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Commercial Fraud Lawyers Association: When Banks Must Say No: the Quincecare duty in Singularis v Daiwa and JPMorgan v Nigeria

Paul Downes QC

Stewart Chirnside

Simon Oakes

The Legal 500 UK Awards 2019 WINNER

WINNER Chambers BAR Awards 2018

Paul Downes QC

Called: 1991 Silk: 2010

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"When it comes to hard-fought heavyweight litigation he is the go-to silk, there is no one you would rather have beside you in the trenches."

(Legal 500, 2020)

Practice Overview

Paul specialises in commercial law, and has specific expertise in banking and finance-related matters. Paul is an Associate of the Chartered Institute of Bankers.

Before coming to the Bar, Paul worked for Barclays Bank and was an assistant examiner in the Accountancy and Banking Law examinations for the Chartered Institute of Bankers. Paul lectured in Accountancy at Stourbridge College (1985-1987) preparing bank employees for their Associateship examinations and was a consultant to Barclays Bank (1988-1993) advising on the training of staff in Accountancy (and other subjects) also for the Associateship examinations.

Paul's practice is has particular emphasis on disputes with a heavy accountancy element, including the manipulation of company accounts, departure from fundamental accounting concepts (especially prudence and accruals), the failure of company accounts to give a true and fair view, unlawful dividends, company valuations, shareholder disputes and commercial fraud.

Paul has acted as an expert witness overseas in relation to banking regulation in the UK and letter of credit, and is lead contributor to Butterworths LexisNexis Encyclopaedia on Forms and Precedents.

Paul also handles international trade, media and entertainment, and professional negligence. He acts as an arbitrator in LMAA shipping disputes, commercial disputes and insurance disputes.

He is recommended as a leading silk for Banking and Commercial Dispute Resolution in Chambers & Partners UK Bar 2019 and for Banking & Finance, Commercial Litigation, Financial Services and Fraud Civil in Legal 500 2019.

What the Directories Say

"Paul's wealth of experience in banking makes him an obvious choice for financial services disputes." (Chambers UK, 2020)

"He immediately gets stuck in and carries a matter through with dedication and energy." (Chambers UK, 2020)

"He is a formidable advocate with a huge intellect." (Chambers UK, 2020)

"Paul is a very strong barrister and a go-to for difficult cases. He's a real fighter." (Chambers UK, 2020)

"A highly skilled advocate and a devastating cross-examier, he absolutely hates to lose and clients can really tell that." (Legal 500, 2020)

"When it comes to hard-fought heavyweight litigation he is the go-to silk, there is no one you would rather have beside you in the trenches." (Legal 500, 2020)

"He gives firm advice and will tackle issues head on." (Legal 500, 2020)

"Quite simply, in a league of his own." (Legal 500, 2020)

Stewart Chirnside

Called: 2005

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"He has courtroom gravitas well beyond his years and he is an even match for many silks."

(Legal 500 UK 2017)

Practice Overview

Stewart specialises in commercial litigation, including banking and finance, commercial fraud, professional negligence, property damage and product liability. Stewart is recommended in Legal 500 as a leading junior in the fields of Banking and Finance, Financial Services and Professional Negligence and in Chambers & Partners UK Bar as a leading junior for Commercial Dispute Resolution.

Described in legal directories as having "courtroom gravitas well beyond his years", he has also been praised for having "an amazing work ethic, a client-friendly approach and excellent advocacy skills". He has also been described as "immensely intelligent" and "a fantastic advocate who is always meticulously prepared".

Stewart regularly appears in trials in the High Court (both as junior and sole counsel) and he is also regularly instructed on interlocutory applications in relation to freezing orders and other interim relief. He also has experience of international arbitrations and appeals to the Court of Appeal where he has appeared most recently in ***PHP Tobacco Carib Sarl v BAT Caribbean SA*** [2017] EWCA Civ 1131 (an appeal in relation to the existence of an exclusive jurisdiction agreement under Recast Brussels Regulation).

Before joining the Bar, Stewart worked as a strategy and risk management consultant in the financial services industry. Stewart is a modern languages graduate with an excellent knowledge of French and German.

