Easter Term
[2022] UKPC 18
Privy Council Appeal No 0044 of 2020

JUDGMENT

Royal Bank of Scotland International Ltd (Respondent) *v* JP SPC 4 and another (Appellants) (Isle of Man)

From the High Court of Justice of the Isle of Man (Staff of Government Division)

before

Lord Briggs
Lord Kitchin
Lord Hamblen
Lord Burrows
Lady Rose

JUDGMENT GIVEN ON
12 May 2022

Heard on 10 February 2022

Appellants (JP SPC 4 and JP SPC 1)
Stephen Auld QC
Oscar Schonfeld
(Instructed by Keystone Law (Douglas))

Respondent
Giles Wheeler QC
(Instructed by Appleby (Isle of Man) LLC (Douglas))

LORD HAMBLEN AND LORD BURROWS: (with whom Lord Briggs, Lord Kitchin and Lady Rose agree)

1. Introduction

1. This appeal concerns whether a bank owes a duty of care in the tort of negligence to a person who is known to be the beneficial owner of moneys held in the account of a customer of the bank and who has been defrauded by the customer.

2. The alleged facts engage two problematic areas for the tort of negligence. The first is that the type of loss in question is pure economic loss (as opposed to economic loss directly consequent on personal injury or property damage). The second is that the relevant conduct of the defendant is an omission (as opposed to a positive act) in the sense that the conduct complained of consists of a failure to prevent the wrongdoing of a third party causing loss to the claimant. It is well established that, in those problematic areas, whether a duty of care is owed does not rest simply on whether the defendant should reasonably have foreseen that the loss to the claimant was likely. Rather for there to be a duty of care owed there are additional limiting requirements. See generally, on these two problematic areas, James Goudkamp and Donal Nolan, *Winfield and Jolowicz on Tort*, 20th ed (2020), paras 5-029 to 5-039, 5-048 to 5-056; *Clerk and Lindsell on Torts*, 23rd ed (2021), paras 7-51 to 7-68, 7-104 to 7-156.

3. The beneficial owner is the first claimant in the proceedings and appellant in the appeal ("the Fund"). It is a Cayman Island based investment fund which established a scheme by which investors were to seek a profit by lending to solicitors in England and Wales to finance their pursuit of high-volume, low-value litigation ("the Scheme"). The customer is an Isle of Man company, Synergy (Isle of Man) Ltd ("SIOM"), through whom the loans were to be advanced and repaid. The bank is the defendant in the proceedings and respondent in the appeal ("the Bank").

4. SIOM held two bank accounts ("the Accounts") with the Bank; one of those accounts was used to pay out loans and the other was used to receive repayments. Although the Accounts were held with the Bank by SIOM, the money held in those accounts is alleged to have belonged beneficially to the Fund, as the Bank is alleged to have known.

5. The Fund has commenced proceedings against the Bank before the Isle of Man courts. The allegation advanced in these proceedings is that SIOM and two of the individuals behind it were parties to a fraud by which money beneficially belonging to

the Fund was paid out for the benefit of those individuals (or their associated companies or other associates) rather than by way of legitimate investments of the kind that the Scheme was intended to make.

6. The Fund alleges that the Bank owed it a "duty of care in tort to exercise reasonable care and skill". The effect of that duty is said to be that, "if the circumstances were such that a reasonable banker would have had grounds for considering that there was a serious or real possibility that the [Fund] was being defrauded and/or its funds were being misapplied …, [the Bank] was obliged not to honour instructions in relation to [the Accounts] until such time as it had made reasonable enquiry and satisfied itself as to the propriety of the conduct of [the Accounts]". The effect of the alleged duty, if established, would be that the Bank was under a duty to take reasonable care to protect the Fund from losses caused by the fraudulent misappropriation of funds from the Accounts.

7. The losses which the Fund seeks to recover from the Bank are losses which the Fund allegedly suffered as a consequence of the fraud but which the Fund alleges the Bank ought to have prevented. The Bank is not itself alleged to be a party to, or otherwise responsible for, the fraud.

8. The Bank applied to strike out or summarily dismiss the claim on the basis that there is no arguable pleaded basis on which the Fund can establish that the Bank owed it the alleged duty of care. That application was dismissed at first instance by Deemster Wild in a judgment of 15 October 2019. The Bank's appeal was allowed by the High Court of Justice of the Isle of Man Staff of Government (Appeal Division) (Judge of Appeal Storey QC and Deemster Collas) ("the Court of Appeal") in a judgment of 9 March 2020 ("the Judgment"). Permission to appeal was granted by the Privy Council by order dated 13 January 2021.

2. The Fund's factual case

9. The Fund's factual case is as set out in its Amended Particulars of Claim and the witness statement of John Paul Royle of Grant Thornton Specialist Services (Cayman) Ltd ("Grant Thornton"), one of the Fund's joint receivers, which was provided in response to the Bank's strike out/summary judgment application. The facts are agreed only to the extent that it is agreed that the Bank's application fell to be determined (and this appeal falls to be determined) on the basis that the Fund would be able to prove at trial the pleaded facts as they allege them to be.

(i) The parties and the Accounts

10. The Fund is an investment vehicle incorporated in the Cayman Islands as part of the Scheme. Under the Scheme investors subscribed to the Fund in response to and in accordance with the terms of the Offering Memoranda. The subscribed funds were to be lent onward by the Fund to solicitors in England and Wales for the purposes of those solicitors pursuing low-value, high-volume claims such as Payment Protection Insurance claims. The basis of the Scheme was that these claims would be profitable for the solicitors and that the loans would be repaid to the Fund with interest. The Fund is in receivership. The receivers are directors of Grant Thornton.

11. The Bank was part of the RBS Banking Group and carried on business in the Isle of Man. Pursuant to the Scheme, the funds flowed from the Fund's account in Cayman to an account held at the Bank (the "Main Account") by SIOM. SIOM was described in the Offering Memoranda as the "Loan Originator/Manager", responsible for the disposition and investment of fund moneys in accordance with the terms of the Scheme documentation. SIOM was specifically used to handle investors' moneys offshore which were remitted from the Main Account to law firm borrowers and other third parties. Loans repaid by law firms were paid into a separate account with the Bank (the "Repayment Account") also held by SIOM.

12. SIOM was an Isle of Man company owned by Mr Timothy Schools ("Mr Schools") and Mr David Kennedy ("Mr Kennedy") (subsequently Mr Schools alone). Mr Schools was a solicitor and Mr Kennedy an independent financial adviser and together they had conceived the Scheme.

13. Mr Schools and Mr Kennedy also jointly owned The Synergy Solution Ltd ("TSSL") which was described as the "Fund Manager" under the Scheme, and they had their own private interests in profiting from the Scheme. Given SIOM's role handling and holding investor funds under the Scheme arrangements, a fiduciary services provider regulated in the Isle of Man was appointed to provide independent directors of SIOM. These directors were to manage SIOM, including the exercise of day to day control of the Main and Repayment Accounts. In practice, however, SIOM was at all material times under Mr Schools' and/or Mr Kennedy's direct or indirect control.

(ii) The operation of the Scheme

14. At the outset of the Scheme in 2009, Clearwater Fiduciary Services Ltd ("Clearwater") was appointed as fiduciary services provider. Two of its directors, Ms Victoria Prentice and Mr John Bingham, were appointed directors of SIOM.

Immediately following the first receipt of investor funds into the Main Account, Ms Prentice and Mr Bingham gave notice to resign their services, stating to Mr Schools and Mr Kennedy that the documentation published in respect of the Scheme was "wholly inaccurate" and that they had concerns about reputational risk because of the manner of the proposed operation of the Scheme. Shortly thereafter, the initial investor funds were returned from the Main Account to the Fund and Clearwater, Ms Prentice and Mr Bingham were replaced by Turnstone (Isle of Man) Ltd ("Turnstone") as fiduciary services provider, and Peacock Management Ltd, a subsidiary of Turnstone, was appointed as SIOM's sole director.

(iii) The alleged fraud

15. Mr Schools and Mr Kennedy, through SIOM, misapplied the Fund's moneys, using the Main Account such that, rather than the flow of funds being from the Fund to the solicitors for the pursuit of legal cases and paid back upon case settlement or success, moneys were diverted from the Main Account directly or via another account at the Bank held by SIOM (the "House Account") to numerous third party accounts. The payments into those third party accounts were ultimately for the benefit of Mr Schools and Mr Kennedy, such payments being contrary to the scope of SIOM's authority under the Scheme documentation.

