OUTER HOUSE, COURT OF SESSION

[2021] CSOH 89

CA13/18

OPINION OF LORD CLARK

In the cause

SEKERS FABRICS LIMITED

Pursuer

against

CLYDESDALE BANK PLC

Defender

Pursuer: Hawkes; MBM Commercial LLP
Defender: Thomson QC; Pinsent Masons LLP

26 August 2021

Introduction

[1] The pursuer had a business bank account with the defender. The pursuer avers that it was an implied term of the contract that the defender had a duty to exercise reasonable skill and care. Several breaches of that duty are alleged. The breaches are said to have occurred at a time when a fraudster was in contact with the pursuer to carry out a scam, which resulted in funds being transferred from the pursuer's account to accounts under the fraudster's control. The defender accepts the existence of the implied term, but argues that it is subject to certain limitations. The defender contends that the pursuer's claims are irrelevant, primarily because they do not fall within the scope of the duty of care but also for

other reasons. The case called before me for a debate on the defender's plea-in-law that the pursuer's averments are irrelevant and lacking in specification.

Background

[2] As this is a debate which takes the pursuer's averments *pro veritate*, for present purposes I summarise those averments as the factual background. The pursuer is a limited company which operated its commercial activities by means of its business bank account with the defender. Certain of the pursuer's employees were authorised to use the online banking facilities which form part of the account. On 20 March 2017 two such authorised individuals (PC and GS) were using the online banking. PC received a telephone call from an individual (the fraudster) who claimed to be from the defender's High Level Fraud Team and gave his name as "Steve". Statements made by him during the call made it apparent to PC that he possessed confidential information about the operation of the account, including references to recent payments. He said that the pursuer's account had been blocked by the bank as a precautionary measure. This type of situation had happened before to the pursuer. There had been occasions when calls from the defender had been received to check that authorised payments should be processed. Neither PC nor GS was able to access the online portal and its screen was blank, fitting with the fraudster's assertion that the account had been temporarily blocked.

[3] The fraudster then said he had unblocked the account. He instructed PC to process a number of supposedly "test payments" in order to check that the account was working normally. He assured PC that there would be no actual transfer of funds and that this was simply a convenient means to test the system. As dual authorisation was in place, the fraudster stated that he would telephone GS to have her authorise the test payments which

PC had initiated. He used a telephone number which was either identical to, or at least similar to, the defender's number. The fraudster repeated to GS the same information as he had conveyed to PC. GS put in the appropriate token number to authorise the payments. The screen showed an authorisation failure. The call was then transferred back to PC and while that continued GS tried to contact the pursuer's Relationship Manager at the defender, namely AM. The call to AM's mobile phone was unsuccessful and GS then sent an email marked "urgent" requesting a call back. The reason for contacting AM was because both GS and PC wanted reassurance that "Steve" was who he said he was, that is, a member of the defender's High Level Fraud Team.

[4] GS then telephoned the defender's BusinessOnline Helpdesk. The call came to an end and GS had the impression that it had been cut-off prematurely. However, the call handler had indicated that he would look into matters. The fraudster told PC that he was aware that GS had tried to call AM and that GS was now on a call to the defender's helpdesk. The call with the fraudster was then transferred back to GS and she was asked to regain access to the web portal and process the "blocked" payments. She was able to log in and authorise the payments successfully. As GS was doing so, PC received a call from AM. PC explained to her the events thus far. AM advised that an attempt should be made to obtain the full name of the person on the other end of the call and to then send her an email. She then rang off. As requested, PC then sent an email to AM explaining the full circumstances and seeking reassurance that the call was genuine. AM's emailed reply again requested that PC should ask for the person's full name and it would then be checked to see if it was genuine. No further advice was given and PC and GS were not told that they must not make payments. They say that they had expected that AM would have come back to them if she had any concerns. Over the remainder of that afternoon certain further

payments were made from the account, totalling £566,000. No further calls were received from the helpdesk or AM. Some of the amounts transferred were later recovered. The pursuer ceased to be a banking customer of the defender in April 2019.

