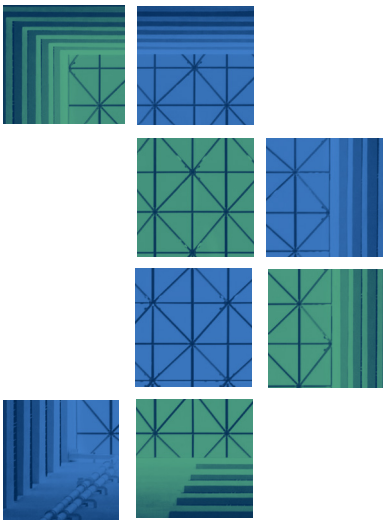

Quincecare, agency and conflict of laws: what law do we look to?

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Much ink has been spilled on the *Quincecare* duty, considering the circumstances in which it may be engaged in the banker–customer relationship. However, that is only one part of a broader picture of inter-related agency relationships, all of which can be in play in cases where a company is being defrauded by someone who might usually be trusted to act in the company's interests. This article sets out to identify, by means of a case study, what sort of issues might arise. It then seeks to explain what English conflict of laws rules would find to be the governing law of the various claims.

Relevance of the law applicable to agency

Recent issues of the *Journal of Banking and Finance Law* have included extensive discussion of the *Quincecare* duty, both in the jurisdiction of England and Wales and internationally. At one stage, there was an apparent expansion of the duty – and a possibility of divergence between different jurisdictions – though the Supreme Court in *Philipp v Barclays Bank* [2023] UKSC 25 has restored the narrower, traditional view of the *Quincecare* duty.

The Supreme Court was clear that the *Quincecare* duty arose out of the agency arrangements between bank and customer, and between the customer and persons purporting to act on its behalf, rather than being a more general principle concerned with the fight against fraud. That said, the Supreme Court made passing reference (at [106]–[110]) to an Australian authority which suggested a limitation on a bank's otherwise-strict duty to comply with valid payment instructions sent on behalf of its customer.

The focus on agency, and the possibility of international differences in (at least) the settled law as it applies in these circumstances, is such as to invite consideration of what the law applicable to the relevant agency relationship is. In many cases, it may be express (such as in a contract for banking services), but it may not be. There is in some cases a need to consider conflict of laws rules to ascertain the applicable law in certain scenarios that are commonly encountered in the sort of fraudulent payment cases that recent cases touching on *Quincecare* have been concerned with.

Case study: Illicit payment to Echo Ltd

To explore the conflict of laws issues that can arise, the following (fictitious) case study will be considered.

Alpha Ltd is a company registered in the British Virgin Islands. Alpha Ltd has a current account with Bank Bravo, a company registered in England. Charlotte is a director of Alpha Ltd and is resident in France. Charlotte has an executive assistant, Dipti, who is employed by Alpha Ltd and works remotely from her residence in Belgium.

Charlotte provides Dipti with a payment instruction for Dipti to pass on to Bank Bravo. The instruction is for a payment to be made from Alpha Ltd's bank account to an account held by Echo Ltd. Echo Ltd is a company solely owned by Charlotte and, unbeknownst to Dipti, there is no commercial reason for Alpha Ltd to be making the payment. Dipti passes the payment instruction on to Bravo Bank.

Should Bravo Bank comply with the payment instruction?

The relationship between Bravo Bank and Alpha Ltd, its customer, is one of agency and contract. It is all but inevitable that there will be written terms of service between them, which

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will include an express choice of law provision. As is invariably the case for English banks, the express choice will be in favour of English law. Thus, English law will establish the content of the *Quincecare* (or equivalent) duty as between the parties.

In the event that there is not an express choice of law in Bravo Bank's terms of service (as may be the case if, for example, Bravo was not a major bank but was instead a much less sophisticated entity), then the law governing the relationship will be determined in accordance with Rome I. Articles 4(1)(b) and 4(2) indicate that the applicable law would be that of England, being the habitual residence of Bravo Bank. The possible exception would be if the account was opened at a branch, agency or other establishment which was resident outside of the jurisdiction (eg if Charlotte opened the account at her local branch in France); if so, then art 19(2) Rome I would permit French law to govern the contract.

Assuming English law to apply, as is highly likely, Bravo Bank has a strict duty to comply with its mandate. Where the bank receives an authorised payment instruction, it must comply. Following *Philipp v Barclays Bank*, the exception to this is where "there are circumstances suggestive of dishonesty apparent to the bank which would cause a reasonable banker before executing an instruction to make inquiries to verify the agent's authority" at [90].

The first question is thus whether the payment instruction was *prima facie* authorised.

The relationship between Alpha Ltd and Charlotte, as its director, is likely to have a contractual overlay, but is fundamentally statusbased. If it was a purely contractual relationship, then Rome I might be expected to apply. However, art 1(2)(f) excludes the present situation from the ambit of Rome I. Instead, English conflict of law rules treat the question of a director's authority as being governed by the place of the company's incorporation – so, the BVI in Charlotte's case.

Given that Charlotte seems to be using her position in respect of Alpha Ltd to perpetrate a fraud on the company, it might be assumed that her actual authority as a director would not extend to misappropriation of company assets. However, can Bravo Bank nevertheless rely on Charlotte's apparent authority?

The relevant law is that which would govern the arrangement between the principal (Alpha Ltd) and the third party (Bravo Bank) if the agent's authority was established: *Rimpacific Navigation Inc v Daehan Shipbuilding Co Ltd* [2010] 2 Lloyd's Rep 236 (HC) at [34]. If Charlotte was authorised to give the payment instruction in favour of Echo Ltd, then the dealings between Alpha Ltd and Bravo Bank would (continue to) be governed by the law of the banking contract. Thus, in the present example, English law would determine whether or not Bravo Bank could rely on Charlotte's apparent authority as director to give payment instructions.

