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Dear All,

Welcome to the YFLA May 2020 Newsletter. Details of our upcoming (virtual given recent circumstances) events can be found on our website (**www.yfla.com**) and on our LinkedIn group (search for "**Young Fraud Lawyers Association**"). We take this opportunity to wish all YFLA members well during an extraordinarily challenging time.

Publicity Secretary's Note

This issue contains a number of excellent contributions covering both criminal and civil developments and drawing from the YFLA's solicitor and barrister membership.

- **Gareth Hall (Greenberg Traurig LLP)** and **Max Hobbs (MacFarlanes LLP)** have offered an impressively researched piece on ss.327-329 POCA 2002 in their article *'Submitting a SAR- What if I don't?*. The article provides great ammunition for those advising in that area.
- **Edmund Gross (Furnival Chambers)** has provided a succinct and insightful case summary of *NCA –v- Baker* in '*Unexplained Wealth Order setback for the National Crime Agency*'. It is particularly worth a read given that some of the key lawyers involved in that case are YFLA members.
- **Emily Wright (Mishcon de Reya LLP)** has an engaging and politically astute analysis of recent trends in financial crime monitoring in *'FATF urges UAE action on Anti-Money Laundering and Counter-Terrorism financing'*. In light of the close connections between the UAE and UK, the article is as important as it is polished.
- **James Gardner (Twenty Essex)** has contributed an excellent and timely piece on a recent decision in the *Tonstate* litigation, and how costs battles can be used by fraud claimants. His erudite *'Costs and Debarring Orders in Fraud Litigation*' is a must-read for the YFLA's civil fraud practitioners.
- **Stefan Ansah (Peters & Peters Solicitors LLP)** has given an intriguing and thoughtful narrative of the NCAs use of UWOs, not least against organised criminals, in his *'Unexplained Wealth Orders: The Story so Far'*. One can see McMafia Season 2 coming soon, no doubt with assistance from this great contribution.
- **Ryan Ferro (3 Verulam Buildings)** has provided the newsletter's designated 'long-read/think piece', looking in detail at the state of the law on *Quincecare* duties which are so important in recovering fraud proceeds. His article entitled *'The Quincecare Lacunae'* is detailed, thoughtful and persuasive in all respects.

Sincere thanks are due to all of our excellent contributors. We hope you enjoy their fine work and encourage all members to volunteer articles for future newsletters.

Philip Gardner, Publicity Secretary

Submitting a SAR – What if I don't?

Readers of this article will almost certainly be familiar with the substantive money laundering offences set out in sections 327–329 of the Proceeds of Crime Act 2002 (**POCA**). Each of these offences contains the corresponding defence of submitting a Suspicious Activity Report (**SAR**) to seek consent to carry out a prohibited act. Whether it is clearing the path for a client to invest in cannabis companies (for example) or for a client to extricate themselves from a suspicious commercial relationship, the SAR regime is familiar to AML practitioners and in-house/compliance teams alike. However, the regime is particularly burdensome on clients in the "regulated sector".

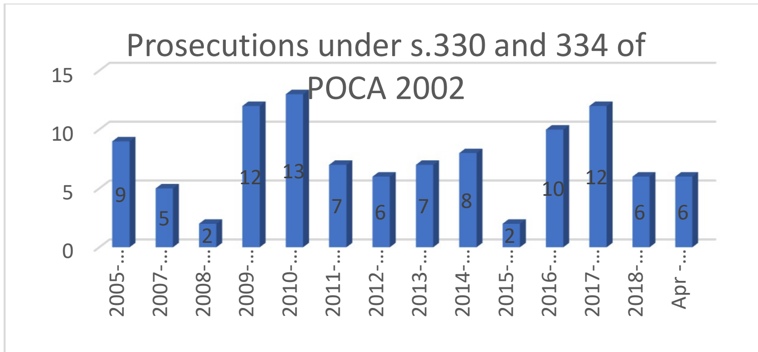
Under section 330 POCA, a person commits an offence if they know or suspect (or have reasonable grounds for knowing or suspecting) that another person is engaged in money laundering and that knowledge or suspicion came to them <u>in the course of a business in the regulated sector</u> but that person fails to make a disclosure of certain information either to a 'nominated officer' within their organisation or to the National Crime Agency directly by way of a SAR