The alleged breaches of the implied term

[5] The defender was said to be in breach of the implied term in four respects, briefly summarised as follows. Firstly, the integrity of the defender's security system had been compromised, thereby allowing sensitive financial information about a customer's account to be disseminated to an unauthorised third party. Secondly, the security advice offered by the defender to the pursuer in relation to management of the online banking facilities was inadequate. Thirdly, the defender's operating software ought to have recognised that unknown IP addresses were used on the day in question to login to Online Banking and that multiple payments were being made in quick succession to beneficiary accounts to which no legitimate payments had previously been made. Fourthly, the advice tendered by the defender's employees on the day in question fell below the required standard.

Submissions for the defender

[6] It was important to note that the ground for the pursuer's case is limited in nature, being solely based upon the implied term. No other breach of duty, for example in delict, was being argued. What the pursuer had fallen victim to was an authorised push payment ("APP") fraud. This arises where fraudsters deceive consumers or individuals at a business to send them a payment under false pretences. The account holder believes they are making a genuine payment to a legitimate bank account. However, the account details provided relate to an account held by the fraudster. Unlike other varieties of fraud, APP fraud is

distinct as the payment is in fact legitimately and properly authorised by the customer, who intends for the payment to be made in accordance with the payment instructions given.

[7] The outcome of the telephone conversations with the fraudster was the pursuer instructing a series of payments in the sum of £566,000. AM had responded to PC's email requesting that the pursuer provide the name of the caller in order that the authenticity could be verified. The pursuer did not respond to the defender's last correspondence and made no attempt at further correspondence before transferring the payments. At no point during any of the communications was the defender told that the fraudster had instructed the pursuer to make payments. Rather, the defender was in fact merely informed that the pursuer was "locked out" of the internet banking portal.

[8] While the existence of the implied term was admitted, that was under explanation that in this context it extended only to reasonable skill and care in executing the pursuer's payment instructions. The pursuer's averments of breach were irrelevant on two broad grounds. Firstly, to the extent that the pursuer appeared to rely upon what is known as the *Quincecare* duty, identified in *Barclays Bank plc* v *Quincecare Ltd* [1992] 4 All ER 363 : (i) that duty is limited in its application to circumstances where a bank is on notice/inquiry that an authorised agent of its customer is seeking to misappropriate the customer's funds (in other words, the instruction to debit an account is in fact unauthorised having regard to the duties imposed on such an agent or fiduciary); and (ii) that duty arises in and about executing the customer's orders and is wholly negative in nature, being a duty to refrain from acting on those orders in certain specific circumstances. In other words the *Quincecare* duty was not one which imposed positive obligations on a bank to address and combat fraud as such, contrary to the entire gravamen of the pursuer's pleaded case. Secondly, the pursuer's averments as to the scope of the duty to exercise reasonable skill and care, and the alleged

breaches of that duty, were not otherwise relevant on any other grounds in law and in any event they materially lacked specification.

[9] The primary duty of a paying bank is to honour its customer's instructions and make payments as instructed in accordance with its mandate: *Paget's Law of Banking* 15th ed at para 23.1. That primary duty is not absolute, given the existence of the *Quincecare* duty, but the bank's duty is subordinate to its primary obligation to implement its customer's payment mandate, adhering strictly to the terms of its mandate: *Chitty on Contracts* 33rd ed Volume II, paras 34-311. The *Quincecare* duty, as explained in that case (at 376g-h), is 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. Reference was also made to *Singularis Holdings Ltd (In Official Liquidation)* v *Daiwa Capital Markets Europe Ltd* [2019] UKSC 50 and *JP Morgan Chase Bank, N.A.* v *The Federal Republic of Nigeria* [2019] EWCA Civ 1641, which confirmed and approved the formulation of the nature and scope of the duty of care as set out in *Quincecare.* They both involved multi-million pound frauds facilitated by those in control of the customer and/or its bank account. It was in such circumstances that the *Quincecare* duty can, in principle be engaged.

