2018. It is Mrs Philipp's instructions during the fortnight or so which are relevant to this issue. The intervention of DS Billam on 16 March 2018 may not be that significant when Mrs Philipp not only failed to question the making of the

two earlier payments but was dissatisfied she could not thereafter make a further payment of £250,000 to Bonito because his intervention had blocked the Account.

126. I also note that Mr Brigden, expressing his view by reference to what the Bank had said in its letter of 13 March 2018 about a payment to a beneficiary taking up to 7 working days from the date of instruction, says that he would expect the payments to Lambi and Bonito to be effected much more quickly than that. This casts further doubt about there being any realistic chance of the Bank being able to reclaim the monies by prompt action after 27 March 2018.

127. However, the anterior question is whether or not the Quincecare duty owed by the Bank required it to have in place the policies and procedures alleged in paragraph 61 of the PoC for the purpose of detecting and preventing the APP fraud or for recovering any monies transferred by Mrs Philipp as a result of it.

128. I have set out what was said about the nature of the Quincecare duty in the *Quinceare*, *Lipkin Gorman* and *Singularis* cases in paragraphs 77 to 83 above. I note again that, in *Singularis* at [1], Lady Hale used language which emphasised the objective standard of probity expected of a bank. In particular, she referred to a bank acting "*recklessly in failing to make such inquiries as an honest and reasonable man would make*".

129. I have already suggested that such language borrows heavily from the concepts which now underpin the requisite level of knowledge or suspicion required to establish a constructive trusteeship on the grounds of knowing receipt or dishonest assistance. The phrase describes a category of knowledge which, along with averting the Nelsonian blind eye, the court would equate with actual knowledge for those purposes. I make that observation because her ladyship's judgment does not purport to lay down any rules about a bank's observance of certain identified banking procedures, relating to the payment process, if it is to avoid being fixed with such knowledge. The emphasis is upon liability where the bank is found to have fallen short of the much more general concepts of what is honest and reasonable. The focus upon the trigger for liability through permitting a payment to be made appears to be upon the reckless disregard of commercially accepted standards of conduct rather than subsidiary negligence (within a wider Quincecare duty) in failing to comply with any specific banking rule. I note again that in *Lipkin Gorman*, May LJ was not prepared to countenance the laying down of detailed rules for this purpose.

130. In my judgment, it is therefore clear from all three decisions that the averments in paragraph 61 of the PoC do amount to an invitation to the court to extend the scope of the Quincecare duty beyond its established boundaries. They postulate the need to have in place certain anti-APP policies and procedures as if there were banking rules or standards requiring such. *Quincecare* establishes that speculation and amateur detective work on the part of a bank have no place in fixing a bank, objectively, with knowledge or belief sufficient to put a payment instruction on hold. Through the obligations asserted in paragraph 61 of the PoC, Mrs Philipp does seek to impose upon the Bank certain professional standards of detective and investigative work, including potential liaison with the police, aimed at establishing whether or not a payment which potentially may have been made in furtherance of an APP fraud really is suspect.

131. Indeed, if the system for prior detection and prevention of such fraud fails to stop the payment in its tracks, she alleges that the Bank was still under a duty to act, by delaying

or reversing a payment instruction, so that its potentially fraudulent nature might be investigated further (whether by the Bank or others). On this aspect, the language of paragraph 61(c) focuses upon procedures for stopping or reversing payments "*where there is or should be concern that a payment may be affected by an APP fraud*". Therefore, on Mrs Philipp's case, the Bank's duties of detection and investigation of payments which might be fraudulent are ones which survive compliance with its primary obligation to act upon the customer's payment instruction. To that extent, the suggested obligation is not integral and ancillary to that primary obligation but instead a free-standing one. Again, this shows that Mrs Philipp is seeking to extend the boundaries of the Quincecare duty as established by earlier authority.

132. The claim therefore does not turn, as Mr Sims QC suggested, upon a more nuanced determination of the standard of care required by the Quincecare duty in a bank's detection of "fraud", whether that arises (as his Venn diagram suggested) out of a misuse of a signatory's authority, money laundering or APP fraud. Instead, the question is whether the duty applies at all where (whether or not motivated as the victim of an APP fraud) the customer is instructing how monies belonging to her should be spent.

133. I have already noted that Mr Sims accepts that his client's case raises a novel point of law if I accept the Bank's argument that the existing authorities limit the duty to cases of attempted misappropriation by an agent of the customer. In my judgment, they do confine the duty to that situation. Therefore, adopting the approach in *Gorham v BT* the question is whether the court should be persuaded that the common law duty of care arises in the context of APP fraud.

134. On this issue I have given careful thought to the views expressed in the Brigden Report, and the prospect they might form part of the evidence at any trial of Mrs Philipp's claim, in considering the question of whether the Quincecare duty supports Mrs Philipp's pleaded case in paragraph 61. I have done so on the basis that I am persuaded that, if this case were to proceed to a trial, there is a realistic prospect that expert evidence might have been permitted for the purpose of assisting the court in determining it.