The threshold for this suspicion is very low, perhaps surprisingly so for those being advised about such issues – it was confirmed in the case of *R v Da Silva* to be simply "*more than fanciful*". This sets the bar and corresponding obligation low and results in a very high number of SAR submissions every year (nearly 500,000 at the last count). Consequently, there are many reluctant clients that feel burdened with the administration of preparing and filing SARs and then have to deal with concerns about what the consequences of the submission may be.

As burdensome as such situations may be, the fact is that those in the regulated sector have a legal obligation to submit a SAR when the requisite level of suspicion is reached. Those being advised will and must be told that the threshold is indeed very, very low and although of course fact specific, the advice in many situations is that the submission of a SAR is simply unavoidable.

This can beg the question (and is sometimes raised by particularly reluctant clients): what would the consequences of not submitting a SAR be? Section 334 POCA sets out that a person guilty of an offence under s330 is liable on summary conviction to imprisonment for a term not exceeding six months or on indictment to a term not exceeding five years (or to a fine or both)… but is this ever enforced, or is it just a tall tale designed to scare compliance officers?

To try and answer this familiar question, we submitted a Freedom of Information Act request to the Crown Prosecution Service, requesting information on the number of prosecutions brought under s330/s334. The conclusion, in the shortest possible way, is: not many, but definitely enough to put the 'tall tale' theory to bed. The following figures may be a helpful resource if a reluctant client needs to be persuaded of the necessity of complying with their legal obligations:



[1]

To put a bit more flesh on those figures, that is **105** prosecutions spread across **58** case files with **14** of those **58** case files resulting in convictions.

So there you have it – "*there have been more than 100 prosecutions under s330*" is the simplest summary. It's not a blockbuster headline, but if any clients ever want to know whether they *really* need to comply with their s330 obligation, and what may happen if they do not, this fact might be quite persuasive.

Gareth Hall
Greenberg Traurig LLP

Max Hobbs
MacFarlanes LLP

Unexplained Wealth Order setback for the National Crime Agency

Background

In April Mrs Justice Lang DBE delivered judgment in NCA v Baker.[2] The Respondents applied to discharge three unexplained wealth orders ("**UWOs**")[3] Mr Justice Supperstone made in May 2019 at an ex parte hearing of applications by the National Crime Agency ("**NCA**").

The UWOs related to London properties. The NCA produced evidence in support of the applications to the effect that the properties were acquired as a means of laundering the proceeds of unlawful conduct by Mr Rakhat Aliyev ("**RA**"), a Kazakh national, who died in 2015. The information sought related to the purchases and transfers of the properties and the registered owners and ultimate beneficial owners ("**UBOs**") of them.

[1] Specifically, being offences charged and reaching a first hearing at Magistrates' Courts.
[2] Full citation: *National Crime Agency v Andrew J Baker, Vailla Magna Foundation, Manrick Private Foundation, Alderton Investments Limited, Tropicana Assets Foundation* [2020] *EWHC 822 (Admin)*.
[3] There were related interim freezing orders.

The Respondents, together with the UBOs, provided significant information about the purchase and transfer of the properties, their registered owners, and the UBOs. The UBO of properties relating to the first and third UWOs is RA's ex-wife. The UBO of the property relating to the second UWO was their son. The properties were stated to be unconnected to RA and his alleged criminal activities, and that he was never the UBO of the properties.

The Law

UWOs compel a person to disclose how they obtained certain property described in the UWO. Failure to comply "without reasonable excuse" leads to a presumption that the property is recoverable property for the purposes of possible civil recovery proceedings.