16. Between July 2009 and October 2012, approximately £110m of investors' money was transferred from the Main Account, purportedly to law firms as loans made as part of the supposed investment, but of this amount only £65m in fact went to law firms. Mr Schools and Mr Kennedy were able to transfer approximately £37.8m from the Main Account, in some cases via the House Account, to various third parties (excluding the law firms) in which they had a beneficial interest and to their own personal accounts in Switzerland, France and the Isle of Man. Of the £65m that did go to law firms, around £40m went to law firms in which Mr Schools had an interest which had not been disclosed to investors, contrary to the terms of the Scheme. The transactions through the Main Account were relatively few in number but the misappropriations were of substantial amounts. Until February 2012 only three law firms borrowed from the Scheme. The highest number of law firms borrowing under the Scheme was only ten, with three joining only two months before the Scheme was suspended in October 2012.

17. The operation of the Main Account and the House Account held by SIOM at the Bank involved some personal interaction between a named manager at the Bank and Turnstone.

(iv) Renaming of the Main and Repayment Accounts and designation as "high risk"

18. In December 2011, the descriptions of the Main Account and the Repayment Account were changed to “client accounts” by the Bank after consultation with its legal team. They were renamed “Synergy (Isle of Man) Ltd Client Account re JP SPC 4 OBO Axiom SP” and “Synergy (IOM) Ltd Repayment Client Account re JP SPC 4 OBO Axiom SP”, which the Fund contends reflected its underlying beneficial ownership.

19. At some point prior to 31 January 2012, the Bank identified these accounts as “high risk”. During 2012, following their renaming and designation as “high risk”, at least £60m was misappropriated through these Accounts.

(v) Payments to Mr Schools and Mr Kennedy

20. Whilst the first fund manager was TSSL (a company registered in the UK), from January 2012 the fund management role was assigned to Tangerine Investment Management Ltd (“TIM”) a company registered in Cayman and solely owned by Mr Schools. As noted in the Scheme documentation, a key supposed purpose of SIOM and Turnstone was to prevent the fund managers handling Scheme moneys. Despite this, the Bank made and/or permitted payment out of the Accounts of £2m to TSSL directly and £14.7m to TIM. A further £5.8m was paid to Mr Schools directly or through his offshore corporate vehicles between January 2010 and October 2012 and £4.4m was also sent to Mr Kennedy directly or through his offshore vehicles.

21. Indices of fraud in relation to the Scheme were discovered shortly before October 2012. As a result, the Fund’s dealings were suspended and all further advances to the Main Account stopped. The Fund and its directors, all of whom were based in Cayman, were never under the control of Mr Schools or Mr Kennedy, were not parties to the fraud and had no ability to monitor any of the accounts held by SIOM at the Bank.

(vi) The Fund’s case in outline

22. The Fund’s case is that there were numerous red flags and indications (in addition to the change of fiduciary services provider and directors in 2009) putting the Bank on notice of potential or actual fraud from the inception of the Scheme, as detailed in the Amended Particulars of Claim. All of the fraudulent payments were made by the Bank from the Accounts and a very substantial part of the fraud was committed after the re-naming of those accounts as client accounts and their

designation as “high risk”. It is the Fund’s case that the Bank did not take the steps that it ought to have taken in response to the evidence of potential fraud. The Fund alleges that, had the Bank acted as it should have done, all or a very substantial part of the loss suffered by the Fund from the fraud perpetrated by Mr Schools and Mr Kennedy (amongst others) could, and would, have been prevented.

3. The alleged duty of care

23. The basis of the alleged duty of care is set out in paras 68 to 71 of the Amended Particulars of Claim as follows:

> “68. From the date upon which [the Bank] ought to have known that the moneys in the [Accounts] were not beneficially the property of SIOM, but instead of the [Fund], [the Bank] owed the [Fund] ... a duty of care in tort to exercise reasonable care and skill.
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> 69. By virtue of such duty, if the circumstances were such that a reasonable banker would have had grounds for considering that there was a serious or real possibility that the [Fund] was being defrauded and/or its funds were being misapplied, generally or in relation to any specific transaction, [the Bank] was obliged not to honour instructions in relation to the [Accounts] until such time as it had made reasonable enquiry and satisfied itself as to the propriety of the conduct of those accounts. Such enquiry would have involved at least contacting the Administrator and/or the Directors and apprising it/them of [the Bank]’s concerns.
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> 70. Further or alternatively, and pending disclosure, the [Fund] will say that even before [the Bank] ought to have identified that moneys in the [Accounts] were beneficially the property of the [Fund], it ought to have been apparent to [the Bank] that the moneys passing through the [Accounts] were not beneficially the property of SIOM. Accordingly, [the Bank] owed such unidentified (to [the Bank]) beneficial owner a duty of care in tort to exercise reasonable care and skill. That beneficial owner was in fact the [Fund].

> 71. By virtue of such duty, if the circumstances were such that a reasonable banker would have had grounds for considering that there was a serious or real possibility that the unidentified (to [the Bank]) beneficial owner was being defrauded and/or its funds were being misapplied, generally or in relation to any specific transaction, [the Bank] was obliged not to honour instructions in relation to the [Accounts] until such time as it had made reasonable enquiry and satisfied itself as to the propriety of the conduct of those accounts. Such enquiry would have involved at least identifying that the beneficial owner was the [Fund] and contacting the Administrator and/or the Directors and apprising it/them of [the Bank]'s concerns."

24. The Fund's primary pleaded case is therefore that the duty of care arose by reason of the Bank's (actual or constructive) knowledge of the Fund's beneficial ownership of the moneys held in the Accounts (para 68). Its alternative case is that such a duty was owed by reason of the fact that it ought to have been apparent to the Bank that the moneys passing through the Accounts were not beneficially the property of SIOM (para 70). It will be apparent that if the Fund's primary case (which requires the Bank to have knowledge of the identity of the beneficial owner) fails in law then its alternative case (which only requires the lesser knowledge that the moneys are not beneficially owned by SIOM) must equally fail. It is therefore appropriate to focus on the Fund's primary case.

25. It is then alleged that "by virtue of such duty", the Bank was obliged to take various steps by way of refusing to honour instructions until reasonable enquiry had been made if the circumstances were such that it was put on inquiry as to the real possibility that the Fund was being defrauded (para 69). On the Fund's pleaded case, the Bank's alertness to fraud is therefore relevant to the question of what the Bank's pre-existing duty of care requires and how it ought to be discharged by the Bank in the factual circumstances alleged, but not to whether there is any such duty. The agreed statement of facts for the appeal at paras 18-19 and para 8 of the Fund's written case summarised the Fund's case in similar terms.

26. It follows that the pleaded facts relied upon to establish the Fund's primary case on duty of care are that the Bank knew or ought to have known that the moneys in the Accounts were not beneficially the property of SIOM, but instead of the Fund. In para 36 of its written case and in oral argument the Fund sought to put forward a duty of care in a more specific (or narrower) way than pleaded in para 68 (or para 70), based on the facts set out in *both* paras 68 and 69 (or paras 70 and 71) of the Amended Particulars of Claim. Despite the departure from the pleaded case which this involves,

we are prepared to consider whether a duty of care was owed in this case on the basis that the relevant assumed facts are as follows: (1) the Bank knew or ought to have known that the moneys in the Accounts were not beneficially the property of SIOM, but instead of the Fund and (2) the circumstances were such that a reasonable banker would have had grounds for considering that there was a real possibility that the Fund was being defrauded ("the assumed facts").

4. The principles relevant to strike out/summary judgment

27. It was common ground between the parties that the principles on strike out/summary judgment in the Isle of Man are materially the same as those in England and Wales, and that they are accurately summarised by Deemster Wild (citing from a decision of Deemster Doyle) at para 23 of his judgment as follows:

> "'Strike out
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> 28. Rule 7.3(2)(a) of the Rules of the High Court of Justice 2009 ('the 2009 Rules') provides that the court may strike out a statement of case if it appears to the court that the statement of case discloses no reasonable grounds for bringing or defending the claim.
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> 29. Mr Leech referred to the helpful judgment of High Bailiff Needham in *Irving v Harding and others* (judgment 27 May 2011) where the learned High Bailiff reviewed the relevant law. An application to strike out should not be granted unless the court is certain that the claim is bound to fail. In *Davis v Radcliffe* 1987-89 MLR 341 and 1990-92 MLR 52 it was held that a claim should not be struck out unless it is effectively unarguable, has no chance of succeeding and as such is a plain and obvious case.
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> Summary judgment
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> 30. Under rule 10.46(a)(i) and (b) of the 2009 Rules the court may give summary judgment against a claimant on the whole of a claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim

or issue and there is no other compelling reason why the case or issue should be disposed of at a trial.

