



## Tacking fraud: a duty of inquiry or a duty if on inquiry?

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### Key Points

- The *Quincecare* duty is triggered by the bank being “on inquiry” of particular circumstances requiring investigation and it does not give rise to a generally applicable duty to investigate regardless of what the bank knows.
- The Supreme Court in *Philipp v Barclays Bank UK plc* [2024] AC 346 (*Philipp*) preferred to analyse *Quincecare* by reference to agency principles and apply the limits on apparent authority to determine when the bank is unable to debit the customer’s account.
- The Court of Appeal has recently confirmed post *Philipp* that the need to make inquiries before relying on an agent’s apparent authority only arises where the third party has reason to believe the agent in question is acting without authority.

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### Introduction

Steyn J’s decision in *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363 has generated a great deal of attention in recent times. It emerged from relative obscurity to feature in four appeals to the Supreme Court or Privy Council in the past six years.<sup>1</sup> In *Philipp v Barclays Bank UK plc* [2024] AC 346 (*Philipp*) the Supreme Court decisively rejected the Court of Appeal’s radical extension of *Quincecare* to a situation where the customer had been tricked into authorising a payment owing to “external” fraud by a third party. The Supreme Court reaffirmed the orthodox position that *Quincecare* concerns “internal” fraud where the bank is instructed by an agent who is defrauding its principal. At the same time, the court recast the basis of the duty, criticised aspects of Steyn J’s reasoning in *Quincecare* and preferred to explain the case on an agency basis.

This article does not dwell on the internal-external fraud distinction that was central to the debate in *Philipp*. It seeks to analyse where the law now is on the approach to tackling fraud and highlights the difference between a bank owing a duty of investigation or inquiry to their customer on the one hand, and only being subject to any such duty when particular circumstances put the bank “on inquiry” that a payment instruction is an attempt to misappropriate the customer’s funds.

It is submitted that there is a fundamental distinction between the two situations. A duty of inquiry or investigation envisages the bank would need to take steps *regardless* of what it knows about the customer or the agent, and if a bank acting reasonably would make further inquiries even in the absence of indicators of fraud known to the bank, it would be in breach of duty. It is submitted the authorities properly understood do not require this. The requirement to investigate is triggered by facts coming to the bank’s knowledge. Moreover, a freestanding duty of investigation or investigation sits uneasily with the essence of *Quincecare*: which does not concern a positive duty to inquire in the abstract, but is rather targeted at a (negative) duty not to make a payment from the customer’s account while the bank is “on inquiry”.

### **Quincecare cases on the distinction**

#### ***Nigeria v JPMorgan***

Prior to *Philipp*, the distinction developed above was explained by Andrew Burrows QC (sitting as a High Court Judge, as he then was) in *Nigeria v JP Morgan Chase Bank NA* [2019] 1 CLC 207 at [28], [31] and [47]. He was considering the bank’s summary judgment application which contended that certain terms and conditions excluded *Quincecare*.

The Judge characterised the core of the *Quincecare* duty of care as negative in nature, to refrain from making a payment when the bank has reasonable grounds for believing the payment instruction is in fraud of its customer. Although he inclined to the view there could be a duty to inquire when the bank had such reasonable grounds, the Judge emphasised that “... a bank, which is acting honestly and without reasonable grounds for believing that its customer is being defrauded, has **no duty of care to enquire/investigate** ...” and it is “potentially misleading” to describe *Quincecare* as giving rise to a duty to enquire/investigate “not least because there is no [*such*] duty of care ... prior to the point at which the bank has the relevant reasonable grounds for belief”. In other words, there is no freestanding duty of inquiry, and such a duty can only arise where there is a particular trigger for it.

The Court of Appeal dismissed an appeal: [2019] EWCA Civ 1641. Rose LJ, as she then was, did not find it useful to describe some parts of the *Quincecare* duty as being core and some parts as subsidiary or additional ([22]). She did not cast doubt however on the Judge’s conclusion that the duty only became engaged when the bank was on inquiry. To the contrary, she held that “...the very different factual circumstances in which the *Quincecare* duty was considered in *Quincecare*, *Lipkin* and *Singularis* show that the question of what a bank should do **when it is put on inquiry** that a payment instruction ought not to be executed will vary according to the particular facts of the case ... ” ([20], emphasis added).