To make an UWO,[4] the High Court must be satisfied there is reasonable cause to believe the respondent holds the property and its value is greater than £50,000. Furthermore, there must be reasonable grounds for suspecting the known sources of the respondent's lawfully obtained income would have been insufficient for the respondent to obtain the property.

Finally, the respondent must be a politically exposed person, or there must be reasonable grounds for suspecting they or a person connected with them are, or have been, involved in serious crime.

Decision

Mrs Justice Lang DBE discharged the UWOs. She described the NCA's assumptions as "*unreliable*" and that they had been rebutted by "*cogent*" evidence. She was not persuaded that there was material non-disclosure at the ex parte hearing, but she did note that "the NCA case which was presented at the ex parte hearing was flawed by inadequate investigation into some obvious lines of enquiry" and that the NCA "*failed to carry out a fair-minded evaluation of the new information provided by the UBOs and Respondents*".[5]

Comment

This is the first successful challenge of a UWO. It is reassuring to see the courts carefully scrutinising the NCA's evidence. The law of UWOs is in its infancy and the setback for the NCA is an unavoidable litigation risk. The NCA say they will appeal and no doubt practitioners will be interested in what the Court of Appeal says.

Edmund Gross
Furnival Chambers

[4] See section 362B Proceeds of Crime Act 2002.

[5] At paragraph 217.

FATF urges UAE action on Anti-Money Laundering and Counter-Terrorism financing

At the end of April 2020 the Financial Action Task Force ("**FATF**") published its report on the UAE's efforts to combat money laundering and terrorist financing in the country. While the report acknowledges that in recent years the Gulf state has taken steps to enhance its legal framework and the tools available to law enforcement agencies, it concludes that the effectiveness of these measures is undermined by weak implementation.

The FATF will continue to monitor the UAE over the next 12 months and has warned that the country needs to make "*fundamental and major improvements*" in order to avoid inclusion in the FATF "*grey list*". Although the FATF has no power to sanction a country, inclusion in this list would be a reputational blow to the UAE, which has invested in developing the legal and compliance practices in its various valuable commercial sectors.

The FATF has recommended that the UAE focus its attention on the pursuit of illegal money networks. It cites a low number of prosecutions for money laundering offences across the country including in Dubai, despite this being a particularly high-risk location.

Records show that between 2013 and 2018 there were only 50 prosecutions (17 of which were in Dubai) and 33 convictions for money laundering offences across the UAE. The figures show that the UAE is better at identifying and dealing with terrorism financing offences for which 92 prosecutions and 75 convictions were brought between 2013 and 2019.

Cities of Salt

The UAE is recognised as having a significant risk profile for financial crime given its geographic proximity to politically unstable regions and its relatively young legal and compliance system. Over the 49 years since the formation of the seven Emirates into the UAE, the Emirate of Dubai has secured its position as a major international business and financial hub but it has also faced allegations that it has become a "*money-laundering paradise*". Critics argue that the rapid emergence of a highly lucrative investment market for property and commodities such as gold, oil and diamonds in the Emirate has also attracted those wishing to exploit these sectors to launder money. In April this year, this issue was brought back to public attention following the finding by the High Court in London that there had been professional misconduct by EY for their part in an audit of a gold refiner in Dubai which laundered drug money from European countries.

Weaknesses identified by the FATF report include the increased opportunity for the misuse of corporate vehicles registered in the UAE, as a result of there being 39 different company registries across the seven Emirates. The report also highlights that the country fails to make effective use of international channels set up to assist in the prevention of money laundering, a criticism which has also been made in relation to the UAE's engagement with INTERPOL. The FATF report underscores the importance of international cooperation in tracing and extinguishing illegal fund flows and recommends a shift in attitude to collaboration with inter-governmental bodies so that international organised crime networks can be targeted effectively.

