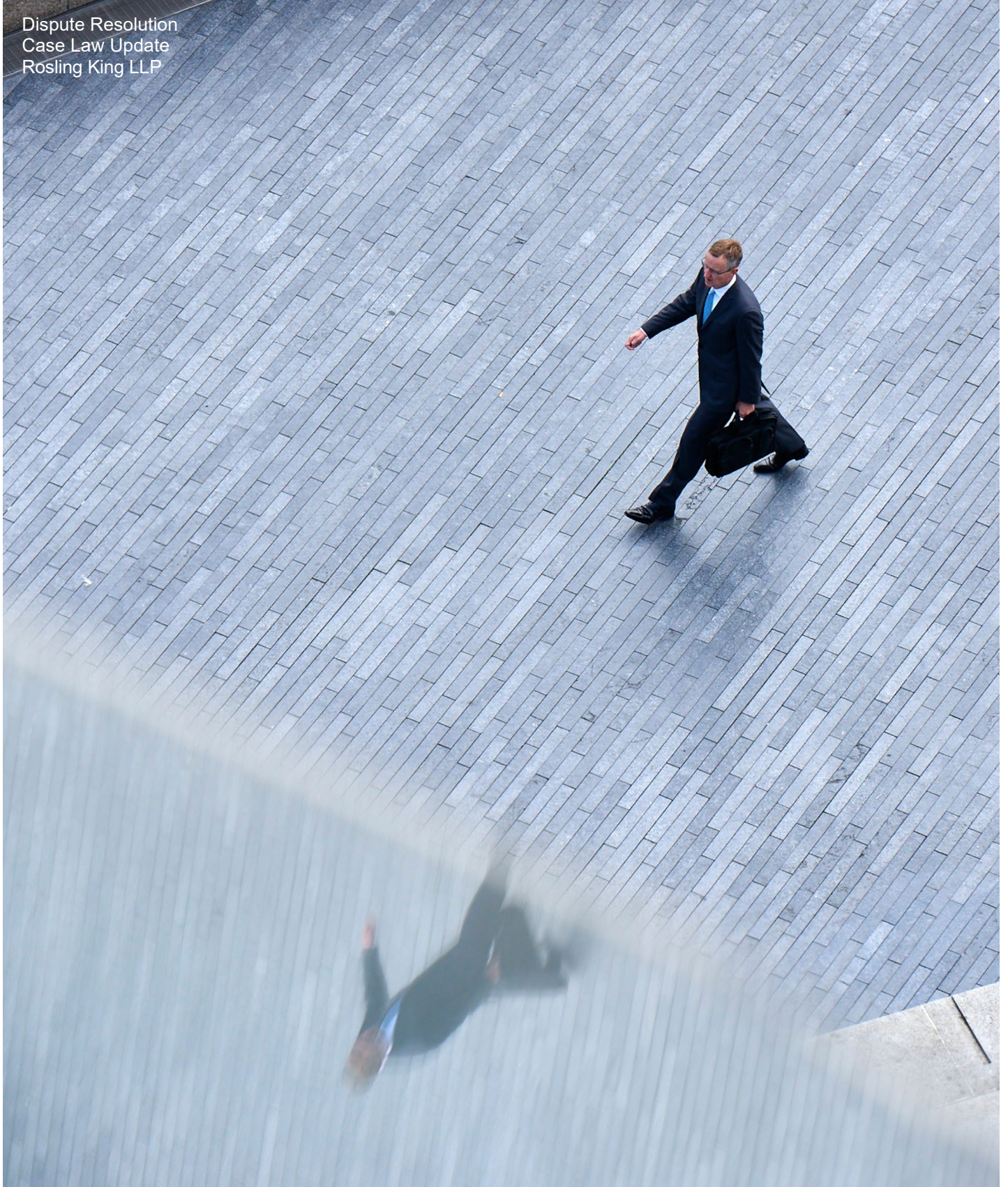


Dispute Resolution  
Case Law Update  
Rosling King LLP





### Case Summary - Philipp v Barclays Bank UK PLC [2023] UKSC 25

In 2018 the Claimant, Mrs Philipp, and her husband, Mr Philipp, were defrauded by criminals claiming that large sums held by Mr Philipp in an investment firm were at risk and needed to be moved to “safe accounts” in a different bank. The fraud was complex, and Mrs and Dr Philipp received multiple telephone calls which appeared to be from various reputable sources, including the National Crime Agency and the Police. Mrs and Dr Philipp were even persuaded not to cooperate with the Police when they received a visit warning them they were at risk of fraud.

As a result of this pressure from the fraudsters, Mr Philipp arranged to transfer £950,000 into his wife’s current account at Barclays Bank UK plc (the “**Bank**”). On 10 and 13 March 2018, Mrs Philipp attended the Bank in person and instructed it to transfer sums totalling £700,000 to bank accounts in the United Arab Emirates. On each occasion, before making the transfer, the Bank contacted Mrs Philipp by telephone to confirm that she had made the initial request and wished to proceed with it. Confirmation was given, and the transactions were completed.

On 15 March 2018, the Philipps received a second visit from the Police informing them that more people had reported being affected by the suspected fraud. The Philipps again refused to engage with the Police. The Police did, however, make contact with the Bank’s Police Liaison Officer and informed it of the suspected fraud and the Philipps’ possible involvement.

On 19 March 2018, despite the further Police intervention, Mrs Philipp visited the Bank and gave instructions for £250,000 to be transferred to an account in the UAE. On this occasion, she was told that her account had been blocked pending a review. Mrs and Dr Philipp attempted, unsuccessfully, to have the Bank lift the restrictions and make the payment, by falsely claiming that they urgently needed to make payment under a contract.

