Neutral Citation Number: [2019] EWHC 347 (Comm)

Case No: CL-2017-000730

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 February 2019

Before :

ANDREW BURROWS QC
(Sitting as a Judge of the High court)

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Between :

THE FEDERAL REPUBLIC OF NIGERIA	**Claimant/ Respondent**
- and -	
JP MORGAN CHASE BANK, N.A.	**Defendant/ Applicant**

- -

Mr Roger Masefield QC and Mr Richard Blakeley (instructed by **Reynolds Porter Chamberlain**) for the **Claimant/Respondent**
Ms Rosalind Phelps QC and Mr David Murray (instructed by **Freshfields Bruckhaus Deringer LLP)** for the **Defendant/Applicant**

Hearing dates: 4-5 February 2019

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JUDGMENT

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ANDREW BURROWS QC

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1. INTRODUCTION

(1) General

1. This judgment deals with an application by the defendant, JP Morgan Chase Bank NA, for reverse summary judgment against the claimant, the Federal Republic of Nigeria, under CPR 24.2; and/or for the claimant's statement of case to be struck out under CPR 3.4(2). The defendant submits that, under CPR 24.2, the claimant has no real prospect of succeeding and that there is no other compelling reason for a trial; and that, under CPR 3.4(2), the Re-amended Particulars of Claim disclose no reasonable grounds for bringing the claim. The claim is one by a sovereign state against an international bank. Even by the standards of this court, it is a very large claim amounting to some US$875,740,000. The claimant alleges that the defendant bank made three transfers ($401,540,000, $400,000,000, and $74,200,000.03) from an account that the claimant held with it, which the defendant bank would not have made had it been exercising reasonable care. More specifically, it is alleged that the defendant bank was in breach of what is commonly referred to as the '*Quincecare* duty of care', named after the case of *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363 in which Steyn J first set out this duty of care. What is being alleged, therefore, is that, although the bank had reasonable grounds for believing that the payments out of its customer's account were defrauding the customer, the bank went ahead, in breach of its duty of care to its customer, and made those payments.

2. The claim was commenced on 29 November 2017. Amended Particulars of Claim were served on 4 July 2018 and an Amended Defence was served on 24 July 2018. This application for summary judgment/striking out was commenced on 31 July 2018. Since then, the claimant has put forward (draft) Re-amended Particulars of Claim. They significantly differ from the Amended Particulars of Claim. In particular, a number of claims have been abandoned (such as breach of fiduciary duty, breach of the Nigerian constitution, breach of anti-money laundering legislation, knowing receipt and breach of mandate). Instead it has been made clear that the claim in contract and tort rests solely on the breach of the *Quincecare* duty of care; and brief particulars of the alleged fraud are also pleaded. Rosalind Phelps QC, for the defendant bank, indicated at the start of the hearing (see transcript day 1, p 9, lines 13-20) that there would be no objection to those re-amendments if this application fails. The important point – and there is no dispute about this between the parties – is that the court is required to deal with this application on the basis of the Re-amended Particulars of Claim.

(2) The relevant facts

3. It is alleged by the claimant that the full background to this case is a complex web of facts that reveal a fraudulent and corrupt scheme whereby the claimant (and hence ultimately the people of Nigeria) has been defrauded of large sums of money. Plainly the court on a summary judgment application cannot possibly attempt to get to the bottom of such allegations and no-one is suggesting that it should. What this application is therefore concerned with is narrow and, as is explained in paragraph 6(iii) below, the court must assume that the claimant will be able to prove the facts it is alleging unless it is clear that those allegations have no real substance.

4. For the purposes of this application, the relevant and undisputed facts can be stated in a few sentences. In this respect, I was assisted by Ms Phelps, who guided me through the first parts of a helpful agreed chronology of events. The claim centres on a depository account that was opened pursuant to a depository agreement dated May 20, 2011 between the Federal Government of Nigeria and the defendant bank. Under that agreement, the defendant bank was the 'depository' and the Federal Government of Nigeria was the 'depositor'. The background to that depository agreement was a long-running dispute about an offshore Nigerian oilfield known as OPL 245. In 1998, the rights to exploit OPL 245 had been originally awarded by the Federal Government of Nigeria to Malabu Oil and Gas Nigeria Ltd ('Malabu'), owned by the then Minister of Petroleum, Chief Daniel Etete (who in 2007 was convicted in France of money-laundering arising out of bribery offences committed in Nigeria). That dispute was settled and, as part of its obligations under the resolution/settlement agreements (dated 29 April 2011), the Federal Government of Nigeria was required to set up an escrow account and, subsequently, set up the depository account with the defendant bank for the purpose of money being paid to those entitled under the settlement. On 23 August 2011, the defendant bank, on instructions by authorised signatories of the Federal Government of Nigeria, made two transfers, of $401,540,000 and $400,000,000 respectively, from the depository account to two separate accounts in the name of Malabu at First Bank of Nigeria plc and Keystone Bank Ltd. On 29 August 2013, the defendant bank, on instructions by authorised signatories of the Federal Government of Nigeria, made a further transfer of the remaining funds in the depository account, $74,200,000.03, to an account in the name of Malabu at Keystone Bank Ltd.