135. However, it is important to bear in mind the proper limit of such contemplated expert evidence. It is one thing for the court to be guided by expert evidence which expresses a view as to whether or not, in the particular circumstances of the case, a bank complied with generally accepted and practised banking standards or (which may not necessarily be the same thing) the standards legally required of the ordinary prudent banker. However, it is for the court to determine what legal duty was owed by the bank – including the requisite standard of care carried with it – in those circumstances.

136. The court may be persuaded that expert evidence is admissible where the expert witness (drawing his opinion from within a recognised body or area of expertise) says his views reflect what is required for the proper observance of recognised rules or standards of conduct. That is quite different from saying that such evidence can meet the restrictive test under CPR 35.1 when the real issue between the parties is one that turns upon legal argument as to what those rules and standards should be. In my judgment, the very nature of the competing submissions of Ms Knight and Mr Sims QC demonstrate that prior question is a purely legal one. I recognise, as both parties do, that a novel point of law appears to be raised by consideration of the significance of the Quincecare duty in circumstances of an APP fraud. However, the assistance the court requires in addressing it can only come through legal argument rather than the hearsay evidence of

an expert. I am not persuaded that the views of Mr Brigden (or any other banking expert) either are or would at any trial be admissible or influential in assisting me to decide what the common law should be taken to have been in March 2018. Such expert evidence might well be regarded as reasonably required, perhaps even essential, for the purpose of assisting the court in deciding whether the Bank fell short in the performance of its duties to Mrs Philipp but it should not influence the finding of what those duties were.

137. Yet one of the four matters which Mr Brigden was required to address (and I should say at least two of the others appear to involve an analysis of the facts and areas for further disclosure by the Bank rather than the communication of an expert opinion upon banking practice) is whether or not he considers "*there are other steps or conduct which a reasonably competent or prudent bank would have carried out and if so what those were and what the potential outcomes could have been, including ranging from declining to accept the instructions, or doing so pending a review, or making further investigations and asking further questions or proceedings with the instructions*." Unless Mr Brigden's views on that point are offered in support of the legal case advanced in paragraph 61 of the PoC (on the basis that the reasonably competent bank not only would have taken such steps but was *legally obliged* to take them) the views he expresses on this aspect do not really advance matters in determining whether or not the Bank is liable. Mr Squire's witness statement (at paragraph 61) makes it clear that he does regard Mr Brigden's views on this point to be relevant in influencing the court's decision upon the content of the Bank's duty of care.

138. Mr Sims referred me to a number of authorities directed to the circumstances in which expert evidence may be admitted by the court. I believe they reinforce the basic point that the only experts who can assist me in determining whether or not the averments paragraph 61 of the PoC (or some of them) accurately reflect the state of English law are the lawyers, deploying their legal arguments, rather than bankers advancing their views on the point.

139. In *RBS Rights Issue Litigation* [2015] EWHC 3422 (Ch) the application to rely upon further expert evidence from an equity analyst (which, at least at that stage of the litigation, was unsuccessful) was made in circumstances where the legal obligation was clearly specified. It was to include "necessary information" in the Prospectus for the purpose of making an informed assessment of the particular matters identified in section 87(A)(2) of FSMA. In broad summary, the defendants wished to rely upon expert evidence to demonstrate what an equity analyst would regard as necessary information for those purposes (as well as what might be regarded as a reasonable belief, on the part of the defendants, as to the truth of the Prospectus for the purposes of a defence which, likewise, was statutorily defined). There was no question of the proposed evidence being used to define the legal obligation itself; a point illustrated by the observation of Hildyard J (at [50]-[51]) that the beneficiaries of it were "investors" and not just equity analysts with their expert tools of research, analysis and evaluation.

140. In *Warner Retail Limited v National Westminster Bank* [2014] EWHC 2818 the court had to decide whether a late application to adduce expert evidence should be allowed on the question of whether the bank's actions or inactions in the sale of an interest rate swap to the claimant were negligent. Rose J dismissed the application on a number of grounds, not the least of which was the lateness of the application given the imminence of a trial that would otherwise have to be adjourned. However, she was also not

persuaded that the claimant would be prevented from properly presenting its case at trial. That case was based upon the bank having given advice negligently, or in breach of contract, on the basis that the relevant regulatory rules governing the sale of such financial products informed the standard of care the bank was required to attain. The relevant legal duty on the sale of the swap was therefore an established one, subject to the corporate claimant transposing it from an unavailable claim for breach of statutory duty to one in negligence, and the proposed expert evidence was in relation to the practice reasonably adopted by banks on the sale of such swaps.