31. Again High Bailiff Needham's judgment in *Irving v Harding and others* is of assistance. The learned High Bailiff referred to *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 and *Three Rivers District Council v Bank of England (No 3)* [2003) 2 AC 1. The courts have discouraged mini-trials in complex cases on disputed issues. The rule is designed to deal with cases that are not fit for trial at all.

32. Counsel referred to the judgment of Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at para 15. The court must consider whether a claimant has a realistic as opposed to a fanciful prospect of success. A realistic claim is one that carries some degree of conviction. This means a claim that is more than merely arguable. In reaching the conclusion the court must not conduct a mini-trial. This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in the factual assertions made, particularly if contradicted by contemporaneous documents. Moreover in reaching its conclusions the court must take into account not only the evidence actually placed before it on the application for summary judgment but also the evidence that can reasonably be expected to be available at trial. However it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the issue.'

…

94. Thus a claim should not be struck out unless it is effectively unarguable, has no chance of succeeding and as such is a plain and obvious case. In the context of summary judgment, the test (to the extent that it is different) is that the claim must be a realistic claim that carries some degree of conviction. It must be more than merely arguable."

28. This summary cites and relies upon the judgment of Lewison J in *Easyair Ltd (trading as Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch). As made clear at para 15(vii) of that judgment, where a case raises a point of law and "the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim". See also *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725 at para 12; *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37; [2017] 4 WLR 163 at para 27.

29. It was submitted on behalf of the Fund that, where the strike out/summary judgment application turns on a complex and developing area of the law, it is best left to be determined after a trial on the basis of actual rather than hypothetical facts - see, for example, *Richards (trading as Colin Richards & Co) v Hughes* [2004] EWCA Civ 266; [2004] PNLR 35, para 30 per Peter Gibson LJ.

30. This must depend on the extent to which the issue of law is fact dependent. Where all the relevant facts can be identified there is no reason why the issue of law cannot be determined and, indeed, it will often be consistent with the overriding objective of the Civil Procedure Rules (CPR Part 1) for that to be done, in the interest, in particular, of saving time and costs.

31. There are many precedents for decisions being reached as to whether a duty of care can be established on the basis of assumed or pleaded facts rather than following a full trial. Notable examples include *Caparo Industries plc v Dickman* [1990] 2 AC 605 (a preliminary issue assuming the facts to be as pleaded, see p 615E); *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (a preliminary issue on the question of law as to whether a duty of care was owed, see p 170A); *Customs and Excise Comrs v Barclays Bank plc* [2006] UKHL 28; [2007] 1 AC 181 (a preliminary issue on assumed facts, see p 188H); *Michael v Chief Constable of South Wales Police* [2015] UKSC 2; [2015] AC 1732 ("*Michael*") (application for summary judgment, see para 3); *N v Poole Borough Council* [2019] UKSC 25; [2020] AC 780 ("*N v Poole"*) (application to strike out, see para 9).

32. In the present case the relevant facts as to whether in law the Bank owed a duty of care to the Fund can be readily identified, namely, the assumed facts. It follows that the lower courts were correct to "grasp the nettle" and to decide the question of law, as to whether there was the alleged duty of care, one way or the other. This does not involve deciding whether, on the assumed facts, it is arguable that there is a duty of care: but rather deciding whether, on the assumed facts, there is, or is not, a duty of care.

5. The grounds of appeal

33. The grounds of appeal may be summarised as follows. The Court of Appeal erred:

(1) in failing to allow the case to proceed to trial so that it can be decided in full view of the facts;

(2) in failing to have any or any sufficient regard to key facts;

(3) in incorrectly applying the burden of proof by failing to require the Bank to show that there was an absence of reality to the Fund's claims;

(4) in mischaracterising the scope of the alleged duty of care and/or the circumstances alleged to give rise to it;

(5) in holding that it was fanciful or hopeless for the Fund to contend that on the basis of existing authority a duty of care could be established against the Bank on the facts of the present case;

(6) in holding that a duty of care could only arise on the basis of an assumption of responsibility by the Bank to the Fund and in failing to recognise the possibility of an implied assumption of responsibility;

(7) in failing to recognise that, if the duty of care alleged does not fall within an established category of duties, it would be an incremental development justified by analogy with existing authorities on duties of care to third parties to protect against economic loss and by considerations of policy;

(8) in placing inappropriate reliance on authorities concerning accessory liability; and

(9) in failing to permit amendment to the Particulars of Claim.

34. The Board proposes to address first the grounds which raise questions of law, namely grounds (5) to (8). These are all questions which it is appropriate to consider on

the basis of the assumed facts. In the light of the determination of those questions of law it will then consider, so far as necessary, the criticisms made of the Court of Appeal's approach and decision making, as set out in the other grounds.

6. Duty of care based on existing authority (ground 5)

(i) Introduction

35. Mr Stephen Auld QC for the Fund relied on two main cases, both at first instance, in arguing that the Bank owed an already established duty of care to the Fund on the assumed facts. The first is *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363 ("*Quincecare*"); and the second is *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509 ("*Baden*"). It is convenient to examine *Quincecare* first although, in fact, *Baden* was decided several years before *Quincecare* in 1983 (but was not reported in the official law reports until 1993).

(ii) The Quincecare duty of care

36. In *Quincecare*, a bank had agreed to loan £400,000 to a company. Under the loan facility, the chairman of the company caused the bank to transfer some £340,000 to a firm of solicitors who, under prior arrangements with him, then transferred that sum into his account in the USA. This constituted a defrauding of the company by the chairman. In the bank's action against the company for repayment of the loan, the company counterclaimed for loss caused by the bank's breach of a duty of care owed to the company. Steyn J carefully formulated and explained the bank's duty of care that was in issue on the counterclaim. This has subsequently been commonly referred to as the *Quincecare* duty of care.

37. Steyn J's description of the *Quincecare* duty of care is that it is a duty on a bank to refrain from executing a customer's order if, and for so long as, the bank is "put on inquiry" in the sense that the bank has reasonable grounds for believing - assessed according to the standards of an ordinary prudent banker - that the order is an attempt to defraud the customer. On the facts, the counterclaim failed because the bank was not "put on inquiry". It had no reasonable grounds for believing that the chairman's instruction to make the transfer was an attempt to defraud the company.

38. It is instructive to set out at length the passages from Steyn J's judgment in which he explained the nature of this particular duty of care. He said the following at pp 376-377:

> "In my judgment it is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing the customer's orders. Moreover, notwithstanding what was said in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1985] 2 All ER 947 at 957; [1986] AC 80 at 107, a banker may in a case such as the present be sued in tort as well as in contract: see *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp (a firm)* [1978] 3 All ER 571; [1979] Ch 384. But the duties in contract and tort are coextensive, and in the context of the present case nothing turns on the question whether the case is approached as one in contract or tort.
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> Given that the bank owes a legal duty to exercise reasonable care in and about executing a customer's order to transfer money, it is nevertheless a duty which must generally speaking be subordinate to the bank's other conflicting contractual duties. 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? If the bank executes the order knowing it to be dishonestly given, shutting its eyes to the obvious fact of the dishonesty, or acting recklessly in failing to make such inquiries as an honest and reasonable man would make, no problem arises: the bank will plainly be liable. But in real life such a stark situation seldom arises. The critical question is: what lesser state of knowledge on the part of the bank will oblige the bank to make inquiries as to the legitimacy of the order? 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. To hold that a bank is only liable when it has displayed a lack of probity would be much too restrictive an approach. On the other hand, to impose liability whenever speculation might suggest dishonesty would impose wholly impractical standards on bankers. 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. Indeed, the evidence of Mr Redhead, a most experienced banker, showed that the principle which I have stated is the very criterion usually applied by bankers. He used the language of a banker being put on inquiry. He explained that if the order had been to transfer £350,000 to a local casino, the money would not have been sent. In this case the bank knew that the funds were required to purchase a business, and the bank expected the funds, or a large part of it, to go to the company's solicitors. Mr Redhead made clear that if he had reason to suspect the payment to [the solicitors], he would have made further inquiries, and notably from the solicitors. He would, he said, have put up with the embarrassment. This evidence reinforces my view that the principle which I have stated does not impose too high a duty on a bank.

