THE *QUINCECARE* DUTY:

misconceived and misdelivered

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The *Quincecare* duty defined

- The putative duty: a bank owes a duty to a customer not to follow the instructions of a person authorised to operate the customer's bank account when it has reasonable grounds for believing that the mandatary is dishonestly using his or her power
- "[a] 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", per Lady Hale in *Singularis v Daiwa* at [1]

Not confined to a duty to inquire

- In *Singularis*, the bank argued that if there were a duty it was only one to inquire of the customer, and in *Singularis* there was no one honest to inquire of
- UKSC rejected the argument, saying there can be a duty not to pay, independent of a duty to inquire
- This holding is particularly indefensible (now followed in a Ponzi scheme case, *Stanford; Nigeria* too?)
- But even a mere duty to inquire is problematic: inquire of whom?; duty to stop internet banking while inquire? Usu only give auth'y to someone one trusts!

An even wider test?

- Parker LJ in *Lipkin Gorman v Karpnale* had proffered an even wider test, cited with approval in CA in *Singularis*:

"The question must be whether, if a reasonable and honest banker knew of the relevant facts, he would have considered that there was a serious or real possibility, albeit not amounting to a probability, that its customer might be being defrauded"

- Ignoring Anti-Money Laundering and Countering Financing of Terrorism Act 2009; and Consumer Guarantees Act 1993 and Aussie equivalents

Outline of argument against the duty 1

- Whether in contract or tort, we are concerned only with a default rule. What obligations should a bank be taken to assume re a customer's dishonest mandataries? [But nb NZ tort law may be not based on assumption of responsibility]
- Customers cannot in justice have it both ways. They cannot expect rapid and unquestioning adherence to a mandatary's instructions, and at the same time a duty not to act just because a bank has substantial or even strong grounds for suspecting misconduct in the mandatary.

Outline 2: summary from JBL article

- Banks are not agents vested with discretionary authority. A bank's sole positive duty is to meet the instructions of the customer's appointed mandataries forthwith.
- A bank is not appointed to monitor the honesty of those mandataries. A regime where a bank must reject the instructions of a mandatary when all it has are reasonable grounds for doubting the mandatary's honesty compromises its non-discretionary role, and undermines the use of banks as a reliable payment mechanism.
- A clear rule that triggers liability in the bank only when its participating staff, like the customer's, are dishonest is preferable.

Erroneous reasoning in *Quincecare* 1

- In *Quincecare*, Steyn J relied almost entirely on *Bowstead on Agency*, using the following proposition. He said:

"Prima facie every agent for reward is also bound to exercise reasonable care and skill in carrying out the instructions of his principal: *Bowstead* p 144."

- In fact that proposition is directed only at agents with discretion. The actual proposition (§6-020) is:

"*If the agent has a discretion to exercise* he must, in general, use proper care and skill" (emphasis added)

Erroneous reasoning in *Quincecare* 2

- No such duty of care is attached by *Bowstead* to non-discretionary powers (§6-003):

"Failure to adhere to instructions is by definition a breach of duty and in principle results in strict liability for resulting loss."

- Lack of discretion applies to both acts and omissions:

"[E]ven if the principal's instructions are foolhardy, the agent must carry out what he has agreed to do."

Erroneous reasoning in *Quincecare 3*

- NB What *Quincecare* posits is not merely an implied term to perform promised services carefully, but a new promise/a new service
- The only way to make a directed payment carefully is to make it, and to the correct person.
- Logically, therefore, what is involved is a separate duty; at a minimum one to inquire, and post-*Singularis,* an outright duty not to pay

The key questions

- That said, it is fairly obvious that a junior agent need not follow a senior agent's instructions where the senior agent is acting dishonestly vis-à-vis the principal.
- The difficult questions are these:

(a) Does an agent have a *privilege* not to follow the senior agent's instructions if the latter is **honest** but there were reasonable grounds for fearing dishonesty?

(b) Does an agent have a *duty* not to follow instructions if the senior agent is **dishonest** but the junior agent has only reasonable grounds for so thinking, but no assurance?

Universal rules not appropriate

- The answers to the two questions should go together
- But it does not follow, as Steyn J thought, that the same pair of answers should be applied to all types of agent.
- One is looking for the appropriate default rule for the type of agency in question.
- Where the agent's role is truly non-discretionary, there is no room for a negligence standard

The default rule for bank payments

- Banks in relation to money payments are in the truly non-discretionary category
- If the appropriate default rule for a bank is to follow a mandatary's instructions unless it actually knows (through rules of attribution, of course) that the mandatary is acting dishonestly then *that* is what a reasonable banker should do.
- i.e. Asking what a reasonable banker would do begs the question.

The default rule for bank payments 2

- The only safe assumption a bank can make is that time is of the essence to its customer. Certainly, a test which requires a bank to ponder: a) whether it has quite enough grounds for suspicion; and b) whether other banks would or would not abide by an instruction, is unhelpful for both parties.
- This is not to deny that for agents who *do* have discretion, what is required will vary with the type of agent and the circumstances of the case.