The Future

The UAE has been under the watchful eye of various international regulatory and observatory bodies since its emergence as a significant international and financial hub. A new anti-money laundering and counter terror financing law introduced in October 2018 was widely seen as a pre-emptive response to the FATF undertaking a review of the country. The FATF has welcomed action by the country's rulers to address the criticisms levelled at it and it is expected that the impact of the new law and other recent developments will soon be felt. However, the report concludes that the UAE currently only has an "*emerging understanding*" of the risks associated with money laundering and terrorism financing.

The FATF hopes that, as it continues to monitor the UAE over the course of the next 12 months the country will take further steps to strengthen its enforcement processes and legal framework. However, in the days after the release of this report the FATC hurriedly published global guidance to deal with the anticipated increase in organised financial crime as a result of the outbreak of COVID-19. While the pandemic's full impact on the world economy remains to be seen, is likely to exacerbate and add to the challenges already faced by the UAE in tackling money laundering and terrorist financing.

Emily Wright
Mishcon de Reya LLP

Costs and Debarring Orders in Fraud Litigation

An interim costs order can provide a (justified) tactical advantage in ongoing litigation. However, it is frequently the case, especially in fraud litigation, that such orders are rendered ineffective by difficulties in enforcement. This may be so where the costs creditor is asserting a proprietary claim over the costs debtor’s known assets, ruling those assets out of consideration for enforcement, or the costs debtor is (or appears to be) judgment proof.

A judgment handed down on 28 April 2020 in the ongoing Tonstate litigation, *Tonstate Group Limited v Wojakovski* [2020] *EWHC 1004 (Ch)*, serves as a useful reminder that such a frustrated interim costs creditor would be well advised to consider applying for a debarring order.

Facts

The Tonstate litigation consists of three related actions being case managed together in the Business List of the High Court: [1]. On 2 March 2020, at a case management conference, Mr Wojakovski ("**the Costs Debtor**") was ordered, *inter alia*, to pay costs orders totalling £61,740.64 by 30 March 2020: [7(ii)]. It was found that in substance these costs orders arose from only two of the three related actions: [40]. The Costs Debtor failed to pay the costs orders whether by 30 March 2020 or at all: [8].

In these circumstances, Mr Matyas, Mrs Matyas and Tonstate Group Limited ("**the Costs Creditors**") applied for an order immediately debarring the Costs Debtor from further participation in any of the three related claims for his failure to pay the costs orders: [9]-[10].

Decision

An order was made stipulating that, unless the Costs Debtor pays in full within 14 days, he will be debarred from defending the two claims from which the costs orders arose (but not the third related action): [48].

In deciding the application, the Judge took as his point of departure the settled principles enumerated by Sir Richard Field in *Michael Wilson & Partners Ltd v Sinclair* [2017] *EWHC 2424 (Comm)*: [12]. However, he also noted the recent judgment in *Siddiqi v Aidiniantz* [2020] *EWHC 669 (QB)* in which it was held that the "*default rule*" is that a litigant's failure to satisfy an existing, non-appealed costs order will result in the court exercising its discretion to make a debarring order: [13]. The Judge held that the Court may depart from this default position where the costs debtor can prove their inability to pay by making full and frank disclosure, supported by "*detailed, cogent and proper evidence*", of their financial position and ability to raise funds from third parties: [12]-[13]; [23].

In this case, due to "*substantial gaps*" in his disclosure of bank statements, the Costs Debtor had "*manifestly failed*" to discharge the burden of proving his inability to pay: [20]; [24]; [35(i)]. The defaulting party's word would not generally be sufficient evidence of this fact, especially where that party was in deliberate breach of the court's orders: [26]. As such, the default position was that a debarring order should be imposed on the Costs Debtor: [35(i)].

In exercising his discretion not to depart from this default position the judge attached particular weight to:

- The impossibility of identifying assets against which the Costs Creditors could seek execution due to the Costs Debtor's failure to provide full and frank disclosure of his assets: [33].

- The Costs Debtor's "*multiple defaults in compliance with Court orders*": [35(iii)].