Having stated what appears to me to be the governing principle, it may be useful to consider briefly how one should approach the problem. Everything will no doubt depend on the particular facts of each case. Factors such as the standing of the corporate customer, the bank's knowledge of the signatory, the amount involved, the need for a prompt transfer, the presence of unusual features, and the scope and means for making reasonable inquiries may be relevant. But there is one particular factor which will often be decisive.

> That is the consideration that, in the absence of telling indications to the contrary, a banker will usually approach a suggestion that a director of a corporate customer is trying to defraud the company with an initial reaction of instinctive disbelief … [I]t is right to say that 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 is entitled, in a given case, to conclude that the banker had reasonable grounds for thinking that the order was part of a fraudulent scheme to defraud the company."

39. There are three main points to highlight about the *Quincecare* duty of care as explained by Steyn J.

(1) The *Quincecare* duty of care is an aspect of the bank's duty of reasonable skill and care in and about executing the customer's orders and arises by reason of an implied term of the contract and under a co-extensive duty of care in the tort of negligence.

(2) Steyn J recognised that this particular duty of care has to be carefully calibrated to reflect the fact that the duty of care is counteracting the receipt by the bank of what appears to be a valid and proper order which it is prima facie bound to execute. In other words, the duty of care runs counter to the bank's standard contractual duty to comply with a valid order of the customer. In line with this, Steyn J was at pains to make clear that the standard of care imposed should not place too onerous a burden on banks.

(3) Steyn J's statement that "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*" (emphasis added) must be read in context. There was no question on the facts of the case of any duty of care being owed by the bank to innocent third parties. That was not in issue. The relevant parties were the bank and the customer. They were in a contractual relationship and the question was how far an implied term or a duty of care in the tort of negligence should be imposed to protect the customer. It is therefore clear that the reference to protecting innocent third parties was merely to the effect that combating fraud committed against a bank's customer, by recognising a duty owed to the customer, protects not only the customer but also other innocent victims of a fraud.

40. The Board was referred to two subsequent cases on the *Quincecare* duty of care. The first is the decision of the UK Supreme Court in *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50; [2020] AC 1189. The claimant company, Singularis, was wholly owned by Mr Al Sanea. A large sum of money was held for the claimant in a client account by the defendant bank (Daiwa). The defendant paid out that money on Al Sanea's instructions to bank accounts in the names of three other companies within the same group of companies. This was a fraud by Al Sanea on the claimant company. The claimant's liquidators successfully argued before Rose J, whose decision was upheld by the Court of Appeal, that the defendant had been in breach of its *Quincecare* duty of care owed to the claimant and was therefore entitled to damages for its loss (subject to a 25% reduction for contributory negligence). On appeal to the Supreme Court, the central question was whether Al Sanea's illegal conduct should be attributed to the claimant so that illegality should be a defence to the claim (or that the company's loss should be treated as caused by its own fault or that there was an equal and opposite claim in deceit). The appeal was dismissed. The illegal conduct of Al Sanea was not to be attributed to the company and illegality was not a defence to the claim (and the company had not caused its own loss and there was no equal and opposite deceit claim).

41. The discussion of the *Quincecare* duty of care in the Supreme Court was relatively limited and essentially formed the background to the examination of attribution and illegality which were by that stage the central issues in the case. It is also clear that no question was raised as whether the *Quincecare* duty of care might be owed to anyone other than the bank's customer. Nevertheless, it is noteworthy that, at paras 23 and 35 of her judgment, Lady Hale (with whom Lord Reed, Lord Lloyd-Jones, Lord Sales and Lord Thomas agreed) stressed that the purpose of the *Quincecare* duty of care was to protect the bank's customer. There was no hint in her judgment that the duty might be owed to anyone other than the bank's customer.

42. It is also to be noted that in the Court of Appeal in *Singularis* [2018] EWCA Civ 84; [2018] 1 WLR 2777, Sir Geoffrey Vos C*,* with whom Gloster and McCombe LJJ agreed, drew a contrast between the limited *Quincecare* duty of care and the potentially more wide-ranging duty of care owed by an auditor in reporting on a company's financial statements. This was precisely said to be because the former is necessarily limited to claims by only a customer. Sir Geoffrey Vos C said at para 88:

> "[The *Quincecare* duty] is unlike the duty of an auditor in reporting publicly on a company's financial statements, where any number of potential claimants may wish to claim that they suffered loss as a result of what the auditor said having been inaccurate. The question of the scope of the duty is far more difficult there, because it would create an

> impossible situation if the duty were to protect everyone from loss. 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."

43. The second case subsequent to *Quincecare* to which the Board was referred was the decision of the Court of Appeal in *JP Morgan Chase Bank NA v Federal Republic of Nigeria* [2019] EWCA Civ 1641; [2019] 2 CLC 559. In that case, it was alleged by the claimant customer, which was a sovereign state, that the defendant bank had made three transfers totalling some US$875,740,000, from the claimant's depository account held with the defendant, which the defendant would not have made had it been exercising reasonable care. This was because it was on notice that those payments, albeit made on the instructions of a person with authority to give those instructions, were defrauding the claimant. The principal issue in the case was whether the terms of the depository account agreement excluded a *Quincecare* duty of care. It was held that they did not with the leading judgment being given by Rose LJ with whom Baker LJ and Sir Bernard Rix agreed. There was no question raised as to whether the *Quincecare* duty of care might be owed to anyone other than the bank's customer and Rose LJ's judgment was entirely framed in terms of the *Quincecare* duty being owed by a bank to its customer. Certainly she gave no indication at all that it might be a duty owed to others. So, for example, at para 40 Rose LJ said:

> "[T]he *Quincecare* duty is one aspect of a bank's overall duty to exercise reasonable skill and care in the services it provides. It can therefore properly be described as one of the incidents which the law ordinarily attaches to the relationship between the bank and the client and it is a duty which is inherent in that relationship."

44. The Board concludes that, on the present state of the authorities, there is nothing in *Quincecare* itself or in the cases subsequently applying it (including the decision in *Philipp v Barclays Bank UK plc* [2022] EWCA Civ 318; [2022] Bus LR 353 which was handed down after the hearing in this case) to support the argument that the *Quincecare* tortious duty of care extends beyond being a duty owed to the bank's customer which arises as an aspect of the bank's implied contractual duty of care and co-extensive tortious duty of care. The mention by Steyn J of protecting innocent third parties in *Quincecare* has to be read in context. It is best understood as recognising that the *Quincecare* duty of care, even though owed only to the customer, protects not only the customer against fraud but also innocent third parties.

(iii) The duty of care recognised in Baden

45. *Baden* is best known as a case on the equitable wrong of dishonest assistance of a breach of fiduciary duty. For several years, the courts often referred to this case for the five-fold classification of the scale of knowledge that might be required to hold a stranger to a trust liable for knowing assistance (often misleadingly referred to as rendering the defendant liable "as a constructive trustee"). That scale was set out by Peter Gibson J in *Baden* at [1983] 1 WLR 509 (Note), para 250. In *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 ("*Tan*"), it was made clear by the Privy Council that the dishonesty standard, not a negligence standard, was correct for the knowing assistance wrong. In so doing, Lord Nicholls said, at p 392, that in this context "the *Baden* scale of knowledge is best forgotten." The significance of *Tan* will be returned to later. But for present purposes, the *Baden* case is relevant for its less well-known, and far briefer, examination of a duty of care in tort.

