KEY POINTS
- Recent cases have dealt with bankers' duties in the context of potential frauds against their customers, investor claims against arranging banks, and the interplay between duties to customers and statutory anti-money laundering obligations.
- The impact of these decisions may be less severe than a first reading would suggest.
- Practical steps can be taken to mitigate risk.

Feature

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Developments in the law on bankers' duties: revolution, evolution or business as usual?

This article considers recent cases concerning bankers' duties and examines whether they suggest banks are being more harshly dealt with by the courts than ever before and, if so, whether that trend looks set to continue.

INTRODUCTION

There has been a recent run of decisions concerning bankers' duties. In *Singularis*,[1] the Court of Appeal upheld the first ever finding that a bank had breached its "*Quincecare* duty". In *Golden Belt*,[2] also for the first time, a court found that an arranging bank owed and had breached a duty to investors. Finally, in *NCA v N*,[3] the Court of Appeal considered the interplay between a bank's duties to its customers and its statutory duties and overturned a decision granting an interim declaration designed to protect a bank from incurring criminal liability when making payments from an account believed to contain the proceeds of crime.

These decisions prompt the question whether these cases indicate (as they appear to at first glance) that the courts are increasingly willing to apply or even extend bankers' duties so as to impose liability on banks and compensate their customers and affected third parties.

BREACH OF THE *QUINCECARE* DUTY: *SINGULARIS v DAIWA*

Mr Al-Sanea was the sole shareholder and a director of the claimant, Singularis. Daiwa, the defendant, is the London subsidiary of a Japanese investment bank and acted as Singularis' stock broker. Over the course of one month and knowing Singularis was on the verge on insolvency, Mr Al-Sanea gave Daiwa instructions to transfer around US$200m from Singularis' client account to the bank accounts of certain related entities.

Following the transfers, Singularis was liquidated and the money could not be recovered. The liquidators of Singularis brought proceedings against Daiwa alleging that it had dishonestly assisted Mr Al-Sanea to perpetrate a fraud on Singularis or, alternatively, that Daiwa was in breach of its "*Quincecare* duty".

Quincecare[4] was a decision of the High Court in 1992, in which Steyn J held that banks owe co-extensive implied duties in contract and tort to exercise reasonable skill and care when executing instructions from customers. This, he said, would include refraining from implementing an instruction for as long as the banker has reasonable grounds to suspect that the instruction is an attempt to misappropriate funds. Prior to *Singularis*, however, it appears that there were no instances of courts holding banks liable for breaching its "*Quincecare* duty".

In *Singularis*, Rose J found at first instance that Daiwa had not acted dishonestly in executing Mr Al-Sanea's instructions, but had acted negligently. This was because Rose J found that there were many obvious, "even glaring" signs that Mr Al-Sanea was perpetrating a fraud, which Daiwa should have acted upon. On Daiwa's appeal, the Court of Appeal upheld Rose J's decision on negligence, and both Rose J and the Court of Appeal rejected Daiwa's argument that it should have an illegality defence on the basis that Mr Al-Sanea's fraudulent intent should be attributed to Singularis because it was a "one man company".

The facts of this case were, however, somewhat unusual. Daiwa was not a typical bank and did not, for example, frequently execute customer instructions on its accounts. Daiwa's witnesses accepted that it was "highly unusual", if not "unique" in their experience, for payments to be made out of an investment account such as this directly to third parties, rather than to an account in the customer's name. The judge at first instance herself recognised that it would be impractical to impose too weighty a duty on banks "administrating hundreds of bank accounts with thousands of payment instructions every week". The individuals at Daiwa implementing the payment instructions also had a much higher level of knowledge of Singularis' affairs than would normally be the case.

In its judgment, the Court of Appeal recognised the exceptional nature of this case, saying:

> "… this is the first case where the court has found against a bank in respect of the *Quincecare* duty. That is because it will be a rare situation for a bank to be put on inquiry; there is a high threshold … trust, not distrust, is the basis of a bank's dealings with its customers; and full weight must be given to this consideration before one can conclude that the banker had reasonable grounds for thinking that the order was part of a fraudulent scheme."

CREATION OF A DUTY OF CARE OWED BY ARRANGING BANKS TO INVESTORS: *GOLDEN BELT v BNP PARIBAS*

BNP Paribas acted as the arranger, sole bookrunner and lead manager of an Islamic financing transaction known as a sukuk (which can, for simplicity, be compared to a

Eurobond issue). The sukuk was intended to raise financing for Saad Trading, a company owned and controlled by one Mr Al-Sanea (the very same Mr Al-Sanea who caused all the trouble in *Singularis*, discussed above). The sukuk was "secured" by a promissory note that was governed by the laws of Saudi Arabia and which Mr Al-Sanea had purported to sign.