141. I do recognise that Rose J noted that the regulatory rules were drafted "*in very broad terms*" and, although her own decision was that the claim could be decided without the assistance of expert evidence, she also referred to the decision of HHJ Havelock-Allan QC in *Battrick v The Royal Bank of Scotland* [2013] EWHC 4848 (QB). In *Battrick* the judge observed that there will be many mis-selling cases where expert evidence is appropriate to assist the court in knowing what standards are adopted in the banking industry to achieve compliance with the regulatory rule where, he said, the rules do not speak for themselves. However, Judge Havelock-Allan QC expressly noted that he was not seeking to lay down a tablet of stone for all such cases. As that judge's successor in Bristol, I am aware from argument before me in subsequent mis-selling cases that the judge's wider observations upon the admissibility of expert evidence in such cases did not end with *Battrick*: see his judgment in *St. Dominic's Limited v The Royal Bank of Scotland Plc* [2015] EWHC 3822 (QB).

142. Mr Sims referred to other authority where the court had taken account of expert evidence of banking practice and the standards to be adopted by a bank.

143. In *Thomas v Triodos Bank* [2017] EWHC 314 (QB); [2018] 1 BCLC 530, [63], HHJ Havelock-Allan QC referred to uncontentious expert and factual evidence to the effect that, on the sale of a fixed rate loan, the defendant bank should have followed not only the applicable regulatory rules but the Business Banking Code. The bank had in fact had stated that it subscribed to the Code in its literature and correspondence with the claimants. However, although the judge referred to that evidence as "background" to the question of whether the bank owed a duty greater than the *Hedley Byrne* duty of care not to mis-state, when its role was a non-advisory one, it is clear from the subsequent paragraphs in his judgment that he approached that question purely as a matter of law. In particular, at [74]-[80] he analysed earlier authority in support of an intermediate duty, falling between the *Hedley Byrne* duty and the so-called advisory duty, and tested whether the intermediate one satisfied the assumption of responsibility of test. On that last point, it was key to his decision (see paragraphs [78] and [81]) that the bank had subscribed to the Code. This was not, therefore, a case in which the court was accepting expert evidence as to what the nature of the duty should be.

144. Mr Sims was also correct to point out that in *Quincecare* itself Steyn J noted, at 376h-377a, that the evidence of the experienced branch manager of the defendant bank supported the conclusion that the standard of the ordinary prudent banker was the appropriate one. But it is clear from the terms in which he expressed himself that the judge was relying upon that evidence to reinforce a conclusion he had, through a process of legal analysis, reached in relation to the legal principle. Mr Sims also made reference to the reliance placed by the Court of Appeal in *Lipkin Gorman* upon the evidence of "*the experienced banker called on behalf of the solicitors*" ([1989] 1 W.L.R. 1340, 1358F-G) but that appears to have related to factual evidence led by the

solicitors which went to the question of whether or not the bank manager, Mr Fox, had sufficient knowledge of their employee's gambling habit for the bank to have been put on inquiry: see [1987] 1 W.L.R 987, 1012B-G.

145. None of these reported decisions addressed in paragraphs 139 to 144 above therefore contemplate that expert or other evidence as to banking practices should encroach upon the court's identification of the relevant legal duty owed by a bank (so far as English law is concerned). The content of any regulatory rule or duty of care can only be matters for the judge. That must include the question of its true scope and whether or not it applies and, if so, with what effect in any given factual scenario, such as payments induced by an APP fraud. Of course, a claimant has to formulate his pleaded case on the law without knowing whether permission for expert evidence as to banking practices and standards will later be granted under CPR 35.1.

146. I have already noted that Mr Brigden's views, Mr Squire's evidence and Mr Sims' submissions to the effect that the Bank fell short in the performance of its duties to Mrs Philipp rest heavily upon the terms of the CRM Code, and the Which? and PSR's publications which preceded it. Their position is that the problem of APP fraud was sufficiently widespread to support the conclusion that, operating as a prudent bank, the Bank should have had (and probably did have) in place a system to prevent APP fraud which, it should be inferred, failed in the present case. And that system should have operated in relation to international payments as well as domestic ones. Mr Squire also identified the "Dear CEO letter" as being "*highly relevant and persuasive evidence*" as to the duty of care owed by the Bank (and Ms Knight was correct to say that paragraph 60 the PoC in fact identifies it as a source of the duties alleged in paragraph 61).

147. Reliance was therefore placed upon the decision of the Supreme Court in *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; [2016] 1 WLR 597, at [89] where, in a health and safety context, the court endorsed the proposition that it should first look to see what risk assessments had been undertaken by the employer before considering the alleged breach which caused the injury (in that case a failure to issue protective equipment to guard against injury through slipping on ice). Mr Sims QC submitted that the court ought therefore to know, through proper disclosure by the Bank, what procedures the Bank had in place by March 2018 to guard against APP fraud. However, in *Kennedy v Cordia* the making of a suitable and sufficient health and safety risk assessment by the employer was part of its express legal obligations under the relevant regulations. I have to decide whether the common law duty of care upon the Bank *required* it to have in place a "blueprint for action" (to borrow the phrase from that case) of the kind alleged by Mrs Philipp in her paragraph 61.