46. The claimants were funds, or the liquidators of funds, that held money in an account with the Bahamas Commonwealth Bank Ltd ("BCB"). BCB in turn held that money in a trust account with the defendant bank ("SG"): ie BCB was the customer of the defendant bank. Acting on the instructions of BCB, the defendant bank paid money out of the account to a Panamanian bank. This was part of a dishonest and fraudulent scheme causing loss to the claimants. Having held that the defendant bank was not liable for the equitable wrong of knowing assistance, Peter Gibson J went on, relatively briefly, to consider whether the defendant bank was liable to the claimants in the tort of negligence. He held that, although the bank owed a duty of care to the claimants, they were not in breach of that duty of care and, in any event, no loss was caused by that negligence. He said the following on the duty of care in tort at para 349:

> "[Counsel for the claimants] submits that where a paying bank is on notice that its customer is a fiduciary in respect of moneys in an account with the bank it owes a duty of care to the persons beneficially interested in those moneys, as soon as the bank is put on such notice. [Counsel for the defendant] does not dispute this, and that concession was rightly made, in my view, in the light of *Ross v Caunters* [1980] Ch 297. In that case the intended beneficiary under a will recovered damages against solicitors who had prepared a will but negligently failed to warn the testator that the will should not be witnessed by the spouse of a beneficiary. Sir Robert Megarry V-C in determining the question whether a duty of care arose followed the two-stage approach laid down by Lord Wilberforce in *Anns v Merton London Borough Council* [1978] AC 728."

47. Peter Gibson J then cited that part of Lord Wilberforce's judgment setting out the two-stage test for a duty of care before continuing in para 349 as follows:

> "Sir Robert Megarry V-C held (1) that a solicitor who was negligent could be liable not only in contract to his client but also at the same time in tort both to his client and to others, (2) that a solicitor instructed by his client to carry out a transaction that will confer a benefit on a third party owes a duty of care to that third party in that the third party is a person within his direct contemplation as someone likely to be so closely and directly affected by his acts or omissions, that he can reasonably foresee that the third party is likely to be injured by those acts or omissions, (3) that the mere fact that the loss to such third party caused by the negligence is purely financial is no bar to the claim against the solicitor, and (4) that there were no considerations which sufficed to negative or limit the scope of the solicitor's duty to the beneficiary. If one then turns to the position of a bank which knows that an account with it is a trust account, in my judgment a bank which is negligent in transacting banking business in relation to the account may be liable not only in contract to its customer but also in tort to the customer and others. Further a bank instructed by its customer to pay moneys out of that account owes a duty of care to the beneficiaries interested in the account in that the beneficiaries are within the bank's direct contemplation as persons likely to be so closely affected by the bank's acts and omissions that it can reasonably foresee that the beneficiaries are likely to be injured by those acts or omissions. Also the mere fact that the loss to the beneficiaries caused by the negligence is purely financial is no bar to the claim against the bank. No considerations negativing or limiting the scope of the banker's duty to the beneficiaries have been suggested or occur to me.
>
> 350. In my judgment the scope of the duty of care owed by the bank to the beneficiaries extends at least this far, that the bank must exercise reasonable care and skill in transacting banking business relating to that account and that such duty includes making such inquiries as may in the circumstances be appropriate and practical if the bank has, or a reasonable banker would have, grounds for believing that the customer

> or its authorised signatories are misapplying, or acting fraudulently in respect of, the trust moneys in that account … Thus if a bank while the duty to inquire subsists pays moneys out of the trust account and it can be shown that the loss is consequent on the failure to perform the duty of inquiry, the beneficiaries would be able to recover in negligence against the bank.
>
> …
>
> 352. In the present case, in my judgment, SG owed the funds a duty of care in that it knew, from the trust account designation placed by BCB on the account, that BCB recognised that it was fiduciary and that others were beneficially interested in that account, and it knew from the sub-depository agreement, proffered by BCB as the trust document, that the beneficiaries were the funds …
>
> 353. For the reasons which I have already given in relation to the claim in equity, in my judgment by 10 May 1973, SG had come under a duty of inquiry but that duty ceased by that date. Accordingly SG was not negligent in transferring the $4m to Panama. If that is wrong and SG remained under a duty of inquiry - and hence under a duty to withhold payment - by virtue of its failure to insist on an answer from BCB to its inquiry as to the beneficial ownership of the $4m no loss resulted from that failure, as … the answer that would have been received from BCB would have been that the order of 12 April released the $4m from the trust and that answer would not have put SG on further inquiry or required it to withhold payment further."

48. The judgment of Peter Gibson J (which was upheld by the Court of Appeal, in an unreported judgment, [1985] BCLC 258 note, on the ground that the bank had not been negligent) clearly supports the submission of Mr Auld. Peter Gibson J was accepting that a duty of care was owed by the defendant bank to the third party beneficiaries (ie the funds) and not merely to its customer in a situation where the bank knew that the accounts were held by its customer as a fiduciary for known beneficiaries. On Peter Gibson J's express reasoning, it did not matter that the loss was pure economic loss and both acts and omissions were held to be covered.

49. Although the decision of Peter Gibson J on the existence of the duty of care has not been formally overruled, and indeed we have not been referred to any subsequent direct consideration of it in any case prior to this one, it is clear to the Board that, in the light of subsequent developments in relation to the tort of negligence, it cannot stand today as good law.

50. The principal reason for this is that, at the time of Peter Gibson J's decision, as he himself made clear, the authoritative approach to determining whether there was a duty of care owed by a defendant to a claimant was that laid down by Lord Wilberforce in *Anns v Merton London Borough Council* [1978] AC 728, 751-752*.* According to that approach, one first asked whether it was reasonably foreseeable to the defendant that the claimant would be likely to suffer loss from the defendant's careless conduct. If so, there was prima facie a duty of care owed. But there would be no duty of care if, secondly, there were good reasons (of policy) why that prima facie duty should be negatived or limited.

51. That two-stage approach led to an expansion of the tort of negligence. And it was during that period that *Baden* was decided. But by the end of the 1980s, Lord Wilberforce's approach was being rejected in a number of House of Lords cases. Perhaps the most important was *Caparo v Dickman*, especially at pp 617-618, which was generally interpreted as favouring a three-stage test for novel duties of care (foreseeability, proximity, and whether fair, just and reasonable) and/or an incremental approach. Then in July 1990, in *Murphy v Brentwood District Council* [1991] 1 AC 398, the House of Lords, applying the 1966 Practice Statement (*Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234), overruled the actual decision in *Anns v Merton,* on the negligence of public authorities*.* Further, Lord Keith of Kinkel, giving the leading speech, expressly stated, at p 472, that not only should *Anns v Merton* be overruled but so should "all cases subsequent to *Anns* which were decided in reliance on it".

52. The rejection of the *Anns v Merton* two-stage approach was later explained in some detail by Lord Reed, giving the leading judgment of the Supreme Court favouring an incremental approach to a novel duty of care, in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] AC 736 ("*Robinson*").

53. It is clear that in *Baden*, as he was bound to do so, Peter Gibson J was applying the now rejected two-stage approach of *Anns v Merton*. Hence in para 349 (set out above), one can see him applying a test of foreseeability followed by the sentence, "No considerations negativing or limiting the scope of the banker's duty to the beneficiaries have been suggested or occur to me." It is also significant that Peter Gibson J did not identify as requiring caution that the loss was pure economic loss and that one was

dealing with an omission (in the sense of a failure to prevent the wrongdoing of a third party causing loss to the claimant).

54. It is true that Peter Gibson J placed direct reliance on the decision of *Ross v Caunters* [1980] Ch 297 which, as shall be explained below, remains good law, having been confirmed by the House of Lords in *White v Jones* [1995] 2 AC 207. But the reasoning in *Ross v Caunters* cannot be upheld because again it was applying the approach in *Anns v Merton*.

55. Mr Auld further prayed in aid a passage from the *Encyclopaedia of Banking Law* (online edition), section C, para 382.1 (and, similarly, section D, para 247) (both Issue 182 released 29 June 2021):

> "382.1 Where a paying bank is on notice that its customer is a fiduciary in respect of moneys in an account with it, the paying bank owes a duty of care to the beneficiaries of those moneys, as soon as the bank is put on such notice. As to the scope of the duty of care owed by the bank to the beneficiaries, the bank must exercise reasonable care and skill in transacting banking business relating to the account. Such duty includes making such inquiries as may, in the circumstances, be appropriate and practical if the bank has, or a reasonable banker would have, grounds for believing that the customer or its authorised signatories are misapplying, or acting fraudulently in respect of, the trust moneys in the account. The duty not to comply with the customer's instructions will cease when the bank receives information which the honest and reasonable banker would accept, with the result that he is not put upon further inquiry. Thus if a bank, while the duty to inquire subsists, pays moneys out of the trust account and it can be shown that the loss is consequent on the failure to perform the duty of inquiry, the beneficiaries would be able to recover in negligence against the bank."

56. Although no authority for that proposition is cited in the *Encyclopaedia of Banking Law*, it represents a summary of the decision in *Baden.* But if, as we have said, *Baden* cannot stand as good law, that passage takes matters no further.