The Costs Creditors failed to persuade the Judge that the debarring order should preclude participation in all three related actions nor that it should take effect immediately (rather than as an unless order): [38]-[48].

Points to consider

An application for a debarring order gives the costs debtor an unenviable choice. He must either make full and frank disclosure of his financial position with cogent supporting evidence or risk being unable to further participate in the proceedings.

Aside from putting the costs debtor to a detailed and expensive disclosure exercise, the costs debtor's evidential burden may flush out revelations about their financial position and asset base that are invaluable to the fraud claimant. Pre-trial this evidence may provide basis for freezing relief, post-judgment it is likely to assist with enforcement and asset recovery.

This judgment and Siddiqui confirm that all a costs creditor need do to impose this heavy burden on their counterparty is show failure to pay an interim costs order.

James Gardner
Twenty Essex

Unexplained Wealth Orders: The story so far

Introduction

The judgment against the National Crime Agency last month ***[See* Unexplained Wealth Order setback for the National Crime Agency *above]*** created intrigue in the storyline plot of the agency's use of Unexplained Wealth Orders to seize and repatriate what it believes to be considerable proceeds of serious crime in a bid to rid the UK of 'dirty' money. The three UWOs, targeted at the late Rakhat Aliyev and Kazakhstan's political elite, were against London properties the NCA argued were ultimately owned by Mr Aliyev through offshore companies. In their High Court challenge, Mr Aliyev's ex-wife and son, Dr Dariga Nazarbayeva and Nurali Aliyev, claimed they were the beneficial owners and bought the properties with 'clean' money. Mrs Justice Lang DBE agreed and the UWOs were discharged. It is the latest development in this saga and the first setback the NCA has experienced up to this point, although it has indicated it will appeal. As with any good tale in which a junction has been reached, a look back at what has taken place up to this point is always needed before the next chapter should begin.

First Character: Mrs Zamira Hajiyeva

Less than a month after UWOs came into force on 31 January 2018, the NCA's applications for two UWOs in respect of properties in London and Ascot, Berkshire were granted. The wife of a jailed Azeri banker, Mrs Hajiyeva became the first person in the UK to be the target of a UWO. The combined value of the properties was estimated to be more than £22 million and Mrs Hajiyev was the beneficial owner of the companies in whose names the properties were registered. The companies were incorporated in the British Virgin Islands and Guernsey respectively.

Mrs Hajiyeva sought to have one of the orders, in respect of the London home, discharged on various grounds but these were all rejected by the judge in his October 2018 judgment. The judge also refused leave to appeal. However Mrs Hajiyeva was eventually granted permission to appeal on the basis that, as this was the first UWO case heard, it would be beneficial to have guidance from the Court of Appeal as to the scope of statutory powers underlying UWOs. In his February 2020 judgment, Lord Justice Burnett, the Lord Chief Justice, dismissed the appeal by holding that the legal criteria to obtain the UWO had been met. The implementation of the UWO in respect of the Berkshire property, a golf and country club, had been stayed pending the resolution of the appeal but subsequently became enforceable.

Next Character: Mr Mansour Hussain

By the time the NCA had applied for a UWO against Mansour Hussain in July 2019, it had already secured the three Aliyev UWOs that would eventually be discharged by Mrs Justice Lang in April 2020. While the Hajiyeva and Aliyev cases centered on politically exposed persons (PEP), the UWO against Mr Hussain was the first order targeted solely at suspected involvement in serious organised crime.

Mr Hussain was said to be a known associate of organised crime gangs involved in drug trafficking, armed robberies and supplying firearms in the Leeds/Bradford area. He allegedly assisted in the laundering of funds through the purchase of properties held by or through his numerous companies purportedly engaged in property development and management. The UWO related to eight properties bought by him in various locations across the country, estimated to be worth £10 million. As a result of applications by members of the press to challenge the decision to hear the UWO application in private, that were later withdrawn, the High Court provided comments regarding privacy in UWO applications. It stated that the presumptive starting point should be that a UWO application will be made without notice and that the hearing of the UWO application and any related interim freezing order application would be in private.