What the Directories Say

"Stewart is always meticulous, reliable and good at the paperwork." (Chambers UK, 2020)

"A very bright, solid, persuasive, reliable and pleasant general commercial counsel." (Legal 500, 2020)

"He is a very bright junior barrister." (Legal 500, 2020)

"User friendly, fantastic with clients, and consistently delivers." (Legal 500, 2020)

'Technically excellent; able to absorb and digest complex financial services litigation.' (Legal 500, 2019)

'Always willing to express a view and works well with the instructing solicitor.' (Legal 500, 2019)

'A solid junior.' (Legal 500, 2019)

..."Processes huge quantities of information and devises coherent strategies very quickly." ..."Approachable and measured, he always provides thorough and pragmatic advice." ... (Chambers UK 2019)

"Helpful and proactive, he's very well prepared and a strong advocate." "He does not take long to come to considered views, which invariably prove accurate." (Chambers & Partners UK Bar 2018)

'He has excellent judgement and the stomach for a fight.' (Legal 500 UK 2017)

"He has an amazing work ethic, a client-friendly approach and excellent advocacy skills" (Legal 500 UK 2016)

Simon Oakes

Called: 2010

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"An effective and valuable junior counsel, who is a very competent young barrister with the ability to think quickly"

(Legal 500, 2020)

Practice Overview

Simon practises in commercial law, with a particular focus on banking & financial services, and complex commercial fraud cases.

Simon has a wealth of experience in some of the most significant banking and financial services cases of recent years, from major interest rate hedging product litigation to regulatory investigations against individuals. He has a deep knowledge of the allegations of LIBOR misconduct against several major banks, a great deal of experience in misselling cases, and a wealth of experience of developing legal and tactical arguments in major commercial litigation.

Simon is recommended as a leading junior in the Legal 500.

Significant recent instructions include:

» ***Three ongoing multi-million pound*** deceit claims against Bank of Scotland and/or Lloyds Banking Group

» Providing expert advice in multiple, High Court cases as to the impact of Brexit on the security of European motor insurers, and FSCS protection.

» ***Aldersgate & Ors v Bank of Scotland & Anor*** [2018] EWHC 2601 (Comm): a Commercial Court claim in excess of £100 million, alleging fraudulent and negligent misrepresentation arising out of LIBOR manipulation. The case also involved a ground-breaking interlocutory application by the defendant, attempting to withdraw pleaded admissions of findings by global regulators.

» The LIBOR test case of ***Graiseley Properties Ltd v Barclays Bank Plc, Deutsche Bank AG v Unitech Global Ltd*** [2013] EWCA Civ 1372 (CA), in the Court of Appeal and in the High Court. One of The Lawyer's 'Top 20 cases' of 2013.

» ***Hockin v Royal Bank of Scotland*** in the High Court: a £55 million Financial List banking case concerning interest rate products and the bank's Global Recovery Group ('GRG'), and involving issues of misrepresentation, LIBOR manipulation, unlawful means conspiracy and implied duties of good faith.

» ***Viavi v Shannan & Others*** [2018] EWCA Civ 681: a significant dispute about the validity of deeds, the principle in Re Duomatic, and estoppel by deed.

Having been seconded to both the Financial Services Authority and the Pensions Regulator, Simon has an excellent understanding of how regulators approach cases. He has acted both for and against the targets of regulatory action, including in multi-jurisdictional cases.

Simon is frequently instructed as sole advocate in the High Court, County Court and Employment Tribunals. He also acts as part of larger counsel teams on long-running commercial litigation.

Appointed to the Attorney General's C Panel of London Counsel on 2 September 2019.