148. The first point to be made on this aspect of the argument reflects an observation I made at the hearing. It was that many banks no doubt consider that their systems and procedures aimed at avoiding loss to their customers exceed what is legally required of them if they are to avoid being held accountable for such loss. I also then remarked that the CRM Code (applying to domestic payments from May 2019) appears to have been implemented on the assumption that banks were under no common law duty in relation to the prevention of APP fraud: see paragraph 105 above.

149. Even ignoring the territorial limitation of the CRM Code and the retrojection required in view of its implementation date of May 2019, this is a further indication that the banks' observance of it is therefore not necessarily a reliable indicator of how they are

or were in March 2018 required at common law to act in a given set of circumstances. On this point Ms Knight cited the reasoning of Kerr J in *Morley v Royal Bank of Scotland Plc* [2020] EWHC 88 (Ch), 157-158, where the judge drew a distinction between a bank's compliance with policies and procedures prescribed by its internal procedures manual and its compliance with rules and standards set for the banking industry. The latter are evidence of what is reasonably expected of those operating within the industry but the former are what the bank requires of itself and they may or may not reflect industry-wide standards in a particular area. Their probative value, if any, for the purposes of providing a reliable indicator of the standard of care required within any common law duty will therefore be uncertain and depend on the facts of the case.

150. I respectfully adopt the reasoning of Kerr J which reinforces my initial view. I say that mindful of the point made by Mr Sims QC (who is leading counsel for the claimant in *Morley*) that an appeal in the case is due to be heard by the Court of Appeal in the next month or so.

151. The decisions in *Kennedy v Cordia* and *Morley v RBS* demonstrate that the existence or otherwise of any internal anti-APP policy or manual adopted by the Bank by March 2018 (and worthy of disclosure and interrogation at a trial) can be of no significance to the outcome of the present claim unless Mrs Philipp can first demonstrate the existence of a legal duty which is properly reflected in the obligations alleged in paragraph 61 of the PoC. Like any expert evidence as to the wider practice and standards of banks in the area, such evidence of individual bank practice cannot be used to create the legal duty of care, nor inform the standard of conduct required by it, if one does not otherwise exist.

152. Nevertheless, and regardless of the views expressed by Mr Brigden, I need to address the point that the materials published in relation to APP fraud prior to March 2018 do support the duty as pleaded.

153. In my judgment, those materials do not support the conclusion that the Bank owed Mrs Philipp the duties alleged in paragraph 61. I say this for the following reasons:

i) The PSR proceeded on the basis that a PSP's obligation to act upon the customer's mandate meant that there was no liability where the payment was authorised, as did the Which? Super-Complaint. Which? noted that the Financial Ombudsman Service ("**FOS**"), which of course is less legally rigid in its approach that the courts, was unlikely to suggest compensation where the customer had been tricked into authorising the payment, even if he had acted sensibly. The Bank's T&C's (paragraph 89 above) also said the same.

ii) As Ms Knight submitted, the published materials from the PSR only serve to demonstrate that, as at March 2018, the industry had yet to settle upon an appropriate response to the growing problem of APP. The PSR's Consultation Paper of November 2017 addressed both prevention of APP fraud and the question of reimbursement where it had taken place. It addressed the former in fairly high-level terms which made it clear that progress within the industry was ongoing and to be the subject of half-yearly reports to the PSR beginning in June 2018: see paragraph 1.8 to 1.11. The PSR's February 2018 paper anticipated the issue of reimbursement being addressed by a voluntary code in place in early

2019. The CRM Code itself says (at DS2(2) in relation to its definition and scope) that it "*does not apply to any payments completed before the coming into force of this Code*." I can therefore see no justification for treating this voluntary code as indicative of the terms of the common law duty as at March 2018 in relation to either domestic or international payments.

iii) The CRM Code addresses the issue of reimbursement of the customer where he has fallen victim to an APP Scam. In relation to the industry-wide model for reimbursement (as opposed to prevention) the February 2018 response expressed the PSR's view (at paras. 3.77 and 4.5) that the bank's adherence or otherwise to the CRM Code would be a matter to be taken into account by the FOS in determining customer complaints. That the CRM Code is persuasive but not binding in the context of the informal alternative route to compensation which the FOS offers to civil litigation shows, in my view, that the Code cannot really influence the circumstances in which a bank should be held liable in such litigation. By addressing the issue of reimbursement in a situation where an APP fraud has been perpetrated, it has no bearing upon the common law duty of care to be exercised by a bank in seeking to prevent such fraud in the first place. Like the independent adjudication of the FOS, it can only operate to reduce the prospect of litigation.