Final Character: Unknown

Many good narratives include a bit of mystery and in this story, we have it in the form of the recipient of the most recent UWO served in another serious organized crime related application. The NCA sought and obtained a UWO in late July 2019 against an unnamed Northern Irish woman with suspected links to criminals involved in paramilitary activity and cigarette smuggling. There was a total of six properties: four in London and two in Northern Ireland (with a total value of approximately £3.2 million). The estimated worth is the smallest of all the cases, with the NCA making it known that it was targeting cases that had the biggest impact on tackling serious and organised economic crime.

Unlike the previous cases, the anonymity order has not been lifted and further details of the case are not publicly available. An application to discharge the UWO does not appear to have been filed.

Happy ending?

This story is far from over. There have been no reported UWOs obtained by the NCA since July 2019 but the challenges in the Hajiyeva and Aliyev cases mean the NCA have been kept busy. This is set to continue with the Aliyev appeal. There is no doubt that the NCA has enjoyed success in its carefully selected cases but the mixed results in the recent cases also mean that it's approach to applications going forward is not entirely clear, particularly given the criticisms it faced in judgment. Where's the fun in a story if you know the ending anyway?

Stefan Ansah
Peters & Peters Solicitors LLP

The Quincecare Lacunae

Singularis Holdings v Daiwa Capital

The Supreme Court's 40-paragraph judgment in *Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50; [2019] 3 WLR 997 is as important as it is concise. The central question was whether a claim against a bank for executing a company's orders in breach of the bank's *Quincecare* duty could be defeated because the director's fraud was attributable to the company.

On the facts, the answer was *"no"*. The director's fraud could not be attributed to the company ([26] *ff.*) but, even if it could be, (i) the company's loss was caused by the bank's breach of duty, and not the company's dishonesty ([22] *ff.*), (ii) the bank could not rely upon a circularity defence based upon a claim in deceit against the company ([24] *ff.*); and (iii) the claim was not barred by illegality, because denying the claim on grounds of illegality would not further the integrity of the law, would adversely affect the role of banks and financial institutions in reducing and uncovering financial crime and money laundering, and would be an unfair and disproportionate response ([13] *ff.*).

The key aspect of the case was its clarification of the Supreme Court's earlier decision on attribution in *Bilta (UK) Limited v Nazir (No. 2)* [2016] AC 1, which (as the Court noted at

[33] of *Singularis*) had since been misconstrued to mean that the dishonesty of the *"controlling mind"* of a *"one-man"* company could *always* be attributed to the company, no matter the context and purpose of the attribution. Happily, Baroness Hale clarified that *Bilta* laid down no such principle. Instead, the guiding principle is that ([34], citing the Rose J's first instance judgment):

> *"…the answer to any question whether to attribute the knowledge of the fraudulent director to the company is always to be found in consideration of the context and the purpose for which the attribution is relevant".*

Even more happily, Baroness Hale followed Lord Neuberger's lead in *Bilta* to *finally* consign to the history books the House of Lords' decision in *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391, which had held that a company's claim against its auditors was barred by illegality because the director's knowledge of his fraud was attributable to the company.

Outstanding questions on the Quincecare duty

Singularis is also noteworthy as the Supreme Court's first opportunity to opine on the *Quincecare* duty: the implied term in the contract between a bank and its customer *"that the bank would use reasonable skill and care in and about executing the customer's orders…"* such that *"there would be liability if the bank executed [a customer's] order knowing it to be dishonestly given, or shut its eyes to the obvious fact of the dishonesty, or acted recklessly in failing to make such inquiries as an honest and reasonable man would make…"* (*Singularis* at [1], summarising the first description of the duty by Steyn J in *Barclays Bank Plc v Quincecare Ltd* [1992] 4 All ER 363). Much academic ink has already been spilt about the implications of *Singularis* for the *Quincecare* duty. But, in truth (and for understandable reasons, given the grounds of appeal) the Supreme Court's decision adds little to the jurisprudence beyond noting that the *Quincecare* duty strikes a *"careful balance"* between the respective interests of the bank and customer ([16], [21]) and that *"the purpose of the Quincecare duty is to protect a bank's customers from the harm caused by people for whom the customer is, one way or another, responsible"* ([23]).
It might therefore be helpful to consider some features of the *Quincecare* duty that were not addressed by the Supreme Court, and which remain ripe for debate.