Following allegations of fraud against Mr Al-Sanea, events of default were triggered under the sukuk. It transpired that holders of the sukuk certificates were not able to enforce the promissory note because Mr Al-Sanea had used a laser-printed signature (not a wet ink signature) which meant it was unenforceable as a matter of Saudi law.

Certain holders of sukuk certificates who had purchased them in the secondary market brought proceedings against BNP Paribas alleging that it was liable to them for failing to meet its duty to ensure the promissory note had been properly executed.

When considering whether the bank owed such a duty of care to investors (rather than to its customer), the court considered:

- whether there was an assumption of responsibility;
- the three-stage test of foreseeability, proximity and whether it would be fair, just and reasonable to impose a duty; and
- the incremental test (which requires courts only to introduce novel categories of negligence incrementally and by analogy with established categories).

Prior to this case, there had been no English case holding that a duty of care was owed to investors by a bank which had assisted a borrower to arrange a publicly listed bond issue. In 2006, a similar issue came before the court in *IFE Fund v Goldman Sachs*[5] where it was held that the arranger of a syndicated loan owed no duty to inform investors that statements made in an information memorandum were incorrect.

BNP Paribas argued that it would therefore be a novel extension of the law to impose a duty to investors in relation to the sukuk and that any such duty would therefore fall foul of the "incremental" test for imposing a duty of care.

At first instance, however, the court disagreed, considering that the duty being imposed was limited and specific and flowed from the application of established principles to the specific facts of the case. The court placed significant emphasis on the fact that the investors were dependent on the bank for the proper execution of the promissory note and the finding that the functions of an arranger "invariably include responsibility for arranging the execution of the transaction documents". Accordingly, BNP Paribas were treated as having effectively assumed responsibility for the proper execution of the promissory note. The court also considered the terms of a disclaimer in the offering circular, but found that it did not disclaim responsibility for the execution of documents.

Although the decision is in certain respects surprising and does represent something of an extension to the law on bankers' duties, its wider impact may be more limited than is first apparent. The duty that was found to exist was limited and specific and, in that sense, the decision is capable of being distinguished in future, or confined to its particular facts. The judge also acknowledged that the duty could be disclaimed and so arranging banks could mitigate the risks created by this judgment by, for example, including an express disclaimer in offering circulars negating responsibility to ensure that transaction documents are properly executed (although for commercial reasons they may be reluctant to do so).

Permission to appeal the decision has been granted, and the appeal is due to be heard in July 2018. The Court of Appeal's decision will no doubt be awaited with great interest.

BALANCING DUTIES TO CUSTOMERS WITH ANTI-MONEY LAUNDERING OBLIGATIONS: *NCA v N*

A company offering foreign exchange services (referred to as N) held funds in accounts with RBS. RBS suspected that the funds in those accounts included criminal property under the Proceeds of Crime Act 2002 (POCA) and made an authorised disclosure to the National Crime Agency (NCA). RBS also sought the NCA's consent to return the funds to N which was duly given. That consent did not permit payments to third parties.

N, however, applied to court for interim mandatory injunctions requiring the bank to make specified payments to third parties, together with interim declarations that RBS would not be committing an offence by doing so.

At first instance, the court granted the interim injunctions and declarations as it was satisfied that it would give rise to "almost certain disastrous consequences" for N if RBS was required to seek the NCA's consent to make payments to third parties, given that the NCA could take well over 30 days to provide that consent. Given N's business, the court was cognisant of the fact that the cessation of third party payments for that period of time might pose an existential threat to N. The court also recognised that the NCA's consent to return the funds to N "carries with it of necessity the fact that the NCA has no evidence as of now that any of this money is the proceeds of crime".

The NCA appealed the decision to the Court of Appeal on the basis it was an interested party to avoid creating a precedent whereby court orders could be obtained to permit dealings with the suspected proceeds of crime without the involvement of the NCA. The Court of Appeal duly overturned the decision. The Court of Appeal noted the well-recognised tension between a bank's duty to perform its customer's instructions and the bank's statutory duty to block an account which it suspects contains the proceeds of crime, without tipping its customer off by explaining the reason it is not performing its instructions. The statutory regime is undoubtedly capable of causing hardship to both the bank and its customer, but "the courts have recognised that [this] represent[s] a price Parliament has deemed worth paying in the fight against crime".