iv) The reference in the PSR's Response of December 2016 to the steps required to combat money laundering, upon which Mr Sims relied to justify the need for the Bank to have raised safeguarding questions of Mrs Philipp, in my view has no bearing upon the payments to Lambi and Bonito. Firstly, the existence of the Money Laundering Regulations 2007 to which the PSR referred (since replaced by regulations of 2017) only highlights the need for a legal duty to be set by reference to industry-wide standards which are known and certain. Secondly, money laundering is a quite different kind of problem to APP fraud and one which belies the context in which the established procedures for combatting it are invoked by Mr Sims QC. Whether or not a money-launderer is the kind of person likely to fall victim to an APP scam, there is no reason to suspect that an instruction to pay illegally laundered money is not a genuine one. The PSR made the point in its Response (at para. 6.17 and by reference to authority) that the payment of "clean" monies to a fraudster, in consequence of an APP fraud, does not mean that initial payment constitutes money laundering on the basis that the monies then represent (in the fraudster's hands) the benefit of criminal conduct. The moneys which came from Tilney were undoubtedly untainted by any suspicion of money laundering.

154. I would add that the CRM Code is itself drafted in quite general terms, for example as to the content of the risk-based and tailored "Effective Warnings" to be given in the face of the particular suspected APP scam. It also identifies exceptions where a bank may choose not to reimburse the customer. Those exceptions include the customer having been grossly negligent and ignoring such warnings. The bank should also consider whether the customer has "*acted dishonestly or obstructively in a material respect*." I mention this for completeness, recognising that if the Code could be taken as the benchmark for the Bank's duty in the present case then it would seem to leave entirely open, for argument at any trial, the Bank's defences based upon causation and contributory negligence.

155. It follows, in my judgment, that the decision as to the true scope and nature of the Quincecare duty must turn upon an analysis of the principles underpinning it.

156. In the introduction to this judgment I flagged the significance of the point that this case concerns an *authorised* push payment fraud. In my judgment the authorisation which Mrs Philipp herself gave for the payments to Lambi and Bonito intended by her undermines the suggested extension of the Quincecare duty to the circumstances of this case. For the purposes of deciding the present application, I have been persuaded by the Bank's submission that the Quincecare duty should be confined to cases where the suspicion which has been raised (or objectively ought to have been raised) is one of attempted misappropriation of the customer's funds by an agent of the customer.

157. I believe the suggested extension of the duty to support the averments in paragraph 61 of the PoC faces two fundamental problems.

158. The first is that it seeks to elevate the duty, which the decided cases have confirmed, is subordinate or ancillary to the bank's primary duty to act on the customer's instruction as to how the monies in his account should be spent, to a point where too much doubt would be cast over the effectiveness of those instructions. This would emasculate the primary duty and involve the supposedly subordinate duty carrying with it a higher level of obligation (essentially one of second-guessing the instruction) than Steyn J was prepared to contemplate.

159. The second related obstacle is that there is no clear framework of rules by reference to which the duty, as extended, might sensibly operate. In the context of suspected misappropriation of monies by an agent of the customer it is entirely appropriate to use the more general language directed at knowing or reckless disregard of commercially accepted standards of conduct and to hold a bank accountable where it falls below them; albeit for a breach of the Quincecare duty rather than for any dishonest assistance on its part (a point highlighted by the failure of the parallel claim for dishonest assistance advanced in *Singularis*). But where the duty is said to involve second-guessing the customer's own outwardly genuine instruction, the raising of the suggested safeguarding questions would in my judgment have to be supported by some form of clearly recognised banking code defining the circumstances in which the need for such questions would be triggered.

160. The Quincecare duty is a common law duty which rests upon the more general concept of a bank adhering to standards of honest and reasonable conduct in being alive to suspected fraud. Accordingly, the benchmark is expressed in quite general terms by reference to the standards of the ordinary prudent banker, which Steyn J expressly noted was not too high a standard. I do not accept that the Quincecare duty can properly be used to impose a higher (or more specific) set of standards which dictate that, in certain defined circumstances, the bank is obliged to question the customer's instructions. It is a duty of care framed by concepts of knowledge (actual or constructive) rather than further negligence in failing to follow the rules of some code. If a bank is to be held to the standards of something equivalent to a code for intervention – for present purposes, in the case of suspected APP fraud - then it needs to know its terms. There was no such code in March 2018 and the observation of May LJ in *Lipkin Gorman* is a clear indication that judges in later cases should not proceed as if a set of detailed rules had been laid down.

161. In my judgment, the observations of Lady Hale in *Singularis* about the purpose of the duty (in the context of both causation and corporate attribution) have no resonance where the cause of the customer's loss is her own desire to make the payments to their intended recipients. The Supreme Court said nothing about a bank protecting an individual customer (and her monies) from her own intentional decision. If the Quincecare duty was to be supported by matters going beyond the honest and reasonable conduct of the ordinary prudent banker then in my judgment it would have to be by reference to some form of industry-recognised rules from which a bank could identify the particular circumstances in which it should not act (or act immediately) upon its customer's genuine instructions.

