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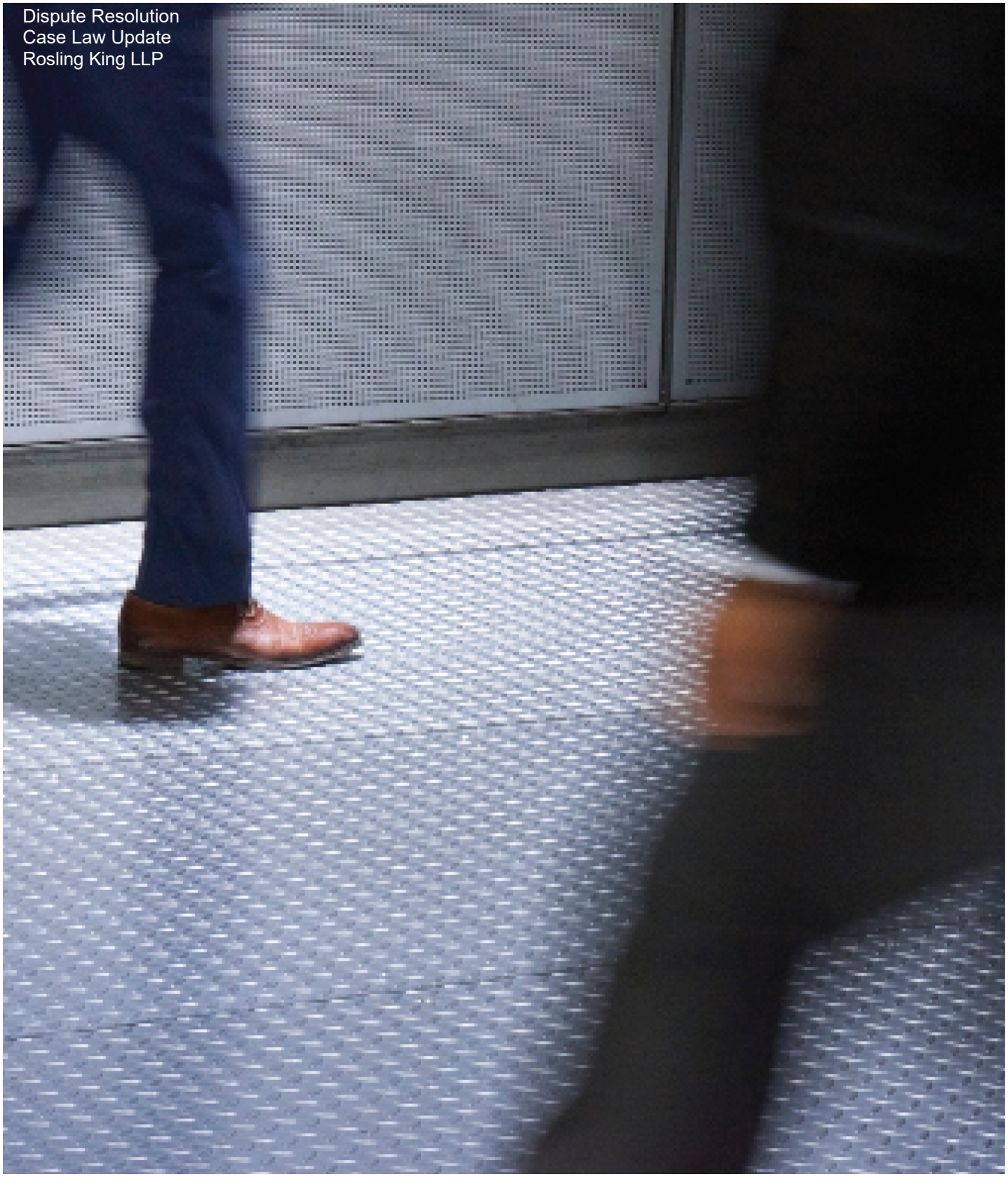

Issue

The Supreme Court has dismissed an appeal against the Court of Appeal's earlier decision to strike out a *Quincecare* duty claim brought by Stanford International Bank Ltd ("**SIB**") against HSBC Bank PLC ("**HSBC**"). The ruling in favour of HSBC was made on the basis that the disputed payments made to SIB's customers out of SIB's accounts by HSBC did not amount to a recoverable loss. The Court ruled that, even if HSBC did owe a *Quincecare* duty to SIB, and even if that duty had been breached, the breach did not give rise to any recoverable loss, and therefore the claim could not continue. The judgment provides guidance as to whether a claimant will suffer recoverable loss as a result of payments made to creditors prior to its insolvency.

Background

SIB was a company incorporated in Antigua and Barbuda, which was owned and controlled by Mr Robert Allen Stanford, who also acted as a director and chairman. Mr Stanford and his colleagues ran a Ponzi scheme through SIB from 2003 until February 2009, when the US Securities and Exchange Commission charged Mr Stanford with fraud and he was given a 110 year sentence in a federal prison. Until SIB's accounts were frozen following the discovery of the fraud, HSBC operated four bank accounts for SIB. From August 2008 until his imprisonment, Mr Stanford purportedly authorised various payments from these accounts to SIB's customers.