5. Under the Re-amended Particulars of Claim, it is alleged (see paras 20-21D of the Re-amended Particulars of Claim) that, in breach of its contractual and tortious *Quincecare* duty of care, the defendant, having been put on inquiry that the claimant was being defrauded, paid out irrevocably (to the accounts in the name of Malabu) sums of $801,540,000 and $74,200,000.03 from the depository account. It is alleged that that money was used to pay off corrupt former and contemporary Nigerian government officials and/or their proxies. It is alleged that some of the money was also intended to be used (and some was used) to make payments to senior executives at Royal Dutch Shell and Eni Corporation (those companies having formed an alliance for the purposes of acquiring the rights to develop the OPL 245 oilfield from Malabu).

(3) The law on summary judgment and the grounds for this application

6. The correct approach for a court to take on an application for summary judgment under CPR 24.2 has been clarified in several cases. These include *Swain v Hillman* [2001] 2 All ER 91, *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, at [10], *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], and *Daniels v Lloyds Bank plc* [2018] EWHC 660 (Comm), [2018] IRLR 813, at [48]. As regards applications by defendants for reverse summary judgment, the central points to be derived from those cases are as follows:

    i. The burden of proof is on the defendant.

    ii. The court must consider whether the claimant has a 'realistic', as opposed to a 'fanciful', prospect of success.

iii. The court should not conduct a mini-trial. Where there is a dispute on the facts, the court should assume that the claimant will be able to prove the facts it is alleging unless it is clear that there is no real substance to those allegations, as where they are contradicted by the documentary evidence.

iv. If there is a short point of law, or construction, 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, the court should grasp the nettle and decide it.

7. The defendant bank's application rests on three grounds. The first is that there was no *Quincecare* duty of care applicable on these facts because such a duty was inconsistent with, or was excluded by, the express terms of the depository agreement. We can refer to this as the 'no *Quincecare* duty of care' issue. The second ground is that, even if such a duty was owed, there is no realistic prospect of the claimant establishing causation of loss: the same outcome would have eventuated even if the defendant had not been in breach of its duty. This is the 'causation of loss' issue. The third ground is that, even if the claimant could establish the breach of a *Quincecare* duty of care causing the alleged loss, the defendant bank would have a complete defence to the claim because of an indemnity clause in the depository agreement: as the defendant bank would be entitled under that clause to be indemnified by the claimant, the claim would fail for circularity. This is the 'circularity' issue.

8. It is important to clarify that an 'incorrect party' ground is not now being put forward by the defendant bank. The claim is being brought by the Federal Republic of Nigeria although the depository agreement was made by the Federal Government of Nigeria. The defendant bank previously contended that that was a reason why summary judgment should be given and/or the claim should be struck out. But in the light of expert evidence put forward on behalf of the claimant – to the effect that, as a matter of Nigerian law, the Federal Government of Nigeria and the Federal Republic of Nigeria are not different legal entities - that line of argument has been abandoned by the defendant bank for the purposes of this application. More generally, it is not in dispute that for the purposes of this application the Federal Republic of Nigeria and the Federal Government of Nigeria should be treated as one and the same.

9. It was common ground between the parties that, leaving aside the 'causation of loss' issue, the court should grasp the nettle and decide the 'no *Quincecare* duty of care' and 'circularity' issues on this application. This is because they are concerned with questions of law as to the contractual interpretation of the depository agreement and the nature of the *Quincecare* duty of care. In other words, in respect of those issues, there has been full legal argument before me and nothing will be changed by having further evidence at trial. I accept that that is the correct approach. So I will be deciding those two issues one way or the other (rather than asking whether the claimant has a realistic prospect of success on the particular point of law). In contrast, the 'causation of loss' issue is primarily a factual issue, although also raising some legal issues, and should be approached by directly asking whether the claimant has a realistic prospect of success.