162. In relation to what I regard as the second obstacle to an extension of the Quincecare duty, Ms Knight was right to point to the vagueness and generality of paragraph 61 so far as the specific procedures for identifying and addressing APP fraud are concerned. I also note that the (non-exhaustive) list of suggested safeguarding questions and scam warnings referred to in paragraphs 33 and 34 of the PoC raise the basic question of identifying the particular circumstances in which the need for a bank to raise them is triggered.

163. Where the relevant facts cause it to arise, the subsidiary Quincecare duty exists in reasonable harmony with the primary duty to act on instructions because the bank may have cause to question the genuineness (from its customer's perspective) of a payment instruction and have grounds for concern that it could be an attempt by the person authorising it to misappropriate the customer's monies. However, as I observed during counsel's submissions, whereas even a sole shareholder can steal from the company for whom he is a signatory at the bank (as Lady Hale recognised in *Singularis* at [37]) Mrs Philipp could not steal from herself.

164. A different way of expressing much the same point is to say that, where the bank's customer is an individual (and not a corporation or unincorporated association which is dependent upon individual representatives and signatories who have the potential to go rogue), the customer's authority to make the payment is not only apparent but must also be taken by the bank to be real and genuine. As between the individual and the bank, the payment instruction will be no less real and genuine in relation to the intended destination of the customer's funds because it has been induced by deceit.

165. Indeed, the fact that Mrs Philipp authorised the payments to Lambi and Bonito means that her payment instructions were valid, in the sense of passing legal title to the monies, even as between herself and the fraudster. The basis on which they were made of course provides her with a claim for damages for deceit (with the advantages the law affords a claimant in those circumstances in terms of its approach to causation and the absence of any contributory negligence defence) or, if the monies could still be traced, the ability to rescind the transaction and re-establish her beneficial interest under a proprietary claim (subject to the usual obstacles of establishing grounds for liability and overcoming any recognised defences to a proprietary claim if they are only traceable into the hands of a third party): see the observations of Lord Sumption in *Re D & D Wines International Limited* [2016] UKSC 47; [2016] 1 W.L.R. 3179, at [39]. But those potential remedies are reflections of that basic point about the effectiveness of the instruction Mrs Philipp gave the Bank to make the payments.

166. By contrast, in a case where an agent of the bank's customer misappropriates the customer's monies then, to the extent that the defaulting fiduciary (or any subsequent transferee from) can claim any legal title to the stolen monies, because the transaction should be treated as voidable rather than wholly void, he will be treated as having received them on constructive trust for the customer from the moment of their receipt. The distinction between that type of proprietary claim and one which might be advanced upon a payor electing to rescind a transaction induced by deceit is illustrated by their different treatment for limitation purposes. I mention this distinction because the Quincecare duty has only been recognised in the decided cases in circumstances where the bank's observance of it would have forestalled any such immediate constructive trusteeship on the part of the defaulting fiduciary. As I have noted above, a bank being held liable in damages for breach of the duty is *not* the same as it being held accountable for dishonest assistance (cf. the decision of the trial judge in *Singularis*) but the circumstances in which the duty arises have parallels with the grounds for such accessory liability.

167. It therefore seems to me to be a point of some significance to the scope of the Quincecare duty that, where a bank customer makes a payment which is induced by deceit, any later claim to rescind the payment and reclaim beneficial ownership of the monies will not support a related claim against persons other than the representor on the basis of dishonest assistance or knowing receipt in respect of their actions prior to rescission: see, for example, the observations of Millett LJ in *Bristol & West Building Society v Mothew* [1998] Ch. 1, 22-23. That, in my view, is a further indication that the circumstances which create a parallel between grounds for such accessory liability and the trigger of liability under the Quincecare duty should not be recognised when the payment was authorised by the customer himself. The paying bank should not be taken to be under a duty to suspect the genuineness of the payment being made by the customer when others assisting the fraudulent representor are not exposed for their dealings with its proceeds before the customer decides to rescind it.

168. Mrs Philipp suggests that, as between herself and the Bank, the Bank was under obligations the fulfilment of which would involve it second-guessing a decision about how she wished to spend her own monies when that decision had been presented by her to the Bank as intentional, freely-willed and (in the case of the payment to Lambi) justified by her husband's previous dealings with the recipient. In other words, she says that the Bank *was* under a duty to second guess her decision as to how she wished to spend her money. In my judgment, the existence of such a duty would involve the triumph of unduly onerous and commercially unrealistic policing obligations over the bank's basic obligation to act upon its customer's instructions. This point goes to both obstacles identified above.

169. Ms Knight referred me to the well-known passage in the speech of Lord Morris in *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* [1964] A.C. 465, 502-3, for the proposition that a duty of care will arise where a person is so placed that others can reasonably rely upon his judgment or skill or his ability to make careful inquiry. I do not believe there is any justification for Mrs Philipp to claim the benefit of such a duty when the payments reflected her firm wish to make them and her decision to make them did not depend upon anything the Bank said or did.