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When Banks Must Say No

Singularis & JP Morgan

Paul Downes QC
Stewart Chirnside
Simon Oakes

2nd December 2019

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Overview

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- Introduction
- *JP Morgan Chase v Federal Republic of Nigeria*
  - Scope of the *Quincecare* duty
  - Exclusion of the duty?
- *Singularis v Daiwa Capital*
  - Scope of duty
  - Attribution / Illegality
  - Circuity
- POCA
- Conclusion

JP Morgan Chase v Nigeria [2019] EWCA Civ 1641

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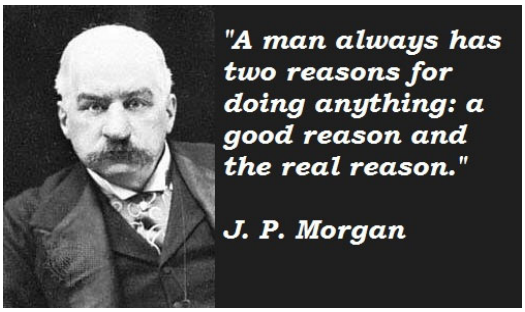

JP Morgan v Nigeria

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- Long running dispute over rights to exploit Nigerian oilfield
- Dispute settled pursuant to various settlement agreements
- US$1 billion paid into a depository account with JP Morgan in FRN's name to be used to pay settlement
- JP Morgan paid out US$875 million on instructions from Minister of Finance and Accountant General of FRN who were authorised signatories on the depository account
- FRN claimed that instructions were fraudulent and part of a corrupt scheme to defraud it involving highest levels of Nigerian government

Barclays Bank v Quincecare [1992] 4 All ER 363

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Barclays Bank v Quincecare

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- Bank lent £400k to Quincecare to purchase 4 chemist shops
- Chairman withdrew £340k and transferred it to US for his benefit
- Chairman went to prison
- Bank sued Quincecare and guarantor – Unichem – for repayment of the loan
- Guarantor argued that Bank was in breach of mandate / negligent
- Nothing unusual about dealings/transaction from bank's point of view

Barclays Bank v Quincecare per Steyn J

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*"Ex hypothesi one is considering a case where the bank received a valid and proper order which it is **prima facie bound to execute promptly** on pain of incurring liability for consequential loss to the customer. **How are these conflicting duties to be reconciled** in a case where the customer suffers loss because it is subsequently established that the order to transfer money was an act of misappropriation of money by the director or officer? …*

***In judging where the line is to be drawn there are countervailing policy considerations.** The law should not impose too burdensome an obligation on bankers, which **hampers the effective transacting of banking business unnecessarily**. On the other hand, the law should guard against **the facilitation of fraud**, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties…*

*In my judgment the sensible compromise, which strikes a fair balance between competing considerations, is simply to say that **a banker must refrain from executing an order if and for as long as the banker is 'put on inquiry' in the sense that 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 an **ordinary prudent banker** is the governing one. That in my judgment is not too high a standard…"*

Lipkin Gorman (a firm) v Karpnale Ltd [1989] 1 WLR 1340

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Lipkin Gorman v Karpnale per Parker LJ

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"If a reasonable banker would have had reasonable grounds for believing that Cass was operating the client account in fraud, then, in continuing to pay the cash cheques without inquiry the bank would, in my view, be negligent and thus liable for breach of contract…"

*"I would not, however, accept that a bank could always properly pay if it had reasonable grounds for a belief falling short of probability. **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**, or, in this case, that there was a serious or real possibility that Cass was drawing on the client account and using the funds so obtained for his own and not the solicitors' or beneficiaries' purposes. That, at least, the customer must establish. If it is established, then in my view a reasonable banker would be in breach of duty if he continued to pay cheques without inquiry. He could not simply sit back and ignore the situation…"*

Positive and Negative Duties?

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JP Morgan v Nigeria - Scope of Duty

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*"[The cases] make clear that the **core** of the Quincecare duty of care is the **negative duty** on a bank to refrain from making a payment (despite an instruction on behalf of its customer to do so) where it has reasonable grounds for believing that that payment is part of a scheme to defraud the customer. **What is not entirely clear is whether, in addition to that core duty, a bank with such reasonable grounds has a duty to make reasonable enquiries so as to ascertain whether or not there is substance to those reasonable grounds**. I strongly incline to the view (although, as will become clear … below, I do not ultimately need to decide this) that Ms Phelps is correct in her submission that **the cases do envisage there as being an additional duty of enquiry.**"*

per Professor Andrew Burrows QC at first instance

JP Morgan v Nigeria - Scope of Duty

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- *"In most cases, the reconciliation of the conflicting duties owed by the bank to which Steyn J referred in Quincecare will require **something more** from the bank than simply deciding not to comply with a payment instruction. The bank will usually be anxious to resolve its concerns, not least so as to minimise the risk of incurring a liability to its client for any loss arising from the non-payment…*"
- *"**I do not see that it is useful to describe some parts of the Quincecare duty as being core and some parts of it as being separate or subsidiary or additional**. Nor do I think it is helpful for this court to give an indication as to what factors are likely to be relevant to the trial judge's overall assessment of what the Bank should have done…"*
- per Rose LJ