57. It is the Board's view, therefore, that, on the existing case law, *Quincecare* does not extend beyond a duty of care being owed by a bank to its customer; and the duty of care owed to third party beneficiaries of an account, held to exist in *Baden*, cannot stand as good law because of the demise of the two-stage approach to the duty of care in *Anns v Merton* on which it rested.

58. The Board therefore rejects the Fund's case that the Bank arguably owed a duty of care to it on the basis of the existing authorities of *Quincecare* and *Baden*. As a matter of law such a claim has no real prospects of success and there is no reasonable ground for bringing it.

7. Duty of care based on assumption of responsibility (ground 6)

59. Mr Auld argued that, in so far as existing authority required an assumption of responsibility to establish the duty of care in this context, there was on the assumed facts an (implied) assumption of responsibility by the Bank towards the Fund as beneficial owner of the money in the Accounts.

60. The principle of an assumption of responsibility has been criticised by some commentators as being elusive and tending to obscure the real reasoning: see, for example, Kit Barker, "Unreliable assumptions in the modern law of negligence" (1993) 109 LQR 461; and Christian Witting, *Street on Torts*, 16th ed (2021), pp 53-55. Other commentators consider it to be an important and distinctive source of legal obligation: see, for example, Donal Nolan, "Assumption of Responsibility: Four Questions" (2019) 72 Current Legal Problems 123. The courts have continued to apply it and to find it useful. In paras 62-64 below we explain the objective nature of the test and some of the main factors that the courts have considered relevant in determining whether there is, or is not, an assumption of responsibility.

61. It is first helpful to refer to the most recent authoritative summary of the principle of assumption of responsibility which is contained in the judgment of Lord Reed (with whom Lady Hale, Lord Wilson, Lord Hodge and Lady Black agreed) in *N v Poole* at paras 67-68:

> "67. Although the concept of an assumption of responsibility first came to prominence in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 in the context of liability for negligent misstatements causing pure economic loss, the principle which underlay that decision was older and of wider significance (see, for example, *Wilkinson v Coverdale*

(1793) 1 Esp 75). Some indication of its width is provided by the speech of Lord Morris of Borth-y-Gest in *Hedley Byrne*, with which Lord Hodson agreed, at pp 502-503:

> 'My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.'

It is also apparent from well-known passages in the speech of Lord Devlin, at pp 528-530:

> 'I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in *Norton v Lord Ashburton* [1914] AC 932, 972 are "equivalent to contract", that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract ... I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care … Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility.'

68. Since *Hedley Byrne*, the principle has been applied in a variety of situations in which the defendant provided information or advice to the claimant with an undertaking that reasonable care would be taken as to its reliability (either express or implied, usually from the reasonable foreseeability of the claimant's reliance upon the exercise of such care), as for example in *Smith v Eric S Bush*, or undertook the performance of some other task or service for the claimant with an undertaking (express or implied) that reasonable care would be taken, as in *Henderson v Merrett Syndicates Ltd* and *Spring v Guardian Assurance plc* [1995] 2 AC 296. In the latter case, Lord Goff of Chieveley observed, at p 318:

> 'All the members of the Appellate Committee in [*Hedley Byrne*] spoke in terms of the principle resting upon an assumption or undertaking of responsibility by the defendant towards the plaintiff, coupled with reliance by the plaintiff on the exercise by the defendant of due care and skill. Lord Devlin, in particular, stressed that the principle rested upon an assumption of responsibility when he said, at p 531, that "the essence of the matter in the present case and in others of the same type is the acceptance of responsibility" … Furthermore, although *Hedley Byrne* itself was concerned with the provision of information and advice, it is clear that the principle in the case is not so limited and extends to include the performance of other services, as for example the professional services rendered by a solicitor to his client: see, in particular, Lord Devlin, at pp 529-530. Accordingly where the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular, the defendant may be held to have assumed responsibility to the plaintiff, and the plaintiff to have relied on the defendant to exercise due skill and care, in respect of such conduct.'"

62. The test for determining whether responsibility has been assumed by a defendant to a claimant is an objective one - see, for example, *Henderson v Merrett* at p 181B per Lord Goff, *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 at p

835G per Lord Steyn, *Customs and Excise Comrs v Barclays Bank plc* at para 5 per Lord Bingham.

63. As Lord Steyn explained in *Williams v Natural Life* at p 835G-H, the objective nature of the test means that it will generally be important to focus on exchanges which cross the line between the defendant and the claimant (or the group of persons of which the claimant is an identifiable member):

> "The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff. Obviously, the impact of what a defendant says or does must be judged in the light of the relevant contextual scene. Subject to this qualification the primary focus must be on exchanges (in which term I include statements and conduct) which cross the line between the defendant and the plaintiff."

64. An examination of the case law indicates (see *Clerk and Lindsell on Torts*, 23rd ed (2021), paras 7-113 to 7-137) that the factors which have been of particular relevance in determining whether there is an assumption of responsibility in relation to a task or service undertaken include: (i) the purpose of the task or service and whether it is for the benefit of the claimant; (ii) the defendant's knowledge and whether it is or ought to be known that the claimant will be relying on the defendant's performance of the task or service with reasonable care; and (iii) the reasonableness of the claimant's reliance on the performance of the task or service by the defendant with reasonable care.

65. In the present case no express assertion of an assumption of responsibility is made in the Amended Particulars of Claim and none of the relevant factors are alleged to be present on the facts. It is not alleged that the Bank undertook to perform any task or service for the Fund or that there were any exchanges crossing the line between them. The only service the Bank undertook to provide was for its customer, SIOM. The Fund and the Bank are not alleged to have dealt with each other at all.

66. Regardless of the pleaded case, Mr Auld submitted that the Bank arguably assumed responsibility to the Fund when it re-designated the Accounts with titles that indicated the funds were held for and beneficially owned by the Fund. There is, however, no suggestion that the redesignation of the Accounts arose from any dealings between the Fund and the Bank. Indeed, the Fund's evidence is that it was

Turnstone (as the director of SIOM) which dealt with the Bank in respect of the renaming of the Accounts (as made clear in Mr Royle's witness statement). There is no evidence to suggest that the Bank did anything other than act as instructed by its customer.

67. Mr Auld further submitted that the Fund's reliance on the Bank could be inferred from the fact that the Fund was unable to monitor the Accounts whereas the Bank was managing them day-to-day and in a position to prevent suspicious (or obviously fraudulent) payments. The Fund has, however, produced no evidence of reliance or indeed of anyone within the Fund giving any thought to the possibility of the Bank owing any responsibility to the Fund. Nor is it alleged that the Bank knew or ought to have known of relevant reliance by the Fund.

68. In all the circumstances, the Board concludes that the Fund has pleaded no factual basis (and there is nothing in the assumed facts) upon which a duty of care based on assumption of responsibility could be established. The Fund has also been unable to identify any or any sufficient actual or prospective evidence which could establish such a duty.

8. Duty of care based on incremental development (ground 7)

69. Mr Auld's alternative submission was that, even assuming that the relevant duty of care is not already established, recognition of that duty would constitute an appropriate incremental development from existing case law. In arguing for an incremental development of the duty of care, he primarily focused on four cases in which a duty of care was held to be owed to third parties suffering pure economic loss: the House of Lords decision in *White v Jones,* the Court of Appeal decisions in *Gorham v British Telecommunications plc* [2000] 1 WLR 2129 and *Dean v Allin & Watts* [2001] EWCA Civ 758; [2001] PNLR 39, and the more recent first instance decision of Males J in *Golden Belt 1 Sukuk Co BSC(c) v BNP Paribas* [2017] EWHC 3182 (Comm); [2018] 3 All ER 113.

70. *White v Jones*, like *Ross v Caunters*, concerned the negligence of solicitors in the drawing up of a will. In *White v Jones*, the negligence comprised a delay in the drawing up of the will such that the will was not drawn up in favour of the intended beneficiaries prior to the testator's death; in *Ross v Caunters* the will was invalid because it was not duly attested as the spouse of one of the intended beneficiaries had been a witness to the testator's signature. In both cases, it was held that a duty of care was owed by the solicitors to the intended beneficiaries so that the latter were able to

succeed in recovering damages from the negligent solicitors for the pure economic loss they had suffered.