Cockerill J (as she then was)'s judgment at trial in *Nigeria* similarly proceeds on the basis that the *Quincecare* duty only arises when the bank is on notice and is not engaged otherwise.<sup>2</sup>

### ***Philipp v Barclays Bank UK plc***

The Judge at first instance (HHJ Russen KC) had rejected the Claimant's case that the *Quincecare* duty required the bank to have in place certain anti-fraud policies and procedures, on the basis that "speculation and amateur detective work on the part of a bank have no place in fixing a bank, objectively, with knowledge or belief sufficient to put a payment instruction on hold ...": [2021] Bus LR 451 at [130]. On appeal, the Court of Appeal distinguished between a bank's obligation to make inquiries "if they were or ought to be on inquiry", and an obligation to make inquiries "in any circumstances", which was a different issue ([64]). Birss LJ suggested a duty of care could arise if the bank was "on inquiry that an instruction may be vitiated by APP [authorised push payment] fraud ..." ([75]).

The Supreme Court overturned the Court of Appeal's conclusion that the *Quincecare* duty applied in cases of APP fraud and (save in one immaterial aspect) restored the decision of HHJ Russen KC. The reasoning of Lord Leggatt is however clear that the duty is triggered if the bank is on inquiry, as opposed to a freestanding duty which arises regardless of what the bank knows: see eg [90]-[91], [96]-[97], [99]-[100] and [47], [52], [80] and [86]. It is only "[w]here a bank is 'put on inquiry' in the sense of having reasonable grounds for believing that a payment instruction given by an agent purportedly on behalf of the customer is an attempt to defraud the customer..." that there is an obligation to refrain from executing the instruction without first making inquiries to verify it has been authorised by the customer. If the bank fails to do so, it will be in breach of duty and acting without authority from its customer and will not be entitled to debit the payment to the customer's account ([97]). By contrast, if the instruction is clear and given by the customer personally or by an agent acting with apparent authority, "no inquiries are needed to clarify or verify what the bank must do" and the bank's duty is to execute the instruction ([100]).

This reasoning applied agency principles to determine whether the agent's payment instruction is authorised or not. This was a departure from the position in *Quincecare*, where Steyn J proceeded on the basis that the bank had received a "valid and proper order" despite the fact the agent in question was defrauding its principal. Lord Leggatt held in *Philipp* that this was wrong and overlooked the potential consequences of the agent's dishonesty on whether they had authority ([55] and [69]ff). The effect of the agent's dishonesty is not the same for actual and apparent authority. An agent would not have actual authority to defraud its principal, but the agent's dishonesty does not prevent them from having apparent authority by virtue of a holding out from the principal. This is subject to the limits of apparent authority, which requires consideration of whether the third party is on notice or on inquiry of the lack of authority.

Specifically, Lord Leggatt observed that apparent authority does not exist where the third party has notice of the lack of actual authority, and thus does not protect someone who "has reason to believe that the agent is acting without authority and fails to make inquiries that a reasonable person would have made in the circumstances to verify that the agent had authority" ([86]).

The prior authorities did not speak with a consistent voice as to what the limits of actual authority were. Lord Leggatt preferred the approach of the Privy Council in *East Asia Co Ltd v PT Satria Tirtama Energindo* [2020] 2 All ER 294, which involves a court asking whether the third party “failed to make the inquiries that a reasonable person would have made in all the circumstances to verify that the agent had ... authority” ([89]).

This is the nub of the test adopted in *East Asia* to determine whether the third party “was put on inquiry as to [the agent’s] lack of actual authority”: see the section of the judgment from [70]-[95]. This is however very different to a freestanding duty of inquiry. As the Board put it in *East Asia* at [75] (after reviewing previous authority and in a passage that was subsequently echoed by Lord Leggatt in *Philipp*), “... if the third party has reason to believe that the agent does not have actual authority and fails to make the inquiries that a reasonable person would have made in the circumstances to verify that the agent has authority, then the estoppel cannot arise, for in such a case reliance on the representation would hardly be reasonable” (emphasis added). Consistent with the *Quincecare* cases addressed above, this ties in with there being a particular trigger for the need to make inquiries.

This reading of *East Asia* is confirmed by Lord Sumption’s judgment in the Hong Kong Court of Final Appeal in *PT Asuransi Tugu Pratama Indonesia TBK v Citibank NA* [2023] HKCFA 3 at [17]. He noted that the phrase “on inquiry” is traditional, but “apt to mislead” because “[t]here is no general obligation spontaneously to inquire into an agent’s authority and no rule that fixes the third party with notice of what might be discovered upon such an inquiry...”. The relevant question is whether the information the third party has calls for inquiry.