[10] In the present case, there was no suggestion that those in control of the account perpetrated the fraud; rather, it was perpetrated by the fraudster. Thus, the payments were properly authenticated in accordance with both the pursuer's internal processes and the defender's two-stage payment authentication process. It was already clear from the authorities that the *Quincecare* duty would not arise in circumstances such as the present case, where the instruction itself was authorised. It was confirmed in *Philipp* v *Barclays Bank UK Plc* [2021] Bus LR 451; [2021] EWHC 10 (Comm), that the duty does not apply beyond

the limited circumstances already discussed, and thus does not apply to APP fraud. There was no legal duty upon the defender to verify the genuineness of the recipients of the payment.

[11] The pursuer has failed to identify any other relevant basis upon which to found liability. If it was intended that the averments that the defender should have had various measures in place to prevent the fraud should be understood as free-standing duties, the pursuer's averments were irrelevant, because these were essentially nothing more than assertions. The pursuer failed to plead any recognised basis for the imposition of such legal duties other than the *Quincecare* duty, which plainly did not extend to these ancillary matters. It was important to note that the pursuer's case is not that the defender was told that the fraudster was instructing payments be made. To the extent that the pursuer may now be seeking to invoke any other general duty that must fail, as doing so would merely be a device to circumvent the specific principles developed by the courts in similar cases by reference to nebulous, general, and unvouched principles.

[12] There were also serious problems with the individual averments alleging breaches of duty. The averment about the defender's security system and stopping sensitive information about a customer's account being disseminated to an unauthorised third party was antithetical to the notion of the exercise of reasonable skill and care, arguing that a person should effectively ensure or guarantee that a particular state of affairs will (or will not) come about. The pursuer does not offer to prove what it is that the defender ought to have done but failed to do in respect of its "security system". The averment that the security advice offered by the defender to the pursuer in relation to management of the online banking facilities was inadequate, and its supporting averments, were irrelevant. They amounted to the imposition of a duty to warn or protect, for which there was no basis in

law, and certainly no basis in the pursuer's averments. The averments that the defender's operating software ought to have recognised that unknown IP addresses were used on the day in question to login to online banking and that multiple payments were being made in quick succession to beneficiary accounts to which no legitimate payments had previously been made, and its supporting averments, were plainly lacking in specification as to the basis on which it is alleged the defender had actual knowledge of the matters condescended upon. Moreover, there was plainly no duty upon the defender to verify IP addresses (or beneficiary account names) when implementing a customer mandate. The averment that the advice tendered by the defender's employees on the day in question fell below the required standard, and its supporting averments, gave no clear offer to prove precisely what it was that the defender's employees were told by the pursuer. For example, there was no offer to prove what it was that the pursuer actually told the BusinessOnline Helpdesk. The averment that the failure to issue advice was reckless was also irrelevant.

Submissions for the pursuer

[13] It was central to the pursuer's position to distinguish at the outset between the defender's general duty of care and the *Quincecare* duty. The former covered the whole range of banking business undertaken by a banker for a customer. The latter was within a sub-set of the former, since it applies specifically in the context of payment transactions. The common law support for that position derived from *Hilton* v *Westminster Bank Ltd* (1926) 135 LT 358 CA and *Selangor United Rubber Estates Ltd* v *Cradock (No.3)* [1968] 1 WLR 1555. The latter case supported the pursuer's arguments that: (1) the bank's duty to exercise reasonable skill and care extends to all its customer's instructions; (2) one aspect of that duty is the ascertainment of the customer's genuine instructions, as distinct from those delivered under

the guise of fraud, whether arising from an agent of the customer (internal fraud) or by means of a third party intervention (external fraud); and (3) the primary obligation to act in accordance with the mandate may be qualified by the exercise of the duty, with the result that a payment instruction which is *ex facie* valid but which elicits suspicion through the tell-tale signs of a fraud ought not to be implemented. The contention that a bank has no duty of care in relation to a customer's payment instruction beyond its execution had been judicially considered and rejected: *Karak Rubber Co Ltd* v *Burden (No.2)* [1972] 1 WLR 602, at 629. The defender was adopting just such an untenable position. In relation to the general duty, reference was also made to *Royal Products Ltd v Midland Bank Ltd* [1981] 2 Lloyd's Rep 194, at 198.

