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Quincecare duty

Keeping it on the straight and narrow

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Although there has been a steady increase in the number of cases in which a *Quincecare* duty is alleged, *Stanford International Bank v HSBC Bank plc* is the first case to reach the Supreme Court since *Singularis Holdings Ltd (in official liquidation) v Daiwa Capital Markets Europe Ltd v Daiwa* (*120221 UKSC 34; 12079] UKSC 50,* see News brief "*Quincecare duty: the role of banks in fighting financial crime*", http://www.practicallaw.com/w-022-9645).

The question for the court was a narrow one: whether Stanford International Bank Limited (in liquidation) had suffered any loss even if HSBC Bank plc owed a *Quincecare* duty to Stanford and had breached that duty. The court upheld the Court of Appeal's decision that Stanford had not suffered any loss, and dismissed its appeal.

Stanford's case against HSBC

The liquidators of Stanford brought a claim against HSBC in March 2019, in which Stanford alleged that there were many warning signs that its business was a fraud, and that HSBC was under a duty of care, known as the *Quincecare* duty, by August 2008 at the latest, to refuse to accept instructions for payments from Stanford's beneficial owner *(see box "Fraud charges")*. After this time, HSBC had allowed payments of approximately £116 million from Stanford's accounts to customers in redemption payments and interest, either directly to those customers or through another bank. Stanford argued that if HSBC had complied with its *Quincecare* duty, those payments would not have been made.

In its defence, HSBC disputed the legal basis of the claim in its entirety. However, it also argued that, even if it owed Stanford a *Quincecare* duty and was in breach of that duty, Stanford had not suffered any loss. It applied to strike out Stanford's claim in the High Court, together with another claim advanced by Stanford at that time that HSBC was liable for dishonest assistance. The court struck out Stanford's claim for dishonest assistance but allowed its *Quincecare* claim to proceed (*12020.1 EWHC 2232 (Ch); www. practicallaw.com/w-028-0497*). Both parties then appealed to the Court of Appeal, which struck out both claims (*12021] EWCA* Civ535; *www.practicallaw.com/w-037-7076*). Stanford appealed to the Supreme Court in respect of the *Quincecare* claim only.

Given that the disputed payments to Stanford's customers relieved it of approximately £116 million of debt, leaving its net asset position unchanged, Stanford did not make the argument before the court that it would have been better off by that amount if HSBC had not breached its *Quincecare* duty. Instead, it argued that its loss was the loss of a chance to discharge the debts of the customers who had received full payment (the early creditors) fora few pence in the pound, in the way that customers who had debts outstanding at the time of liquidation would be paid (the late creditors). It argued that its loss was therefore the difference between the payments that HSBC had allowed to the early creditors, and the dividend that the early creditors would have received had they been required to prove in the liquidation.

Supreme Court analysis

The court dismissed Stanford's appeal by a 4-1 majority, upholding the Court of Appears decision to strike out Stanford's *Quincecare* claim. In her lead judgment, Lady Rose considered the nature of the chance that Stanford claimed that it had lost, and concluded that there was no loss with pecuniary value to it. The counterfactual that Stanford argued for was a situation in which Stanford had an additional £116 million available to it before going into liquidation, but also additional debts of the same amount.

In this situation there would be no distinction between early or late creditors, and the chance of being able to pay the early creditors less would be matched by the risk of having to pay the late creditors more. No additional indebtedness was extinguished. The alleged loss of Stanford's chance to act more fairly as between creditors, by ensuring that the early creditors did not benefit by receiving full payment at the expense of the late creditors, was not a pecuniary loss and the fairness of payments was not a matter that the court could investigate in these circumstances.

Lord Leggatt concurred, noting that there is no way of escaping the simple truth that the payment of a valid debt does not reduce the payer's wealth: the liquidators could not have their cake and eat it on the point as, however considered, there was no net loss.

Lord Sales, dissenting, considered that Stanford had suffered a loss. At the time of the payments, Stanford was hopelessly insolvent. In Lord Sales's view, Stanford's interests as a legal entity were therefore fully aligned with those of its general creditors as a class. Given that Stanford was insolvent, any funds should have been retained for its benefit, which at that time meant for the benefit of the general creditors as a class. In his view, the alleged diversion of funds from the general creditors as a class to the early creditors represented a loss to Stanford itself.

Implications for financial institutions

One of the key drivers for the *Stanford* litigation appears to have been the uneven distribution between innocent customers of the Ponzi scheme, in circumstances where there was no other mechanism open to the liquidators to adjust the distributions to be more equitable. Despite this challenge, financial institutions will be reassured by the court's adherence to conventional principles on loss in the context of the *Quincecare* duty. The development of the duty in recent years shows how much emphasis the courts place on financial institutions identifying and preventing financial crime, but *Stanford* demonstrates that courts recognise that the duty must be tightly controlled.

Indeed, although the court made clear that nothing in its judgment concerned the scope of the *Quincecare* duty, Lord Sales observed that, to prevent the *Quincecare* duty becoming uncommercial, it should be kept within narrow bounds, by a strict approach governing when it applies and a careful analysis of the scope of the duty.

Financial institutions will, no doubt, also pay close attention to the upcoming appeal in *Philipp v Barclays Bank UK PLC,* in which the Supreme Court will expressly consider the scope of the *Quincecare* duty (see Briefing *"Banking and financial services litigation: 2022 in review and 2023 in prospect", this issue*).

Fraud charges

Stanford International Bank Limited (in liquidation) (Stanford), a company incorporated in Antigua and Barbuda, operated a Ponzi scheme selling certificates of deposit as investments, and made payments to customers using the capital invested by other customers. In 2008, an increasing number of customers requested payment and there was a run on the company. In February 2009, Mr Robert Stanford, the company's beneficial owner, was charged by the US Securities and Exchange Commission (SEC) in relation to the fraud and a receiver was appointed over Stanford. In April 2009, the Antiguan courts appointed liquidators to Stanford, and the liquidation was subsequently recognised by the English High Court as foreign main proceedings under the Cross-Border Insolvency Regulations 2006 (*SI2006/1030*). At the time of its collapse, Stanford held only a fraction of the funds required to pay its creditors in full.

HSBC Bank plc provided correspondent banking services to Stanford. It froze Stanford's accounts in February 2009, when the SEC charged Mr Stanford.

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