Through its liquidators, SIB brought two claims against HSBC:

(i) a claim that HSBC negligently failed to spot warning signs of the Ponzi scheme which put HSBC on notice of the fraud, and therefore HSBC breached its duty to refuse to accept Mr Stanford's instructions to pay out money from the accounts (the *Quincecare* claim, relying on the duty established in *Barclays Bank plc v Quincecare Ltd and another* [1992] 4 All ER 363) from August 2008; and

(ii) a claim that HSBC dishonestly assisted Mr Stanford's breaches of fiduciary duty.

HSBC applied to the High Court to strike out both the claims, but was only successful in relation to the second claim for dishonest assistance. Both SIB and HSBC appealed to the Court of Appeal, which upheld the decision to strike out the dishonest assistance claim and reversed the decision to strike out the *Quincecare* claim.

SIB appealed to the Supreme Court. The appeal was concerned with payments from SIB's accounts totalling £116 million, which were either paid directly to SIB's customers, or paid to customers after being transferred by HSBC to SIB's account with a different bank ("**the Disputed Payments**"). The appeal focused solely on whether, even if HSBC did owe a relevant duty of care and was in breach of that duty, that breach gave rise to any recoverable loss.

Supreme Court Appeal

In a majority decision given by Lady Rose (Lord Sales dissenting), the Supreme Court dismissed the appeal, upholding the Court of Appeal's decision to strike out the *Quincecare* claim on the basis that SIB had not suffered any recoverable loss.

Loss of Chance

SIB's customers were divided into two categories, the first being "early customers" - those who withdrew their funds before the Ponzi scheme collapsed, and who escaped without loss as they were paid in full through the Disputed Payments - and the second being "late customers" - those who did not withdraw their funds before the scheme collapsed, who will have to prove their debt in the subsequent liquidation, and are likely to recover only a few cents in the dollar. SIB sought the "loss of chance" of discharging the debt of the early customers for a few cents in the dollar via the liquidation process (as opposed to making the Disputed Payments prior to the liquidation). SIB argued that it suffered a loss measured as the difference between the amounts actually paid, and the amounts that would have been paid to the relevant investors in the liquidation process.

The Supreme Court rejected the argument put forward by SIB on the basis of the "net loss" rule in *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673. If the £116 million worth of Disputed Payments had not been paid to the early customers, then both the late and early customers would have formed one creditor group. That group would then receive equal and slightly enhanced dividends in the insolvency process. The £116 million retained would still be discharging the same amount of liabilities, albeit to a larger group of creditors. The "loss of chance" of not making the Disputed Payments to the early customers was matched off by the risk of having to pay the late customers higher dividends in the distribution of SIB's assets. This would have a neutral effect on SIB's balance sheet, and since the net position of SIB would be unaffected, no net loss was suffered.

Fairness

SIB also argued that it lost the chance to pay the customers fairly, since the late customers would only receive a few cents in the dollar in comparison to the early customers who were paid in full. Although the Supreme Court noted that it may be said to be unfair, the fairness of the payments was not a matter for them to investigate or assess in this context, as it is a policy matter for the applicable insolvency regime. Furthermore, earlier proceedings in the Antiguan courts had already determined that SIB could not now claw back the payments made to the early customers.

Lord Sales' Dissenting Judgment

Lord Sales dissented, concluding that SIB had suffered a loss. He determined that, at the relevant times the Disputed Payments were made, SIB was hopelessly insolvent. SIB would not have lawfully made the Disputed Payments to the early customers if it had not been

deceived by Mr Stanford. It would have instead likely retained the £116 million to spend on other lawful purposes. Payment of more than was necessary to the early customers depleted SIB's assets, which constituted a loss to SIB; it was a diversion of funds to an improper destination which resulted in a loss to SIB. Lord Sales further agreed with Nugee J (who heard the High Court claim in this matter) that, if the Disputed Payments had not been made, they would have been allocated to the liquidation fund pool. Consequently, the liquidators would have had a larger fund to pursue third party claims. Furthermore, since SIB has a separate corporate personality, it had a duty to preserve its remaining assets to benefit the general creditors as a whole at the time. The Disputed Payments to the early customers diverted payment away from the general group of creditors. Lord Sales concluded that the treatment of the body of creditors as a whole when the company was hopelessly insolvent caused a loss to SIB.

Commentary

This is a useful decision for banks on recoverable loss in *Quincecare* duty claims, particularly given the detail in which it is analysed by the Supreme Court. However, it is important to note that in this case the Court assumed that there had been a breach of the *Quincecare* duty so provided very little by way of judicial commentary on its scope and application, save that Lord Sales, in his dissenting judgment noted that the *Quincecare* duty should be kept within "*narrow bounds*", stating that the "*impact of the Quincecare duty should be kept within bounds by a strict approach governing when it applies according to the standard of care under it and by careful analysis of the scope of the duty*". *Quincecare* is of course a fertile area of developing law and we anticipate further developments in the coming year – in particular, we note that the Supreme Court appeal in *Philipp v Barclays Bank plc* will be heard in early February 2023.

For further information, please contact Hannah Sharp or the Partner with whom you usually deal.