2. OUTLINE OF THE MAIN SUBMISSIONS OF THE PARTIES

10. Although I will be referring at various stages later to further details of the parties' submissions, it will be helpful now to give an outline of their main submissions.

(1) Outline of the Defendant Bank's Main Submissions

(i) The 'no Quincecare *duty of care' issue*

11. This issue took most time at the hearing. In general terms, Ms Phelps submitted that the nature and purpose of the depository account, as set out in the terms of the depository agreement, left no room for a *Quincecare* duty of care. In contrast to an ordinary current account, the depository account was essentially a single-purpose account, analogous to an escrow account, and was set up to enable the claimant to fulfil its specific payment obligations under the resolution/settlement agreements. The depository agreement contained, for example, detailed and narrow depository release conditions. These required written instructions in the form of a 'release notice' (a draft of which was scheduled to the agreement), signed by an authorised officer and confirmed by a telephone call-back. The contract was a detailed code setting out expressly the conditions which had to be satisfied before the 'depository amount' could be released. The contract was designed to preclude any additional duty of care to go behind instructions which were in compliance with the contract. The defendant bank could not be liable, outside the express terms of the contract, for following compliant instructions. The role of the defendant bank was intended to be largely automatic or mechanical.

12. More specifically, Ms Phelps submitted that a *Quincecare* duty of care, whether seen as arising by reason of an implied term or in the tort of negligence, was in conflict with particular express terms of the depository agreement. She categorised the conflicting terms into three broad types. First, there was clause 5.1 which excluded a *Quincecare* duty of care because it confined the defendant bank's obligations to those under the express terms of the contract. Secondly, there were clauses (clauses 5.8, 7.2, 7.4 and 11.5) which had a content which was inconsistent with a *Quincecare* duty of care. Thirdly, even if a *Quincecare* duty of care did apply, clauses 8.2(d) and 10.1(a) were exemption clauses which excluded the defendant bank from the consequences of complying with the mandate given. In interpreting some clauses of the contract it was relevant to recognise that, in her submission, the cases show that the *Quincecare* duty of care embodies a duty to enquire/investigate: it is not merely a negative duty to refrain from paying in certain circumstances.

13. It is helpful at this point to set out the specific terms of the depository agreement relied on by Ms Phelps:

'5.1 The duties and obligations of the Depository in respect of the Depository Cash shall be determined solely by the express terms of this Agreement. The Depository has no knowledge of the terms and provisions of any separate agreement or any agreement relating to the Depositor's Obligations, and shall have no responsibility for compliance by the Depositor with terms of any other agreement, or for ensuring that the terms of any such agreement are reflected in this Agreement and shall have no duties to anyone other than the Depositor.'

'5.8 The Depositor hereby authorises the Depository to act hereunder notwithstanding that:… (ii) the Depository or any of its divisions, branches or affiliates may be in possession of information tending to show that the instructions received may not be in the best interests of the Depositor and the Depositor agrees that the Depository is not under any duty to disclose any such information.'

'7.2 The Depository shall be under no duty to enquire into or investigate the validity, accuracy or content of any instruction or other communication.'

'7.4 The Depository need not act upon instructions which it reasonably believes to be contrary to law, regulation or market practice but is under no duty to investigate whether any instructions comply with any applicable law, regulation or market practice.'

'8.2(d) [The Depository shall not be liable to the Depositor for any loss suffered by the Depositor by] the Depository acting on what it in good faith believes to be instructions or in relation to notices, requests, waivers, consents, receipts, or other documents which the Depository in good faith believes to be genuine and to have been given or signed by the appropriate parties.'

'10.1 The Depositor hereby irrevocably and unconditionally agrees on demand to indemnify, and to keep fully and effectively indemnified ... the Depository, and its directors, officers, agents and employees (the "indemnitees") against all costs, claims, losses, liabilities, damages, expenses, fines, penalties, Tax and other matters ("Losses") which may be imposed on, incurred by or asserted against the indemnitees or any of them directly or indirectly in respect of:
(a) the following of any instruction of other directions upon which the indemnitees is authorised to act or rely pursuant to the terms of this Agreement, or arising as a result of entering into this Agreement or their status as holder of the Depository Cash;'

'11 The Depositor hereby represents and warrants to the Depository on a continuing basis that:
11.5 …the transactions to be effected under this Agreement will not violate any law, regulation, by-law or rule applicable to it or any agreement by which it is bound or by which any of its assets are affected and it is not restricted under the terms of its constitution or in any other manner from performing its obligations hereunder.'