[14] What amounts to the "business of banking" was considered in *United Dominions Trust Ltd* v *Kirkwood* [1966] 2 QB 431, which adopted the definition in *Bank of Chettinad Ltd of Colombo* v *Commissioner of Income Tax, Colombo* [1948] AC 378, 383 that a banker is one who carries on as his principal business the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order. As technology has developed, the transfer of money by electronic means and the maintenance of systems to facilitate such transfers fall within ordinary banking operations, as do a customer's communications with its banker's staff in relation to such transfers. *Paget's Law of Banking*, at para 22.52 explains that when executing the customer's instruction to make a funds transfer the bank acts as its customer's agent and owes the customer a duty to observe reasonable skill and care in and about executing the customer's orders. *Barclays Bank plc* v *Quincecare Ltd* arose in the context of "internal fraud", that is the misappropriation of money by somebody within the customer's organisation. However, as the previous authorities made clear, the *Quincecare* duty is, properly understood, a sub-set of the bank's general duty to exercise reasonable skill

and care which extends across the whole range of its customer's ordinary banking business. Moreover, the *Quincecare* duty should apply equally to external fraud. *Singularis Holdings Ltd (In Official Liquidation)* v *Daiwa Capital Markets Europe Ltd* and *JP Morgan Chase Bank, N.A.* v *The Federal Republic of Nigeria* also involved internal fraud claims. There was no logical reason why the duty should not extend to the situation of protecting a customer from fraud where an ordinary prudent banker would or should have identified that risk. Reference was made to *Paget's Law of Banking* (at para 22.51) and *Lipkin Gorman (a firm)* v *Karpnale Ltd* [1989] 1 WLR 1340; [1991] 2 AC 548. There was nothing in *Quincecare* or *Lipkin Gorman* to suggest that the statements of general principle apply only in the factual context of internal fraud. Moreover, in the present case, an instruction vitiated by fraud could not truly be said to have been "properly" authorised by the customer itself; a fraudster cannot be characterised as the truly intended payee. The threshold test for intervention was being put on inquiry, that is by having reasonable grounds for believing that the customer's order is an attempt to misappropriate funds, whether the grounds arise from an employee/signatory or a third party.

[15] In relation to *Philipp* v *Barclays Bank UK plc*, the plaintiff's case was much broader than the pursuer's case here and the earlier authorities bearing upon the bank's general duty were not before the court. The factual distinctions were evident. The plaintiff on several occasions actively misled the bank into accepting her authorisation of the transactions. She told the bank of her willingness to make the payments and as such there was no reason for the bank to second-guess what it was being told by its customer. Put short, there were no reasonable grounds to intervene, in contrast with the position here where the pursuer was actively seeking the bank's reassurance that the intended transactions were legitimate. It

was, furthermore, wrongly decided on the issue of whether the *Quincecare* duty should be applied in the prescriptive manner. The case was being appealed.

[16] But even if *Quincecare* was confined to such cases, there were several elements in the pursuer's pleaded case here (the interaction with the defender's employees, in particular) which fell outwith that discrete duty and fell to be tested instead against the general common law duty on the defender to exercise reasonable skill and care in ordinary banking business. Payments induced by any type of fraud are not legitimately and properly authorised by the customer. The true intention of the customer has been subverted irrespective of the precise manner by which the fraud comes to be realised. If a bank's duty to exercise reasonable skill and care extends to the communications which the customer sends to it in relation to his banking business or the whole range of banking business or all ordinary banking operations, it was not clear why it should nevertheless be excluded entirely in the case of APP fraud in circumstances where the fraudster is external to the customer.