JP Morgan v Nigeria - Scope of Duty

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- *Quincecare* duty involves:
  - Negative duty not to comply with payment instruction where reasonable grounds for believing fraudulent
  - Positive duty to do "something more"
- Both aspects of duty carry equal weight
- Court of Appeal avoided specifying exactly what factors might be relevant to assessing what "something more" might be
  - all depends on facts of individual case
- Little practical guidance for banks beyond making enquiries of customer

Can Quincecare duty be excluded?

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Can Quincecare duty be excluded?

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- Four categories of clause relied on by Bank
  - Entire agreement clause which excluded duty
  - Clauses defining or delimiting the Bank's primary obligations which were inconsistent with duty
  - Exemption clause relieving the bank of liability if it acted in good faith on what it believed to be the instructions of its customer
  - Indemnity clause under which FRN was required to indemnify the Bank for all losses caused by the Bank following instructions by which the Bank was authorised to act

Can Quincecare duty be excluded?

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- It **is** possible to exclude *Quincecare* duty:

  "*It is not, of course, impossible for a bank and its client to agree that the Quincecare duty would not arise and that the bank should be entitled to pay out on instruction of the authorised signatory even if it suspects the payment is in furtherance of a fraud which that signatory is seeking to perpetrate on its client…*"
- But **clear words** would be needed
  - JP Morgan's terms were "*nowhere near clear enough*"
- Other clauses were not inconsistent with duty – they were aimed at situation where Bank acted on instructions it believed to be genuine but were not
- Indemnity clause would denude *Quincecare* duty of any value in cases where most needed

Can Quincecare duty be excluded?

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- Clear words – express reference to *Quincecare* duty required to exclude it?
- Exclusion contrary to FCA Rules – requirement to treat customers fairly?
- Subject to any statutory restrictions:
  - Unfair Contract Terms Act 1977
  - Consumer Rights Act 2015
- How does *Quincecare* duty fit with automated systems for detection and prevention of fraud?

Singularis v Daiwa Capital

[2019] UKSC 50

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Singularis v Daiwa Capital

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The villain

Singularis v Daiwa Capital

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- Singularis owned/controlled by Mr Al Sanea
- Daiwa provided finance to Singularis – invest in shares
- 2008 portfolio valued at $10bn
- 2009: Singularis sold substantial investments in HSBC & JP Morgan
- Daiwa concerned – increased security – nothing delivered
- May 2009: Family defaulted on loan and Saudi assets frozen
- Daiwa sought exit - $204m on client account
- June 2009: $199m paid to Saad Specialist Hospital Company
- July 2009: $5m paid to Saad Air

First Instance: Rose J

[2017] EWHC 257 (Ch)

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- Al Sanea was in breach of fiduciary duty in making payments
- Al Sanea's duties changed when Co. in precarious state
- Claim for dishonest assistance failed
- Daiwa owed *Quincecare* when on enquiry
- No principle which precluded claim by one man company
- Glaringly obvious that payments were not for Co benefit
- Daiwa therefore negligent – damages reduced 25%

Court of Appeal
[2018] EWCA Civ 84

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Main issues on appeal:

(1) Scope of Duty

(2) Illegality defence: attribution

(3) Illegality defence: public policy

(4) Circuity of action defence

(1) Scope of Duty

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"The limited scope of the Quincecare duty makes it obvious that it is only to protect the customer from the loss of its money, and that only the customer can vindicate a claim for breach of it…

For these reasons, the judge was, I think, right to conclude that the Quincecare duty applied, even where only the creditors of a company, to whom it is not directly owed, stood in practice to benefit from the proceedings."