There is accordingly a good case that the payment instruction was *prima facie* within Charlotte's apparent authority. The second question is then whether the circumstances would cause a reasonable banker to pause before executing the transaction. If not, then Bravo Bank would be obliged to pay in accordance with the instruction and the only question would be what recovery Alpha Ltd could make against Charlotte, the fraudulent director. However, in the following section, it will be assumed that there *were* circumstances such as would have put the bank on enquiry, but that the bank nevertheless followed the payment instruction without making such enquiries.

Before that, what difference does the interposition of Dipti cause for the analysis?

Dipti is not giving the payment instruction herself, only passing on to the bank a payment instruction that Dipti has received from Charlotte. Dipti's actual authority will be governed by the law applicable to her employment contract (here, likely Belgian law, given her remote worker status: art 8(2) Rome I). However, it is unlikely that she will have actual authority to direct payments from the company's bank account.

It is more likely that Dipti's apparent authority will be relevant. As in *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 (CA), it might be argued that Dipti had apparent authority to communicate to the bank that a specified instruction had been given by another who did have the necessary authority. This limited apparent authority may not be important in the present case study, but consider its importance if it was Dipti, rather than Charlotte, who was generating the fraudulent payment instruction.

As above, the law applicable to Dipti's apparent authority is that which would govern the arrangement between Alpha Ltd and Bravo Bank if the authority was established. As with Charlotte's apparent authority, the effect of Dipti's apparent authority (to communicate to the bank that Alpha Ltd had instructed that the payment be made) would engage the underlying banking contract, and thus Dipti's apparent authority is governed by the law applicable to that contract (ie English law).

What is the consequence if the payment is (improperly) executed?

Let it be assumed that Bravo Bank complied with the payment instruction despite it being on notice of facts as ought to have put the bank on enquiry. Thus, as between the bank and its customer, the bank had no authority to debit the customer's account. Bravo Bank is therefore strictly liable to Alpha Ltd to reinstate the account balance as it was prior to the unauthorised payment. That liability is governed by the banker–customer relationship: so, English law (in the present case study) for the reasons explained above.

As to the position between Alpha Ltd and Charlotte, Alpha would have a right of recourse against Charlotte for her breach of the duties that she owed to Alpha Ltd. There is a possible, though likely theoretical, difficulty in respect of the claims against Charlotte in that they could be governed by the laws of different jurisdictions.

Charlotte may well owe (express or implied) duties as a matter of any contract by which she was appointed as Alpha Ltd's director. As canvassed above, in the absence of an express choice of law, a contract of employment is generally governed by the law of the jurisdiction from which the employee carries out their work (art 8(2) Rome I; *cf* art 4(1)(b)). Thus, a breach of contract claim against Charlotte may be governed by French law.

However, Charlotte's office as director may also mean that she owes distinct noncontractual duties to Alpha Ltd. The law governing the director–company relationship is, as explained above, the law of the state of incorporation, so BVI law may govern any claims for (eg) breach of fiduciary duty: *cf Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm) at [141]–[142].

Insofar as Alpha Ltd might have any claim against Dipti, that claim – like the contractual claim against Charlotte – will be governed by the law of the jurisdiction in which Dipti is habitually resident, so Belgium. However, by contrast to Charlotte's position, insofar as Dipti might owe fiduciary duties by virtue of her position as (limited) agent for Alpha Ltd, then claims for breach of those fiduciary duties are governed by the same law as that which governs the contract claims against Dipti. This is on the basis that such fiduciary duties are incidents of the parties' relationship, which is governed by the employment contract.

Bravo Bank may also have claims as against Charlotte, for having provided the unauthorised payment instructions which (as she intended to be the case) the bank complied with. The juridical nature of the bank's claim, and thus the law which governs the claim, is not settled.

The cause of action is for breach by the agent (ie Charlotte) of their (implied) warranty of authority, proffered in exchange for the third party (ie Bravo Bank) complying with the agent's instruction. In *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* [2012] 1 WLR 3674 (CA), it was assumed without argument that this is a form of implied contract (thus governed by Rome I) rather than being a free–standing tort (and so governed by Rome II).

Strictly, that might lead to a provisional conclusion that the claim would be governed by the place from which the agent was habitually resident: art 4(2) Rome I. However, the conclusion that Bravo Bank would need to pursue action against Charlotte in France (or Dipti in Belgium) is somewhat unsatisfactory, and there would be strong grounds to argue that the "contract" between Alpha Ltd's agent and Bravo Bank is manifestly more closely connected with the law which governs the bankercustomer relationship – ie English law.

Takeaways

- Inter–related agency relationships can be in play where a company is being defrauded by someone who might usually be trusted to act in the company's interests.
- When considering the law applicable to the relevant agency relationships, the conclusion can in some respects be unsatisfactory, as illustrated in the case study.
- A bank that improperly executes a payment on dishonest instructions would normally have a claim against the agent governed by the law of the agent's habitual residence, though there would be strong grounds to argue that the "contract" between the agent and the bank was manifestly more closely connected with the law which governs the banker–customer relationship.

Meet the author

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Matthew enjoys a broad commercial practice. Clients frequently instruct him to advise on issues of mistaken payments, and he has acted both for and against banks and other financial institutions in fraud litigation. Matthew is also the author of *A Practical Guide to Cyber Fraud Litigation* and teaches law at Queen Mary University London.

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