170. In my judgment, the rather open-ended way in which the suggested policies and procedures have been pleaded illustrates their unworkability as a matter of banking

practice. So far as the Bank was concerned, Dr Philipp may well have had previous dealings with Lambi and it is not at all clear to me what steps it could reasonably be expected to have taken to second guess the accuracy of that statement, especially in the context of Mrs Philipps' request for a speedy international payment to be made. It is important to note that Mrs Philipps' claim rests upon the Bank being under a duty to undertake checks which *might* reveal the transaction is one that, if executed, its customer could in hindsight come to regret making. Mr Brigden recognises that the suggested safeguarding questions would be raised with a view to unearthing *potentially* fraudulent transactions which might prove to be nothing of the sort. Necessarily, a duty to ask such questions would have to be observed in relation to payments which were not only truly intended by the customer at the time of instruction to the bank but those over which the customer had no later cause for regret.

171. In my view, it would plainly be commercially unrealistic to expect bank staff to ask such questions whenever any payment instruction is authorised by the customer attending the bank in person, regardless of the sum involved. If that is right, obvious questions therefore arise in relation to identifying the characteristics of a particular payment instruction that might mark it out as one potentially procured by fraud and worthy of further interrogation by the bank. If one of the indicia of grounds for suspicion is said to be the size of the payment in question what would be the threshold at which it should be regarded as sufficiently substantial (whether assessed objectively or by reference to the particular customer's bank balance) to trigger further inquiry? Should an international payment and/or one to a first-time (or one-off) payee be regarded as inherently more suspicious and, if so, why? Mr Brigden's view that the payments to Lambi and Bonito had the necessary characteristics is one expressed with the benefit of hindsight, knowing that they were procured by fraud, but, notably, it also involves attributing the Bank with a degree of foresight of the risk that they might have been so procured which Mrs Philipp herself was not prepared to countenance at the relevant time.

172. It is because the Bank cannot be expected to carry out such urgent detective work, or treated as a gatekeeper or guardian in relation to the commercial wisdom of the customer's decision and the payment instructions which result, that the duty cannot in my judgment extend to the obligations alleged by Mrs Philipp. A duty which carried with it the need for the Bank to have had in place in March 2018 procedures aimed at potentially protecting its customer from her own decisions would involve the Bank being under just the type of unduly burdensome obligation eschewed by Steyn J in *Quincecare*.

173. One therefore comes back to the basic point that it is for the bank's customer to decide how his or her money should be spent; a point illustrated so vividly on the facts of the present case by Mrs Philipp's insistence up until 27 March 2018 that she wanted the two payments (and a third which was only thwarted by the blocking of the Account as a result of detective work by the police) to go through.

174. There is in my judgment no proper basis for imposing liability upon a bank in respect of alleged omissions which, viewed from the perspective of the purpose behind the suggested duty to act, really relate to testing the genuineness of the recipient of the monies rather than the genuineness of the instruction to pay the monies (whatever the circumstances behind that instruction may be and whether or not the payor might have a compelling claim in deceit against the payee as a result of them).

175. The red flags relied upon by Mr Sims QC (paragraph 108 above) did not signal any danger that the Bank could be acting upon an instruction which Mrs Philipp might in hindsight say she did not truly intend. It is not clear to me why any of the matters relied upon should be regarded as indicative of an APP fraud. If such matters, taken separately or together, were to be regarded as reasons why a bank is obliged to refrain from acting on a payment instruction the result would be a significant inhibition upon its customer's freedom to spend his monies, including his ability to use any of its branches. Again, a contrary conclusion would require an industry-recognised set of rules making that clear.

176. There remains the argument that the Quincecare duty should be extended to cover the facts of this case by analogous reasoning to that which applies when a bank is taken to be on notice that that a proposed transaction of a type which calls for explanation may be the product of undue influence. I have mentioned that the thrust of Mr Sims' argument was that the Bank should have given Mrs Philipp the opportunity to consider independently the wisdom behind making the payments in the absence of Dr Philipp and ideally with the benefit of independent legal advice. That is obviously not because Dr Philipp was himself guilty of such equitable fraud but because it is said he was the person through whom JW channelled his fraud upon Mrs Philipp.

177. I do not believe it is correct to draw a distinction between Mrs Philipp and Dr Philipp in this way. As I said in the opening paragraph of this judgment, they were both equally the victims of JW's fraud: the moneys stolen by him had only days before been in the sole name of Dr Philipp. As Mr Squire puts it in his witness statement as a "*unit together*" they were both under "*the spell*" of JW. Mr Squire says that, even so, the argument based upon principles of undue influence cannot be dismissed at the summary judgment stage.