(i) When is a bank "put on inquiry"?

The first is what it means for the bank to be *"put on inquiry"*. This is important: after *Singularis'* ruling on attribution, the focus in *Quincecare* cases is now more likely to be on testing the boundaries of this concept, together with the principles on constructive knowledge and recklessness.

At first instance in *Singularis* ([2017] EWHC 257; [2017] Bus LR 1386, Rose J referred (at [169]) to Steyn J's remark in *Quincecare* that a bank is *"put on inquiry"* when *"he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company…And, the external standard of the likely perception of*

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an ordinary prudent banker is the governing one". Steyn J's analysis had been approved by the Court of Appeal in *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340, in which the Court adopted a test that was avowedly pragmatic, declining to lay down any detailed rules (p 1356), but noting that *[t]he 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"* (p 1377). These open-textured tests now also need to be seen in light of recent authority clarifying the Court's approach to establishing wilful blindness. In *Group Seven Limited v Notable Services Limited* [2019] EWCA Civ 614; [2020] Ch 129, the Court of Appeal affirmed that wilful blindness requires (i) *"the existence of a suspicion that certain facts may exist"*; and (ii) *"a conscious decision to refrain from taking any step to confirm their existence".* The existence of the suspicion is to be judged subjectively by reference to the beliefs of the relevant person: [58]. The importance of wilful blindness in the *Quincecare* context is that knowledge of a fact may be *imputed* to a person if they turn a blind eye to it (*Group Seven* at [59], citing *Twinsectra Ltd v Yardley* [2002] 3 AC 164). The most obvious use of this principle would be to try to establish that the bank *knew* about the fraud because it was wilfully bind. But constructive knowledge could foreseeably be used in more subtle ways to expand the compass of the *"relevant facts"* which, when taken together, would lead a reasonable and honest banker to conclude that there was a real risk of fraud.

All in all, the process of establishing that the bank was *"on inquiry"* is fact sensitive. *Singularis* itself is unlikely to be an especially helpful yardstick because the *"red flags"* were so glaring that even the Supreme Court felt able to say that the judge's finding of breach was *"incontrovertible"* ([12]). Difficulties are instead likely to arise in borderline cases, in which the outcome may be somewhat impressionistic. In practice, the key to success may be to identify as many *"unusual"* factors as possible about the customer's transactions. If the customer had a pre-existing relationship with the bank before the fraud, a fruitful exercise may be to highlight any differences between the customer's pre-fraud transaction history and its transactions during the period of the fraud. But unduly forensic arguments are unlikely to find favour with the Court. As Parker LJ noted in *Lipkin Gorman* (p 1377), *"…the customer cannot, of course, rely on matters which a meticulous ex post facto examination would have brought to light".*

(ii) What is the content of the Quincecare duty?

Second, how far does the *Quincecare* duty go? It is not enough to show that the bank was put *"on inquiry"*: there is still the discrete question about what the bank should have done in response. This issue came up for recent consideration by the Court of Appeal in *JP Morgan Chase Bank, N.A. v The Federal Republic of Nigeria* [2019] EWCA Civ 1641. Significantly, the Court noted (at [21]) that *"[i]n most cases, the reconciliation of the conflicting duties owed by the bank…will require something more from the bank than simply deciding not to comply with a payment instruction".* It therefore seems clear in principle that a bank could be found liable on *Quincecare* principles even *if* the bank refuses to process the suspicious transaction.