### **Apparent authority cases**

In the recent Court of Appeal decision in *Giwa v JNFX Ltd* [2025] EWCA Civ 961 (*Giwa*), it appears that an attempt was made to argue that unless a third party makes reasonable inquiries, they cannot rely on apparent authority. The court considered whether *Philipp* was to be interpreted as imposing such a requirement. Nugee LJ answered that question in the negative (at [99]-[100]). He indicated that the principle that a third party could not rely on apparent authority if it failed to make reasonable inquiries “only applies if the third party has reason to believe that the agent is acting without authority”. In other words, there is no duty to make reasonable inquiries in the abstract. On the facts, Nugee LJ held that the claimant had no reason to believe the agent in question lacked authority, but even if he should have made reasonable inquiries, it made no difference to the result on the facts.

Had this decision gone the other way and held that there was a duty to make reasonable inquiries in every case, the same logic would have applied in the banking context, when considering what a bank needs to do before it can rely on the authority of an agent to debit the customer’s account. The Court of Appeal – it is respectfully submitted rightly – declined so to hold.

The same principle can be seen in the earlier Supreme Court decision in *Law Debenture Trust Corp plc v Ukraine* [2024] AC 411. One of the grounds on which Ukraine resisted liability under the Eurobonds at issue in that case was that they had been concluded in breach of a Ukrainian budget law.

The Trustee of the Eurobonds was said to be on notice of that breach, and Ukraine contended this meant that not only did the Minister of Finance lack actual authority, but the Trustee could not rely on apparent authority. The Court of Appeal proceeded on the basis that the Trustee of the Eurobonds was to be taken to know of publicly available Ukrainian legislation, but rejected the contention that the Trustee was on notice of a breach of the budget limit on the facts ([2019] QB 1121 at [114]-[126]).

The Supreme Court observed that the “critical question” was whether the Trustee was put on inquiry as to whether the Notes would breach the borrowing limit ([91]). Earlier in the judgment, the court explained that this was to be evaluated by reference to the approach in *East Asia*.<sup>3</sup> It rejected the Court of Appeal’s reasoning that the Trustee was taken to know about the Ukrainian budget limit. The Supreme Court held that “[t]he question the [Court of Appeal] ought to have asked itself was whether a reasonable person in the position of the Trustee would have made inquiries which would have revealed the limit and, if they would, that the issue of the Notes would or might lead to a breach of it” ([95]). This does not envisage there is a need to make inquiries in every case.

The Supreme Court held that this question was to be answered in the negative. The Trustee was entitled to assume the Minister had the authority he claimed to have and was not on inquiry of the budget limit ([96]-[102]). The court reasoned that it was sufficient to conclude the apparent authority in the Trustee’s favour “[i]f the Trustee was not aware of the existence of the purported limit on external borrowing imposed by [the Ukrainian budget law] and, as we would hold, a reasonable person would not have been put on inquiry as to its existence or relevance to the issuance of the Notes ...”.

### **The wider context: beyond *Quincecare* and apparent authority cases**

The approach that has been advocated in this article of distinguishing between owing a duty of inquiry or investigation in the abstract and owing such a duty when “on inquiry” is also supported by authorities in other areas of law.

Three examples can usefully be developed:

#### **1. Bona fide purchaser**

The Privy Council has considered when a bank will have constructive notice of impropriety in the context of determining whether a bank has a bona fide purchaser defence to defeat a claim by a victim of fraud where the bank has received some of the proceeds: *Papadimitriou v Crédit Agricole Corpn* [2015] 1 WLR 4265.

The Board held that the mere possibility of a third-party right was not enough to put a bank on inquiry, but it was not necessary to conclude such a right probably existed. The test is somewhere in between, such that “[t]he bank must make inquiries if there is a serious possibility of a third party having such a right or, put in another way, if the facts known to the bank would give a reasonable banker in the position of the particular banker serious cause to question the propriety of the transaction” ([20]).

Lord Sumption gave a short concurring judgment emphasising that in this context, the courts “are *not* concerned with an actionable duty to investigate” ([33], emphasis added). He held that “[t]here must be something which the defendant actually knows (or would actually know if he had a reasonable appreciation of the meaning of the information in his hands) which calls for inquiry”. If without inquiry or explanation the transaction appears to be a proper one, there is no justification for requiring the defendant to make enquiries and he is without notice. By contrast, if there are features of the transaction that if left unexplained are indicative of wrongdoing, “an explanation must be sought before it can be assumed that there is none ...”. This is broadly similar to Lord Sumption’s later explanation of the concept of being “on inquiry” in *PT Asuransi Tugu*, which has been addressed above.