Per Vos C.

(2) Attribution: "One Man Company"?

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(2) Attribution: "One Man Company"?

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"None of the other directors was found to have been recklessly indifferent, even if they were contributorily negligent. Moreover, the judge made "no finding as to whether the directors at any stage exercised any influence over the management of the company" … The burden was on Daiwa to show that Singularis's other directors played no role in its management in order to make good its defence, which it seemingly failed to do."

Per Vos C.

(3) Illegality

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"I accept Mr Miles's submission that barring Singularis's claim would serve to undermine the carefully calibrated Quincecare duty, and would not be a proportionate response, particularly where, as the judge said, Daiwa's breaches were so extensive and the fraud was so obvious."

Per Vos C.

(4) Circuity of action

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"The existence of the fraud was a precondition for Singularis's claim based on breach of Daiwa's Quincecare duty, and it would be a surprising result if Daiwa, having breached that duty, could escape liability by placing reliance on the existence of the fraud that was itself a pre-condition for its liability."

Per Vos C.

Supreme Court Judgment

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"*This case is bristling with simplicity* […] *Daiwa should have realised that something suspicious was going on and suspended payment until it had made reasonable enquiries to satisfy itself that the payments were properly to be made. The company (and through the company its creditors) has been the victim of Daiwa's negligence.*"

Per Lady Hale at [39]

Supreme Court Judgment

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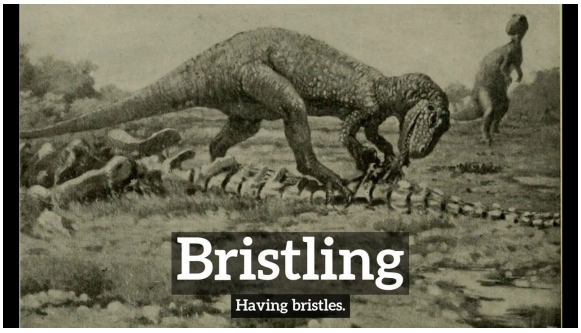

Supreme Court Judgment

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- **No attribution**:
  - Test depends on purpose of attribution, not 'one man' nature of company
  - *Stone & Rolls* "*can finally be laid to rest*"
  - Banks are different to auditors
  - Companies are different to individuals

Supreme Court Judgment

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- Even if attribution had been found:
  - **No illegality defence**: Purpose, public policy, disproportionality
  - **No causation**: "*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]

POCA

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- POCA 2002 criminalises dealing in "criminal property" (ss.327-329)
- Mens rea is suspicion (ss.327-329)
- Actus reus is dealing with "benefit from criminal conduct" (s.340)
- Bank knows it is suspicious – cannot know whether property is POC
- Bank therefore acts defensively: freeze and report, seek consent
- Bank cannot make enquiries – risk of tipping off (s.333)
- Question: If Bank has consent from NCA – is it exposed to civil liability?

Suspicion v Placed on Enquiry

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- Suspicion: based on criminal law – think there's a possibility more than fanciful
- On enquiry: facts and matters which cause a reasonable banker to enquire
- Both are usually triggered by transaction factors that are out of the ordinary
- POCA – potential victim is third party – account holder is accessory
- Singularis – potential victim is the account holder
- BUT – in POCA dimension Bank cannot enquire – tipping off (s.333)

Case Study

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- Bank holds account for XYZ Ltd – Directors are A and B
- Bank is concerned about unusual transactions going through the account
- Bank reports transactions to NCA – consent is obtained
- If XYZ is being used by A and B as vehicle for fraud – XYZ is also a victim
- If XYZ becomes insolvent – claims by fraudsters – liquidators may bring claims against the bank
- Fact that consent was sought – could be presented as grounds for enquiry

Conclusion

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- Singularis will strengthen grounds for claims against banks
- Not limited to classic "asset stripping" claims
- Singularis could also be deployed in fraudulent trading type situations
- POCA and defensive reporting culture could be problematic for banks
- Liquidators/IPs should consider AML/SARs history where evidence of dishonesty against directors

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