However, the present authorities give little guidance on what *more* a bank must do. In *JP Morgan,* the Court recognised (at [20]) that the exercise will again *"vary according to the particulars facts of the case".* For example, Rose LJ noted that, in *Singularis,* what the bank should have done was to pay the money into an ordinary bank deposit account in the name of the company (rather than pay it to other companies within the corporate group), but that may not have been an option for JP Morgan: [20]. Likewise, a bank may be prohibited from raising the matter with the client ([21]), and it seems that a bank may not (always) be positively required to reach out to other representatives of the defrauded customer to verify the suspicious transaction: *Lipkin Gorman*, in which (as the Court in *JP Morgan* noted at [20]) May LJ held (p. 1357) that there was no duty on the bank to call a partner at the defrauded solicitors' firm, even though a single call would have brought an end to the fraud.

There are competing principles at play in deciding where to draw the line. On the one hand, banks are relied upon more-and-more to play an important role in reducing financial crime and money laundering (a role recognised by the Supreme Court in *Singularis*: [17], [21]). On the other, the policy of the *Quincecare* duty is to protect a bank's customers from harm. It is not to enrol banks as private fraud investigators. At the same time, if the *Quincecare* duty is expanded too zealously, the policy objectives served by *Quincecare* may be undermined by encouraging banks to draft more expansive exclusion clauses into their banking contracts. How these tensions will be reconciled by the Courts remains to be seen.

(iii) What about the duties of "receiving" banks?

Third, could the policy rationale for the *Quincecare* duty be used to expand the duties of *receiving* banks? Take, for example, a case where a corporate director instructs the client bank to pay funds out of the company account into a personal account with another bank. The *Quincecare* duty latches onto the *client* bank's obligations. But could *Quincecare* be used as the foundation for an argument that the *receiving* bank may *also* be liable to the defrauded company if put on inquiry? This possibility takes on additional prominence in light of recent regulatory changes that expanded upon the responsibilities of receiving payment service providers. For example, new FCA rules came into effect on 31 January 2019 extending the jurisdiction of the FOS to consider complaints that *receiving* payment service providers did not do enough to prevent or respond to authorised push payment fraud.

What seems clear is that a receiving bank will not owe a *Quincecare* duty *per se,* because the duty is rooted in the banking contract. A more fruitful argument may be that a receiving bank owes a common-law duty of care to the customer of the paying bank based on *Caparo* principles.

Such an argument would likely face immediate hurdles: it would be an expansion (however incremental) of existing principle, and arguably runs against the grain of existing authority; e.g. in *Abou-Rahmah v Acacha* [2005] EWHC 2662 (Ch), Treacy J rejected an argument that a bank owed a non-customer drawer of a cheque a duty to guard against fraud, referring (at [62]) to a decision of the British Columbia Court of Appeal in which the Court had held that such a duty would *"place a well-nigh intolerable burden on banks and seriously interfere with the expeditious transaction of banking business"*. However, *Quincecare* suggests that *some* inquisitorial duty would not impose an *intolerable* burden on banks. Equally, the imposition of *some* duty, however modest, is consistent with the expectation that banking institutions have a positive part to play in detecting and preventing fraud, and the existence of particular *types* of banking relationships (e.g. correspondent banks) might offer fertile ground for seeking to overcome objections based upon proximity and remoteness. It may therefore be that a court could be persuaded that a receiving bank does owe a modest duty to non-customers to detect and prevent (further) fraud, which is neither devoid of content nor inimical to the effective transaction of banking business. The risk that receiving banks may be brought into the fray cannot be ignored.

Conclusion

On the whole, meaty questions remain about the *Quincecare* duty. The Supreme Court's decision in *Singularis* arguably presents a missed opportunity to comment (albeit *obiter*) on its potential scope and application. It will surely not be the last.

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We would like to extend our heartfelt appreciation to all our contributing authors.