Decision and reasons

Existence of a duty of care

[17] The authorities make clear that there is an implied duty upon a bank, under its contract with a customer, in carrying out its part with regard to operations within the contract, to exercise reasonable skill and care. The duty includes dealing with the communications which the customer sends in relation to his banking business (see eg *Hilton* v *Westminster Bank Ltd* (at 362) and *Selangor United Rubber Estates Ltd* v *Cradock (No.3)* (at 61)). In relation to the general implied duty, the latter case was cited with approval in *Karak Rubber Co Ltd* v *Burden (No.2)* and *Royal Products Ltd* v *Midland Bank Ltd*. Obviously,

the precise nature and scope of the duty, in particular the risks of harm to the customer against which the law imposes on the bank a duty to exercise reasonable skill and care, will depend upon the specific context. Particular contract terms, or implied obligations, on either side can influence the nature and scope of the duty. In the present case, I was not referred to the terms of the contract and neither party relied upon any specific terms as being of relevance to the nature and scope of the duty. However, the fundamentally important obligation upon the bank, whether express or implied, to comply with the customer's instruction to make payment plainly is, and was accepted to be, a relevant factor.

[18] The duty in *Quincecare* takes that factor into account and can be summarised as limited to whether a reasonable banker would have had reasonable grounds for believing, or at least would have considered that there was a serious or real possibility, that the person authorising the payment was operating the client account in order to misappropriate funds. The bank's primary obligation is to comply with the customer's mandate and in dealing with instructions to make payment the duty of care is restricted to matters which would cause the bank to question whether the person with authority was nonetheless acting in a fraudulent manner. *Singularis Holdings Ltd (In Official Liquidation)* v *Daiwa Capital Markets Europe Ltd* involved an application of the *Quincecare* duty and there was no live issue about the nature or scope of the duty; rather the issue was whether there was a defence based upon attributing the fraudulent conduct to the plaintiff company. The case did not involve any matter of pre-authorisation communications. In *JP Morgan Chase Bank, N.A.* v *The Federal Republic of Nigeria* the central issue was whether the terms of the depository agreement between the parties governing the operation of the depository account had the effect either that the *Quincecare* duty never arose in the circumstances of this particular client/bank relationship or that liability for any breach of that duty was excluded. Again, no

issues as to communications prior to the authorisation arose. Accordingly, in cases that focus upon authorised payments the crucially important obligation to make payment when the customer authorises it leaves only a limited scope for the duty of reasonable skill and care and *Quincecare* demonstrates that restricted scope.

[19] In the present case, authorised payments occurred and one can therefore see some force in the argument that the matter falls to be determined by application of the *Quincecare* duty. Notably, however, the defender contends that the authorised individuals, in their communications with the defender's staff, had not stated that the fraudster was seeking payment, or that payments were to be made. In fact, what I view as the only relevant aspect of the pursuer's case (as explained below) founds upon communications made prior to the authorisation of payment. Their discussions were, on the pursuer's averments, about whether "Steve" was indeed a genuine member of the defender's staff. The pursuer avers that the call-handler in the defender's BusinessOnline Helpdesk had indicated that he would look into matters. If there had been no such discussions on matters arising before the authorisation of payment, and this was merely a case of payment being made by authorised individuals, the restricted *Quincecare* duty, covering the execution of instructions, would have resulted in the pursuer's case being irrelevant. But given that there were these discussions and the inquiries made, the issue is how the general duty to exercise reasonable skill and care operates, and what is its nature and scope, in the present context.

[20] The nature and scope of that duty in circumstances such as the present is not determined in the case law. There are specific examples, as listed in *Paget's Law of Banking* (at [4.25]-[4.26]) of a bank's particular duties falling within the general duty. Without full evidence on the factual circumstances here it would be inappropriate for me to conclude on the nature and scope of any duty in this case. But I certainly cannot rule out the existence of

such a duty. I do of course accept that the instruction was a key factor in causing the loss suffered by the pursuer and that the pursuer can succeed in any recovery only if steps ought to have been taken by the defender in advance of the transfers of funds which would have resulted in these not proceeding. Any evidence that the defender's employees were not being told that "Steve" was trying to get the pursuer's authorised staff to make payments will form part of the factual circumstances concerning the nature and scope of the duty of care.