178. I disagree, and do so even on the basis that it is right to draw a distinction between Mrs Philipp as the victim and Dr Philipp (with his mobile phone providing audio contact with JW throughout their visits to the Bank) unwittingly providing the channel for JW's wrongdoing. Even then, the grant of equitable relief by appealing to the court's conscience (see the speech of Lord Nicholls in *Etridge* at [6]) is of no relevance to a case where there is nothing unconscionable in the Bank's conduct. The wrongdoing said to have occurred in this case was common law wrongdoing. It comprised the conceptually separate tort of deceit on the part of JW and, so Mrs Philipp alleges when there appears to be no prospect of JW being brought to account for it, the Bank's breach of the Quincecare duty. If Mrs Philipp cannot bring the facts within the established scope of the Quincecare duty then she is not assisted by the doctrine of undue influence. There is in my view no basis for attempting to define the scope of that duty by reference to an equitable doctrine when the application of each is so different. For example, contributory negligence on the part of the claimant has no place in the latter, though laches (and not just limitation) does.

179. Ms Knight is therefore right to say that the payments to Lambi and Bonito cannot be equated with the situation where a bank itself becomes a party to a tripartite transaction which is vulnerable to being set aside by reason of the undue influence of a third party of which the bank was put on inquiry. The Bank merely administered Mrs Philipp's payments to those two entities. As she correctly submitted, "*there is no need to free its conscience, because it is a disinterested party*." I would add that there is also nothing in the expenditure of a customer's monies at a bank which, in and of itself is disadvantageous to the customer, or which "*calls for an explanation*" in the sense used

in *Etridge*. The point is illustrated by contemplating the customer making a gratuitous bank payment (e.g. to Charity) rather than in return for value. If the customer's proposed expenditure calls for further inquiry on the part of a paying bank then, as I have said, that can only be because the facts fall within the clearly delineated scope of the common law Quincecare duty.

180. In conclusion and for all these reasons, expressed at some length in an effort to do justice to the comprehensive and skilled arguments of both counsel, I find the limits of the Quincecare duty are clear enough for me to be satisfied, on the present application, that the duty does not support a legal obligation to have had in place any of the suggested policies and procedures alleged in paragraph 61 of the PoC. I am not persuaded that the duty extends beyond the situation of attempted misappropriation of the customer's funds by an agent of the customer.

181. It follows that I find that Mrs Philipp cannot make good her pleaded claim against the Bank for the purposes of either CPR 3.4(2)(a) or CPR 24.2(a) and I see no other compelling reason why the claim should proceed to a trial.

182. Had I concluded that the Quincecare duty supported the obligations alleged in paragraph 61 of the PoC then, in my judgment, it would not have been consistent with the overriding objective to have attempted a summary determination of the causation issue. There would be too much conjecture in a prediction that the Bank's observance of the first three obligations would not have tempered Mrs Philipp's appetite for insisting the payments be made. Like the factual disagreement between the parties as to what took place on the visits to the Bank's branches (with the potential impact that has upon the defence of contributory negligence) that would have been a matter for trial. Similarly, the claim for the loss of a chance of recovering the monies from the UAE through prompt action by the Bank (a claim related most obviously but not exclusively to the fourth obligation in paragraph 61(d)) is one that could not have been properly determined summarily. I have expressed above my doubts about the Bank's ability to recover the payments after 27 March 2018 (when they were prepared to realise their mistake) but there are too many imponderables in this counterfactual scenario for the matter to be decided against Mrs Philipp on paper.

Decision

183. One cannot reasonably feel anything other than acute sympathy for Mrs and Dr Philipp who have fallen victim to the dishonesty of JW and any of his partners in crime. They have lost a very significant part of their personal savings to the fraudster.

184. However, it would not be fair, just or reasonable to impose liability on the part of the Bank in respect of the APP fraud perpetrated upon Mrs Philipp. For the reasons expressed above, such liability could only rest upon what I regard to be an unprincipled and impermissible extension of the Quincecare duty.

185. I therefore grant the application and propose to enter summary judgment in favour of the Bank.

186. This judgment will be handed down in the absence of the parties. The procedure identified in *McDonald v Rose* [2019] EWCA Civ 4, [21], will apply in relation to the proposed appeal which the circulation of a draft of this judgment has revealed Mrs Philipp wishes to pursue. In the light of the representations made in correspondence about other professional commitments, I direct that an application for permission to appeal (with draft grounds of appeal) shall be made to me in writing, and sent to the Bank's solicitors, by 4pm on 10 February 2021 and any submissions by the Bank in response shall be filed and served by 4pm on 19 February 2021. The application for permission will be determined by me on the papers and the hand-down shall be adjourned for that limited purpose. The time for filing an Appellant's Notice with the Court of Appeal under CPR 52.12(2)(a) will be 21 days from my determination of the application for permission.

187. The same correspondence has revealed that there is disagreement between the parties as to the appropriate consequential costs order to be made in the light of this judgment. The parties recognise that the issue of costs can also probably be fairly determined by me on paper without the need for a further hearing. I therefore direct that sequential submissions be filed and served by the same deadlines, with the Bank as the successful party going first.