71. The House of Lords in *White v Jones* decided, with the leading speech being given by Lord Goff of Chieveley, that a duty of care in the tort of negligence was owed because practical justice demanded that there should be a remedy to fill the lacuna that would otherwise arise given that the estate which had a cause of action had suffered no loss whereas the intended beneficiaries who had suffered the loss had no cause of action. To fill this lacuna, the law should treat the assumption of responsibility owed by a solicitor to its client as extending to the intended beneficiary.

72. It was made clear, however, that, while the decision in *Ross v Caunters* was correct, its reasoning was not. In Lord Goff's words, at pp 267-268:

> "[A]n ordinary action in tortious negligence on the lines proposed by Sir Robert Megarry V-C in *Ross v Caunters* [1980] Ch 297 must, with the greatest respect, be regarded as inappropriate, because it does not meet any of the conceptual problems which have been raised."

And in the words of Lord Mustill at pp 282-283:

> "Sir Robert Megarry V-C [in *Ross v Caunters*] naturally approached the problem by the method prescribed in *Anns v Merton London Borough Council* [1978] AC 728, which had been decided only two years before. By this method, it was relatively easy at the first stage to establish a prima facie duty of care, the problem being to ascertain whether considerations of policy should operate to exclude it. This is, however, no longer the law. It may be that Sir Robert Megarry V-C would have reached the same conclusion in the very different legal climate of 1994, but I think it unprofitable to speculate. It is better to start again."

73. Although Mr Auld argued to the contrary, there is no equivalent lacuna on the pleaded (and assumed) facts of this case which is, therefore, distinguishable from *White v Jones*. The customer of the Bank, SIOM, had a valid claim for negligence in contract and tort against the Bank under which, if successful, it would have been legally entitled to recover the loss suffered by the Fund, and hence the beneficiaries, for which it was the trustee. In contrast to the estate on the facts of *White v Jones*, one

cannot say that the Fund has suffered no recoverable loss. It is irrelevant that, factually, SIOM is now unlikely as a practical matter to bring an action against the Bank. Furthermore, on the pleaded (and assumed) facts, the Fund would have a claim to recover its loss against SIOM for breach of fiduciary duty. This contrasts with *White v Jones* where plainly there was no possible action by the intended beneficiaries against the testator or his estate. The testator had committed no possible legal wrong against the intended beneficiaries.

74. In *Gorham v British Telecommunications plc*, *White v Jones* was applied by the Court of Appeal to what was regarded as a directly analogous situation. The deceased had received negligent advice from the defendant insurance company in respect of pension and life insurance cover for his wife and children, who were the claimants. The consequence of the negligent "pensions mis-selling" was that the deceased had opted out of his more favourable employer's pension scheme so that, on his death, his wife and children were less well provided for than they otherwise would have been. It was held that, applying *White v Jones*, the defendant insurance company owed a duty of care to the claimants. Again, the finding of the duty of care in this case can be, and was, justified because of the legal lacuna that would otherwise have arisen: the estate of the deceased would have suffered no loss (the loss was that of the wife and children directly not the deceased) and the wife and children, who had suffered the loss, would otherwise have had no claim. But as has been explained above, that is not the position in the present case.

75. *Dean v Allin & Watts* is a significantly different type of case in the sense that the facts did not involve the death of a client and there was no legal lacuna. The claimant had lent money to borrowers. The borrowers' solicitors, the defendants, had drawn up the relevant documentation and the agreed security for the loan included property represented by the title deeds that were held by the defendants. When the borrowers failed to repay the loan, the claimants sought to enforce the security but discovered that, as a matter of law, the holding of the title deeds by the defendants did not constitute valid security. The claimant therefore brought an action in the tort of negligence against the defendant solicitors for failing to ensure that the loan was validly secured.

76. It was held that the defendant solicitors did owe a duty of care to the claimant although they had been acting for the borrowers rather than for the claimant in the transaction. Not surprisingly, no reliance was placed by the Court of Appeal on any legal lacuna, not least because the claimant clearly had legal claims against the borrowers for the repayment of the loans. What was stressed was the close relationship between the claimant and the defendant solicitors whereby the claimant, as the defendants knew or ought to have known, was relying on the defendants, and was not instructing his own solicitors, to ensure that there was valid security. In what

were regarded as special or exceptional circumstances, it was considered fair, just and reasonable for there to be a duty of care owed by the defendants to the claimant in respect of the pure economic loss.

77. Finally, in *Golden Belt v BNP Paribas* the defendant bank had been engaged by Saad Trading, Contracting & Financial Services Company ("Saad") to arrange for a promissory note to be issued which would be valid under the law of Saudi Arabia. The purpose of the note was to give investors with Saad a ready means of enforcement if Saad defaulted on an Islamic financing instrument known as a Sukuk. The promissory note drawn up by the defendant bank was invalid, because it was not properly executed, under Saudi law. It was held that, even though the customer of the bank for whom the service was directly carried out was Saad, the investors who were Sukuk certificate holders were owed a duty of care by the defendant bank.

78. At para 150 Males J correctly identified that past cases considering the existence of a duty of care to a third party for pure economic loss indicated that three particularly relevant factors were: the purpose of the service provided, whether the defendant knew that the claimant was relying on the service, and the reasonableness of that reliance. On the evidence he found that it made no difference to Saad, once it had got its money, whether or not the promissory note was validly executed, so that the service was being carried out "entirely for the benefit of certificate holders" (para 177). He found that, as the defendant knew or should have known, the certificate holders were relying on the defendant for the correct drawing up of the promissory note (paras 191-193). He found that the certificate holders were relying on proper execution of the promissory note by the defendant and reasonably so (paras 179-183). He further found that it was only the certificate holders who would suffer any loss if the promissory note was not properly executed and that it was the certificate holders who in fact relied on the defendant "to ensure proper execution and for whose benefit, for practical purposes, the Note was produced" (para 196). In the light of these findings, Males J concluded that the bank had objectively assumed responsibility to the certificate holders to exercise reasonable care (para 199) and it was fair, just and reasonable for the bank to owe such a duty of care (para 200).

79. It can be seen from the last two cases that, even without a legal lacuna, it is possible, exceptionally, for a duty of care to be owed by a professional or a bank to someone who is not a client or customer as regards pure economic loss. However, in both those cases the purpose of the service was to benefit the third party; and in *Golden Belt v BNP Paribas* the third party was relying directly on the defendant bank to have drawn up a valid promissory note, as the bank knew or ought to have known. As already explained, in the present case, none of these factors applies. In particular, one cannot say that the purpose of the Bank's service was to benefit third party beneficiaries of the Accounts. Rather, the purpose was to benefit the customer.

Equally, one cannot say that the Fund placed direct reliance on the Bank, or that it was or ought to have been known to the Bank that any such reliance was being placed.

80. One of the criticisms made of focusing just on an incremental test for the identification of a novel duty of care is that, in itself, incrementalism does not explain which are the factors that are relevant for an analogy to be drawn. In that respect, as Lord Reed made clear in *Robinson*, at para 27, one needs to resort to underlying judgement as to what is fair, just and reasonable. Lord Bingham made a similar point in *Customs and Excise Comrs v Barclays Bank plc*, at para 7. In this sense, incrementalism and the reliance in *Caparo v Dickman* on what is fair, just and reasonable go together. It is the Board's view that, without a close analogy in terms of purpose and reliance, and without any legal lacuna of the type found in *White v Jones*, it would, on the pleaded (and assumed) facts of this case, not be fair, just and reasonable to impose a duty of care on the Bank to the Fund. This would place an unacceptable burden on banks going outside their contractual relationship with their customers. In other words, the Board sees no good reason in this case for incrementally developing the tort of negligence, beyond the well-established *Quincecare* duty of care, so as to impose on a bank an equivalent duty of care to a third party who is not a customer of the bank.

81. Although it featured more in his oral than his written submissions, Mr Giles Wheeler QC for the Bank urged on the Board that a further reason for caution before considering an incremental extension of the duty of care is that one is here concerned not merely with pure economic loss but also with an omission in the sense that what is alleged is the failure of the Bank to step in to prevent harm being caused to the claimant by the wrong of a third party. Put another way, the duty of care would be one to protect the claimant against the fraud of the Bank's customer.