Westpac v MAP: one side of the coin

- *Westpac v MAP*: NZSC holds that if the customer is honest and not acting for anyone else who is dishonest, a bank is liable for not following their instructions even though bank had v strong grounds for suspecting illegality or dishonesty involved in the payment
- "[T]he starting point for resolving the issue must be that, as a matter of contract, a bank's clear initial duty is to act in terms of its customer's instructions. Too ready or easy an undermining of that obligation would introduce much inconvenience and uncertainty into a fundamental commercial relationship" at [11].

Westpac v MAP Associates 2

- *Quincecare* footnoted, but the two cases are close to irreconcilable. *Westpac* is the other side of the coin
- NB: true that in *Westpac* no reason for thinking customer's direct personnel were dishonest, but good reason for so thinking re the customer's own clients. No pf duty to protect customers' clients, but clear that NZSC would reach same conclusion if bank wrongly thought customer's mandatary was dishonest
- The facts of *Westpac v MAP* are fantastic

Singularis v Daiwa: the other side of the coin

- One wholly-owned co drained of US$204 million when facing insolvency by payment to another co wholly-owned by same s/holder (Al Sanea).
- Said not to be in the same group, but really?
- CA at [98] per Vos C: said to be first successful *Quincecare* case, and "it will be a rare situation for a bank to be put on inquiry; there is a high threshold"; "This case is, therefore, an unusual one, the circumstances of which are unlikely often to arise."

Singularis v Daiwa Capital 2

- Yeah right! Just a routine intra-group transfer when companies in financial difficulty.
- Insolvency does not terminate power to trade and operate bank accounts, nor to make inter-co transfers.
- Contrary to Rose J, irrelevant that Daiwa not a retail bank with modest numbers of customers. Instructions of customers of a boutique bank just as important as any other bank's customers.

Singularis v Daiwa Capital 3

- None of factors listed by Lady Hale as notable were very notable:
- Bank knew group to be in financial difficulty. But that is common. Suspicion is not knowledge.
- Bank given inconsistent reasons for the movement of funds around the group, but since customer no duty to explain and bank no duty to ask, only suspicion could be raised by that.
- Account totally drained, but in 8 steps. Money is there to be withdrawn and the account there to be closed.

Singularis v Daiwa Capital 4

- Sums very large. But then group had dealt in huge sums. Largest creditor, LBIE, had security for US$1.3 billion, and its ultimate loss only US$144 million
- Basic problem: there is no moral or legal basis for expecting banks to undertake a monitoring role.
- But also huge forensic costs: in *Singularis,* conduct of individual staff members and their competence (not honesty) was gone over with a fine toothcomb, all backed with expert evidence.

JP Morgan Chase v Repub Nigeria 1

- So-called "very rare" situation followed by another major case within 2 years. The *Quincecare* duty is on the loose.
- Again huge sums, and very senior personnel the bank was supposed to be monitoring (Govt minister!); corruption which reached to highest levels of the Nigerian state. Who to inquire of here?
- CA rejects raft of exclusion clauses in the bank's contract with the customer
- Repeats endorsement of relevance of money-laundering legislation from *Singularis*

JP Morgan Chase v Repub Nigeria 2

- Andrew Burrows QC, as he then was, reiterated this in *JP Morgan* at [40]:

"To recognise such a duty of enquiry would be in line with sound policy. In the fight to combat fraud, banks with the relevant reasonable grounds for belief should not sit back and do nothing."

- Begs question of the cost-benefit analysis of money-laundering legislation. CL is there to provide a minimum regime, not to be the handservant/action-person of Parliament. Who knows if Parliament has it right?
- Pointless too when accepted that can "contract out"

More case law

- *Stanford Intern'l Bank Ltd v HSBC Bank Plc* [2020] EWHC 2232 (Ch) (*Quincecare* where customer's e'ees running a Ponzi scheme; no strike out)
- *Philipp v Barclays Bank UK Plc* [2021] EWHC 10 (Comm) (*Quincecare* not extended to cases where customer is induced to make payment by external fraud)
- *Tandem Group v ASB Bank* [2021] NZHC 52 (customer defrauded by own agent but personally signs – claim not struck out)

Personal “consumer" customers

- The foregoing argumentation is premised on the position of commercial parties. That fits the pattern of the 3 leading cases. No place for implied terms here.
- The article is also focused only on fact patterns where the dishonesty is in the customer’s own personnel. It does not address cases of external scamming. Banks also at risk if person operating account has no authority at all.
- In consumer transactions, banks may voluntarily assume responsibility, or Parliament may impose a duty to warn of unusual activity (costs will be passed on by banks—loss sharing).
- Room too for more informal dispute resolution mechanisms than a trial e.g. banking ombudsman