Following a third visit by the Police, Mrs and Dr Philipp came to realise they had been the victims of fraud, and they notified the Bank of this on 27 March 2018. On or after 31 May 2018, the Bank sought to recall the funds transferred to the UAE, without success.

### First Instance and Court of Appeal

Mrs Philipp brought a claim against the Bank on the basis that the Bank had a duty in contract or in common law to not carry out her instructions if, as she alleged, the Bank had reasonable grounds for believing that she was being defrauded.

Mrs Philipp claimed that the circumstances (the large and unprecedented sum being received into her bank account, the size of the payments being made, the fact that the payments were going to the UAE and the fact that she had no previous dealings with the companies being paid) were such that the Bank ought to have suspected that she was being defrauded.

The Bank applied for summary judgment on the basis that it had no such duty to Mrs Philipp. The High Court agreed and granted summary judgment in favour of the Bank in 2021.

An appeal was allowed, and the Court of Appeal in 2022 accepted the Claimant’s argument

that, in principle, a bank owes a contractual duty to its customer of the kind alleged; whether such a duty was owed in this case was a matter for trial.

### Quincecare

The Court of Appeal's reasoning relied on and extrapolated from the decision in *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363. In that claim, a bank agreed to lend money to a company for the purchase of chemist shops. The company's chairman fraudulently instructed the bank to transfer funds to his own bank account in the United States. The bank sued the company for repayment of the loan, and in response the company alleged that the bank had paid the monies out in breach of mandate or in breach of its duty of care to the company.

In a judgment by Steyn J the Court of Appeal found that a bank does have a duty to exercise reasonable care in executing a customer's order to transfer money, but this should generally be subordinate to the bank's other conflicting contractual duties (i.e. the duty of the bank to hold monies on account of the customer and transfer those sums on proper instruction of the customer).

Steyn J found that "*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 as 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 the funds of the company...*"

On the facts of *Quincecare*, the Court of Appeal found that the bank had no duty to refrain from payment, as there was nothing in the history of the matter to suggest dishonesty on the part of the chairman, who was mandated to authorise payments.

### The Supreme Court Decision

In this case, the Supreme Court (in a judgment delivered by Lord Leggatt) went back to first principles and considered the Bank's basic contractual duties. In that regard, the Bank's duty to comply with its mandate is strict. It is not the duty of the Bank to concern itself with the wisdom or risks of its customers' payment decisions. Indeed, if the Bank refused to transfer funds in accordance with Mrs Philipp's direct instructions and she suffered loss as a result, the Bank could be liable.

The Court then looked again in detail at the *Quincecare* principle and the other legislation surrounding it. The Supreme Court drew a clear distinction between the *Quincecare* cases and this claim on the basis that the *Quincecare* cases all involved agents attempting to defraud the bank's customer.

The Court found that, although the result in *Quincecare* was correct, the reasoning was flawed. First, "*the duty to exercise reasonable skill and care only arises where the validity or content of the customer's instruction is unclear or leaves the bank with a choice about how to carry out the instruction*". In cases where a bank receives a valid payment order which is clear and leaves no room for interpretation, the duty of care does not apply. There is no conflicting duty and, in

the absence of any expressly or impliedly agreed exception in the contract, the bank's duty is to simply execute the order.

Secondly, the Supreme Court found that Steyn J was wrong to seek to balance the perceived contractual conflicts to achieve a "sensible compromise". The Court reiterated that it is for legislators and regulators to set rules which impose obligations on banks and their customers in order to combat fraud; it is not the place of the Courts to do so.

In conclusion, the *Quincecare* duty, properly understood, is simply an application of the general duty of care owed by a bank to interpret, ascertain and act in accordance with its customer's instructions.

In this case, Mrs Philipp had no agent and gave instructions herself, in person, for the transfer of her own monies. There was therefore no duty for the Bank to refuse to follow her clear and unambiguous instructions.

The Supreme Court also considered the argument that the Bank unreasonably delayed in seeking recall of the funds once it was made aware of the fraud, and losses had been caused as a result of this delay. The Court found that it was arguable that there was a duty on the Bank to seek recall once Mrs Philipp made it aware of the fraud, and that the delay may have caused loss. The Court therefore allowed summary judgment in favour of the Bank insofar as it was based on the allegation that the Bank owed Mrs Philipp a duty not to execute her instructions. Summary judgment in relation to the late attempts to recall the monies was refused.

### Commentary

This judgment is a welcome clarification on what has previously been known as the "*Quincecare principle*" and will be something of a relief for banks and lending institutions.

However, the issue of APP frauds continues to be topical, as such a large number continue to be perpetrated. Consumer protection in this regard is a live matter although, as Leggat LJ noted, policy considerations are a matter for Parliament to address. Indeed, APP fraud is covered in the recent Financial Services and Markets Act 2023, although the protections in the new Act are limited to payment orders over the Faster Payments Scheme and would therefore not have assisted Mrs Philipp in this case.

Fraud schemes are becoming ever more complex, and the law and regulatory regimes will have to try to keep pace with criminals who have a vested interest in staying ahead of the game. It is likely that we will see more litigation involving third parties who end up caught in the middle, although the opening of floodgates feared by the banks is on hold...for now.

In the meantime, all eyes are now on Parliament to see whether more consumer protection will be put in place.

Should you wish to discuss this in more detail, please do not hesitate to contact [Lauren Pardoe](#) or the Partner with whom you usually deal.