## 2. Undue influence

In the context of loans secured on matrimonial property, the courts have departed from the conventional use of equitable constructive notice (which does not generally apply to commercial transactions in any event<sup>4</sup>) when developing the law of undue influence: *Royal Bank of Scotland Plc v Etridge (No 2)* [2002] 2 AC 773 (*Etridge*)<sup>5</sup> This requires the bank to take a series of prescribed steps as laid down by the House of Lords in particular situations to avoid being fixed with constructive notice.

This is a very different situation to a bank deciding when it receives instructions from an agent whether it is on inquiry that that agent is defrauding its principal. Even in the undue influence context however, the Supreme Court has recently emphasised that the approach is “binary” in nature, and either the creditor is on notice of the risk of undue influence or it is not, and this determines whether further steps are required.<sup>6</sup> As the court put it, “... if the creditor is on notice, then the *Etridge* protocol must be followed, whereas if it is not, *there is nothing to be done, and no steps are required at all*” ([52]). There is no general duty of inquiry, and the Supreme Court preferred to focus on whether there is “... on the face of the non-commercial transaction, a surety element giving rise to a heightened risk of undue influence or there is not”.

## 3. Auditors

Even for professionals such an auditor whose duties include taking reasonable care regarding the detection of fraud, the courts have traditionally recognised a distinction between cases where there is “nothing to excite suspicion” where “very little inquiry will be reasonably sufficient” and a situation where “suspicion is aroused” where “more care is obviously necessary”.<sup>7</sup> An auditor’s duties will now be informed by accounting standards<sup>8</sup> and this is of course very different to a bank considering a payment instruction. Nonetheless, it illustrates how anomalous it would be to impose a “one size fits all” duty to make inquiries on a bank, even where there are no facts putting it on inquiry.

## Conclusion

This article has sought to highlight the distinction between a generally applicable duty to make inquiries or investigate the situation on the one hand, and a duty which is “triggered” by being “on inquiry” of particular circumstances on the other. It is submitted that it is a mistake to regard *Quincecare* as giving rise to a freestanding and generally applicable duty to investigate, regardless of the facts known to the bank.

It might be objected that the distinction that this article seeks to draw can be undermined by the test which the court applies when considering when a bank is “on inquiry”, given it involves asking whether there has been a failure to make inquiries that ought reasonably have been made in the circumstances. It might therefore be suggested this collapses the distinction between a generally applicable duty, and a duty which arises in particular circumstances. It is submitted that any such objection is unpersuasive. *JPMorgan v Nigeria*, indicates that a bank which is “acting honestly and without reasonable grounds for believing that its customer is being defrauded, has *no duty of care to enquire/investigate ...*”. It is submitted that this remains good law post *Philipp*, and the fact the authorities recognise a trigger for the duty to become engaged indicates it does not arise in all situations.

A useful rule of thumb is that there generally needs to be something known to the bank which triggers the need to make inquiries.<sup>9</sup> That conclusion is also consistent with the Court of Appeal’s recent analysis in *Giwa*, in the context of apparent authority.

1. Prior to *Philipp*, these were in chronological order: *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2020] AC 1189; *JP SPC 4 v Royal Bank of Scotland International Ltd* [2023] AC 461 and *Stanford International Bank Ltd v HSBC Bank plc* [2023] AC 761.
2. [2022] EWHC 1447 (Comm) at [158(iii)]: “[u]nless the bank is on notice that the instruction in question may be vitiated by fraud - that the payment instruction is an attempt to misappropriate the customer’s funds - the duty does not arise”.
3. At [39]: “[Apparent authority] protects a contractor who is entitled to assume that the person with whom he is dealing has the authority which he appears to have. But the principle cannot be relied upon by a contractor who is put on inquiry, by which we mean that the contractor fails to make the inquiries that a reasonable person would have made in all the circumstances to verify that the person with whom he is dealing does indeed have authority: [citing *East Asia*]”.
4. See eg *Manchester Trust v Furness* [1895] 2 QB 539 at 545.
5. See eg at [39].
6. *Waller-Edwards v One Savings Bank* [2025] UKSC 22 at [52].
7. *In re London and General Bank (No 2)* [1895] 2 Ch 673 at 683. See also the Singapore Court of Appeal decision in *PlanAssure PAC v Gaelic Inns Pte Ltd* [2007] SGCA 41 at [52] (holding that an auditor is not required to take a wholly sceptical view about the veracity of the account, by making further inquiries in all cases regardless of whether suspicious circumstances exist).
8. See the discussion on the detection of fraud by auditors in *Jackson & Powell on Professional Liability* (9th edition) at [17-093]-[17-094].
9. This reflects the views of *Chitty on Contracts* (36th edition) on apparent authority, at [22-066]. See also *Bowstead and Reynolds on Agency* (23rd edition) at [8-048].