[21] Counsel for the pursuer argued that the *Quincecare* duty must extend beyond internal fraud, but acknowledged that there was no authority to that effect. A third party (external) fraudster who influences the instruction of a payment is not interfering with the authority of the person acting for the customer; in making the payment that authority is exercised. I therefore reject the submission for the pursuer that the *Quincecare* duty extends beyond internal fraud. I also reject the pursuer's contention that there was no properly authorised instruction, because it had been induced by fraud by a third party. From the bank's perspective, it was properly authorised.

[22] The decision in *Phillip* v *Barclay's Bank UK plc* (which I am told is under appeal) does not in my view assist either of the parties in the present case. In that case, the judge noted (at para [113]) that the basic issue between the parties was whether or not the bank should at the material time have had in place a system for detecting and preventing the APP fraud. While there were, on the facts, communications prior to authorisation of payment, this was not a case in which the bank was notified of activities on the part of the fraudster; the judge refers (at para [115]) to the bank's application for striking out resting upon what the customer was prepared to tell its branch employees about how she wished to spend moneys without revealing the remote presence and influence of the fraudster. The main issue was

the bank's duty when payments were instructed by the customer. In light of its factual differences and its focus on the *Quincecare* duty in circumstances concerning instructions on payment, I do not regard the decision as of particular relevance for present purposes.

[23] For the reasons given, it is open to argument that in the present circumstances the bank owed a duty to exercise reasonable skill and care in dealing with the communications before payment was authorised. Put more simply, I cannot conclude that the pursuer is bound to fail in relation to any such duty. The nature and scope of such a duty, and whether it has been breached, are matters to be determined after inquiry.

The alleged breaches of duty

[24] However, there is the separate issue of the relevancy and specification of the pursuer's averments on breach. In my view, the first three breaches alleged are not capable of being established on the basis of the pursuer's averments. I accept the submissions for the defender on these points. In particular, the pursuer does not offer to prove what it is that the defender ought to have done, but failed to do, in respect of its "security system" or in respect of the advice offered in relation to management of the online banking facilities. On the third alleged breach, (broadly that the defender's operating software ought to have recognised that unknown IP addresses were used to login to online banking, with multiple payments made in quick succession to accounts not previously paid) there is no real specification of what the defender knew or should have known and why the defender required to verify IP addresses or account names. No averments concerning ordinary or standard banking practice on such matters are made in respect of these three alleged breaches.

[25] The fourth alleged breach, that the advice tendered by the defender's employees on the day in question fell below the required standard, does create some concerns given that precisely what was told to the defender's staff is not made fully clear. There are, however, the averments about discussions, such as an email to AM being marked as urgent, and about seeking confirmation from AM that "Steve" was a genuine employee, and the call-handler saying he would look into matters. I accept the defender's point that the averment that a failure to issue advice was reckless is not relevant in the absence of a basis supporting recklessness, rather than carelessness. But there are in my view sufficient averments to justify inquiry on the issue of whether on this ground there was a breach of duty to exercise reasonable skill and care. In short, I am unable to find that the pursuer is bound to fail on the issue of breach of duty.

Conclusions

[26] I therefore conclude that the defender's contention that the pursuer's case is irrelevant as a result of the meaning and effect of the *Quincecare* duty cannot be accepted, given that the existence of a duty to exercise reasonable skill and care may have application in the present context of the pre-authorisation communications with the bank. However, of the four alleged breaches of duty, only the last one provides a relevant ground for that allegation.

Disposal

[27] I shall therefore sustain the defender's plea-in-law in relation to the relevancy of the first three grounds of alleged breach but before doing so I shall put the case out by-order, to

be addressed on precisely which averments fall to be excluded from probation in light of the conclusions I have reached, reserving in the meantime all questions of expenses.