The Court of Appeal did not accept a submission that POCA ousts the court's

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jurisdiction to grant interim relief, but found that the public interest in enforcing the duties owed under statute was highly relevant to the exercise of the court's discretion, saying "cases justifying such intervention are likely to be exceptional". The Court of Appeal also accepted the NCA's submission that there may be many reasons why the NCA might give consent in a particular case and so the judge at first instance was wrong to infer from the fact of NCA consent that there was no evidence known to the NCA that suggested that the funds represented the proceeds of crime.

At first instance, the judge had relied heavily on the case of *Bank of Scotland v A*[6] which concerned earlier, pre-POCA money laundering legislation and in which the Court of Appeal had suggested that banks could apply for interim declaratory relief to protect themselves from criminal liability when making payments.

The Court of Appeal in *NCA v N* did not, however, consider the *Bank of Scotland* case relevant as it concerned legislation which did not contain time limits to respond to requests for consent, whereas POCA now requires the NCA to act within specified, limited time periods (either granting consent or taking other steps with respect to funds believed to be the proceeds of crime). The Court of Appeal referred to *K Ltd v NatWest*[7] (an appeal decision from 2007) which it considered had already confirmed that those limited time periods represented a workable balance between public and private interests such that the problems caused by the old regime could be avoided. The court further noted that whilst the statutory time limits might still be so long as to cause serious damage to innocent parties, in practice the NCA responded to urgent requests promptly (and sometimes within hours).

Whilst *NCA v N* does make clear that a bank will generally not be able to secure interim declaratory relief protecting it from criminal liability as it seeks to perform its duties owed to its customers, that is consistent with case law stretching back to 2007 and should not therefore be a surprising decision.

CONCLUSION

On closer inspection, the cases discussed in this article do not appear to be representative of a sea change in the courts' attitude to banks. They do not significantly widen banks' exposures to claims from customers or third parties, or affect the way banks are to balance their contractual and statutory duties when those duties pull in different directions.

The fact patterns in both *Singularis* and *Golden Belt* were unusual and would not necessarily open the door for further negligence claims against banks in respect of their dealings with their customers and third parties. Further, the first instance decision in *Golden Belt* will not be the courts' final word on the matter, as an appeal is pending.

NCA v N, on the other hand, does not appear to represent any change in the law at all: the public interest in a bank complying with its duties under POCA continues to outweigh the private, commercial interests of banks and their customers. The possibility of harsh outcomes under the POCA regime and the potential for innocent parties to suffer harm without redress continues to be noted, but the legal position appears clear (and workable from a bank's perspective, since it will not incur civil liability for compliance with POCA).

That said, this should not be seen as an invitation for complacency and there are lessons that banks can take on board from these cases. Banks should ensure that their staff charged with implementing payment instructions are familiar with the *Quincecare* duty and provide them with a framework for dealing with and escalating concerns where they believe they may have grounds to suspect fraud. The court in *Singularis* particularly criticised Daiwa because its employees dealing with payment requests did not properly understand what steps to take to verify the requests.

Not least as a result of *Golden Belt*, arranging banks for bond issues would also be well advised to revisit the disclaimers they use in offering documents (if commercially acceptable) and to consider appointing their own local counsel to ensure any local laws have been complied with (where relevant).

Finally, in light of *NCA v N*, banks asked to deal with customer funds that they suspect may be the proceeds of crime should continue to follow the POCA regime, and where this causes difficulty because customers require funds to be paid quickly, should communicate the urgency to the NCA and seek a decision from the NCA on an expedited basis. ■

1. *Singularis Holdings Ltd (In official liquidation) v Daiwa Capital Markets Europe Ltd* [2018] EWCA Civ 84.
2. *Golden Belt 1 Sukuk Co BSC(c) v BNP Paribas* [2018] Bus. L. R. 816.
3. *National Crime Agency v N and Royal Bank of Scotland* [2017] 1 W.L.R. 3938.
4. *Barclays Bank v Quincecare* [1992] 4 All E.R. 363.
5. *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887.
6. *Governor and Company of the Bank of Scotland v A Ltd* [2001] 1 WLR 751, CA.
7. *K Ltd v National Westminster Bank plc (Revenue and Customs Comrs intervening)* [2006] EWCA Civ 1039.

Further Reading:

- The scope of arrangers' duties after *Golden Belt v BNP Paribas* (2018) 4 JIBFL 226.
- The banker's duty of care for fraudulent payments (2017) 6 JIBFL 271.
- LexisPSL: Banking & Finance: Banks' duty of care in financial transactions.