82. The Supreme Court has extensively examined the law on the duty of care in the context of such failures in *Michael* and *N v Poole*. In *Michael*, the deceased had rung the police to report that her former partner had threatened to return to kill her. The police delayed in responding to that call and, in the interim, the deceased was stabbed to death by her former partner. It was held that there was no duty of care owed by the police to prevent the harm to the deceased. In *N v Poole*, the claimant children, along with their mother, were placed by the defendant public authority in accommodation where they were subjected to harassment and abuse by a neighbouring family. It was again held that no duty of care was owed by the public authority to prevent the harm to the children. In both cases it was emphasised that the common law does not generally impose liability for failure to prevent harm caused by others. As Lord Toulson expressed it at para 97 in *Michael*:

> "It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else."

83. In those cases, therefore, the Supreme Court recognised that for a duty of care to arise restrictive principles needed to be satisfied. Those principles are, most importantly and relevantly, that the defendant has some special level of control over the source of danger or has assumed a responsibility to protect the claimant from the danger: see *Michael* at paras 99-100; and *N v Poole* at para 76. In neither of those two cases were either of those principles made out on the facts.

84. Applying those principles to the present case, it can be seen that the Bank had no special level of control over the source of danger (ie it was not in control of the fraudsters) and, for reasons already set out, it cannot be said to have assumed responsibility to protect the Fund from the fraud. Therefore, viewing this case through the lens of the conduct of the defendant being an omission, in the sense of a failure to protect the Fund from the fraud of the Bank's customer, further supports the decision that the Bank owed no duty of care to the Fund.

9. Reliance on the authorities concerning accessory liability (ground 8)

85. Both counsel relied in support of their submissions on the principles established in relation to the equitable wrong of dishonest assistance in *Tan*. In that case the claimant airline had appointed a company as its agent in a particular area for the sale of passenger tickets and cargo transportation. Under the agreement, the company was to hold the moneys received in trust for the airline until paid across to the airline. The company paid the money into its current bank account and in breach of trust used that money for its own business purposes. When the company became insolvent, the claimant sued the defendant, who was the company's managing director and principal shareholder, on the basis that the defendant was liable to account as a constructive trustee for knowing assistance.

86. In giving the judgment of the Board, Lord Nicholls made three main points. First, contrary to earlier authority, it is not necessary for the scheme assisted to be fraudulent and dishonest. It is sufficient that what is assisted, with the required state of mind, is a breach of fiduciary duty. Secondly, and most importantly, the required state of mind for this form of liability is dishonesty. One is centrally concerned with "accessory liability" for dishonestly assisting a breach of fiduciary duty. Prior to this case, there were many cases (both on "knowing assistance" and on "knowing receipt")

in which the courts had struggled to decide whether the standard of liability included negligence as well as dishonesty. It had become commonplace to refer to this as the question of whether the relevant knowledge encompassed more than the first three points on the five-point scale of knowledge put forward by Peter Gibson J in *Baden* (see para 45 above). Lord Nicholls made it clear beyond doubt that the dishonesty standard is correct for the "assistance" cases. Thirdly, the range of conduct extends beyond assistance to include procuring a breach of fiduciary duty.

87. *Tan* was approved and applied in respect of "dishonest assistance" by the House of Lords in *Twinsectra Ltd v Yardley* [2002] UKHL 12; [2002] 2 AC 164 and the meaning of dishonesty in this context was further clarified by the Privy Council in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37; [2006] 1 WLR 1476.

88. The Board considers that the decision in *Tan* supports the view that no duty of care should be owed by the Bank to the Fund in this case. Although Mr Auld is clearly correct that *Tan* was concerned with accessory or secondary liability, and not the primary wrong of negligence with which the Board is directly concerned in this case, *Tan* represents an emphatic decision, after many years of judicial uncertainty and prevarication, that banks and other parties who are alleged to be assisting a breach of fiduciary duty are liable only if they are dishonest and not if they are merely negligent. On the assumption that there has been a breach of fiduciary duty by the Bank's customer to the Fund, if one were to treat the Bank as liable to the Fund for the tort of negligence this would be tantamount to holding it liable for having negligently assisted a breach of fiduciary duty. It would therefore undermine *Tan*.

89. Mr Auld referred to a passage in the judgment of the Privy Council in *Tan* where, in dealing with where trustees are acting dishonestly, Lord Nicholls recognised that there might be exceptions to the requirement for liability that the assisting party is dishonest. His Lordship said at p 392:

> "There may be cases where, in the light of the particular facts, a third party will owe a duty of care to the beneficiaries. As a general proposition, however, beneficiaries cannot reasonably expect that all the world dealing with their trustees should owe them a duty to take care lest the trustees are behaving dishonestly."

90. This passage is entirely consistent with the view expressed above (see para 79) that there can be exceptional circumstances where a duty of care is owed by a bank to trust beneficiaries who are not the bank's customer. But there are no such exceptional

circumstances on the pleaded (and assumed) facts of this case. The general position established in *Tan*, of there being no duty of care owed by the bank to the beneficiaries, therefore applies.

10. Conclusion on duty of care and the remaining grounds of appeal

91. For all the reasons set out above, the Board rejects the Fund's case that there is the alleged duty of care based on existing authorities or an incremental extension of them.

92. The Board's conclusion that as a matter of law there is no basis on which the Fund can establish that the Bank owed it a duty of care means that the grounds of appeal which seek to criticise the approach and decision making of the Court of Appeal do not arise. Even if any of such criticisms were justified, the Court of Appeal reached the correct conclusion. There are, however, two grounds of appeal upon which it is appropriate to comment.

93. The first is ground (4), which suggests that the Court of Appeal mischaracterised the scope of the alleged duty of care and/or the circumstances giving rise to it. In its written case the Fund sought to criticise the Court of Appeal for describing a duty which was broader than that alleged and for failing to recognise that there were two pre-requisites for the alleged duty to arise: (1) that the Bank knew or ought to have known that the funds in the Accounts were beneficially the property of the Fund or alternatively of some unidentified beneficiary; and (2) that the circumstances were such that a reasonable banker would have had grounds for considering that there was a real possibility that the beneficiary was being defrauded. This criticism is unjustified. As already explained in para 26 above, the pleaded claim alleges a duty of care on the basis of (1) alone, pleading that it is "by virtue of such duty" that (2) arises so that the bank is obliged, if there are circumstances putting it on inquiry, to stop payments out of the account: we have nevertheless considered the case on the more specific basis set out in (1) and (2), as reflected in the assumed facts.

94. The pleaded case does not treat suspicious circumstances as an element needed before the duty arises. The duty arises simply as a result of the Bank's knowledge that the Fund, or some unidentified beneficiary, was the beneficial owner of the moneys in the Accounts (paras 68 and 70 of the Amended Particulars of Claim). Unless there is such a duty, the pleaded consequential *Quincecare* type duty equally could not be established. It is inherent in the Board's above analysis of the relevant authorities that the bare facts alleged in paras 68 and 70 are insufficient to establish any duty of care. There is nothing in principle or in the cases to support the idea that the tortious duty

of care owed by a bank to its customer to exercise reasonable care and skill, which is co-extensive with the contractual duty of care owed by a bank to its customer, can be extended across to a third party with whom the bank has no contractual relationship even if the bank knew or ought to have known that the third party was the beneficial owner of the moneys in the customer's account.

95. Given that the pleaded duty of care (in paras 68 and 70 of the Amended Particulars of Claim) would arise whenever a bank knew, or ought to have known, that funds in a customer's account were beneficially the property of another (whether or not identified), the Court of Appeal in para 61 of its judgment correctly drew attention to the radical implications if it were to be accepted by the courts that there is such a duty of care:

> "This is not … [an] exceptional case. Bank accounts in which funds are held not for the account holder (the bank's customer) but for other persons and are designated as such, to the knowledge of the banker, are not at all uncommon. To extend the Alleged Duty of Care to the [Fund] would be more than an incremental development of existing case law; it would be a massive extension with significant consequences for banking law."

96. The second further ground of appeal on which it is appropriate to comment is ground (9) which criticises the Court of Appeal for failing to consider whether to allow the Fund to amend the Amended Particulars of Claim, in particular, to plead implied assumption of responsibility and reliance. No such draft pleading was put forward to the Court of Appeal, nor has it been before the Board. There is no pleaded case which would meet the legal defects in the claim made.

11. Conclusion

97. For the reasons set out above, the Court of Appeal was correct to conclude that there is no reason for the Fund's claim to proceed to trial because on the basis of the Amended Particulars of Claim and the assumed facts the claim is bound to fail. The Board will therefore humbly advise Her Majesty that the appeal should be dismissed.