(ii) The 'causation of loss' issue

14. Ms Phelps submitted that, even if a *Quincecare* duty of care was imposed on the defendant bank in this case, there is no realistic prospect of the claimant successfully showing causation of loss: the same outcome would have eventuated even if the defendant had not been in breach of its duty. In other words, there is no realistic prospect of the claimant showing that the payments out would have been avoided had that duty been complied with. This was because reasonable enquiries would not have uncovered the alleged fraud. Indeed, the defendant bank sought and obtained a letter from the Attorney-General of Nigeria to the effect that the payment instructions were legitimate. Moreover, the investigation into the alleged fraudulent scheme has taken years of work by, for example, the Italian and Nigerian law-enforcement authorities so that the idea that the defendant bank, faced with payment instructions that on the face of it complied with

the mandate – and with the express assurances of the Attorney-General of Nigeria – would, or should, reasonably have taken on this task, in order to decide whether to make the payments, is wholly unrealistic. Put another way, if, as alleged, the fraudulent scheme went to the highest level of the Nigerian government – including the then President Goodluck Jonathan – reasonable checks with the highest of officials would merely have served to satisfy the defendant bank that the money should be paid. So, in short, the essential submission here is that because of the nature and extent of the alleged fraudulent scheme there is no realistic prospect of the claimant establishing that it would have avoided paying the money away, even if a *Quincecare* duty of care was imposed on it.

(iii) The 'circularity' issue

15. Ms Phelps submitted that, even if the claimant could establish that the defendant bank owed the claimant a *Quincecare* duty of care and had a realistic prospect of establishing breach causing loss, the defendant bank has a complete defence to the claim by reason of the indemnity clause, clause 10.1(a), in the depository agreement (set out in paragraph 13 above). As the defendant bank would be entitled to be indemnified against the claim by the claimant, the claim fails for circularity.

(2) Outline of the Claimant's Main Submissions

(i) The 'no Quincecare *duty of care' issue*

16. Roger Masefield QC for the claimant initially stressed – and Ms Phelps did not dispute this – that because, on a summary judgment application, the court should assume that the claimant will be able to prove the facts alleged (and there was nothing sufficient here to counteract that assumption), the court must accept the following: that the claimant was defrauded by way of a fraudulent and corrupt scheme; that the defendant bank was 'on inquiry' (ie it had reasonable grounds for believing) that the payment instructions it received were part of an attempt to defraud the claimant; and that, despite that, the defendant bank went ahead and made the payments to Malabu of $801,540,000 in 2011 and $74,200,000.03 in 2013. The factual basis for the *Quincecare* duty of care arose because the defendant bank was 'on inquiry'. Mr Masefield then submitted that the terms of the depository agreement did not displace that *Quincecare* duty of care, whether one stood back and looked at the contract generally or one examined the particular terms highlighted by Ms Phelps (each of which, he submitted, should be given a different interpretation than the one Ms Phelps was putting forward). The *Quincecare* duty of care arose by reason of a term implied by law at common law and/or by statute (under s 13 of the Supply of Goods and Services Act 1982); and/or was imposed by the tort of negligence. As the duty gave the customer a valuable right and was imposed by the general law for good policy reasons – to encourage banks to help combat fraud – the correct approach to interpretation was that there had to be clear wording in the contract to displace it. There was no such clear wording in the depository agreement. Moreover, there was no reason of principle or authority why the *Quincecare* duty of care should not be applied to a depository account (rather than a current account). Indeed, as such an account had a limited purpose with limited numbers of transactions and instructions – and in that sense would place a less onerous burden on the bank than where an account involves multiple transactions – it was *a fortiori* that a *Quincecare* duty of care should be owed.

17. In so far as relevant to interpreting the contract, Mr Masefield submitted that the *Quincecare* duty of care is a duty which requires a bank, while it is 'on inquiry' that a payment out would be a fraud on its customer, to refrain from paying out. In his submission, the authorities do not establish that, once the bank is on inquiry, it is under any duty to investigate: all that the cases lay down is that the bank should refrain from paying unless and until it no longer has reasonable grounds for believing that the payment would be defrauding the customer.

(ii) The 'causation of loss' issue

18. Mr Masefield submitted that this was pre-eminently a triable issue which the court would need to decide in the light of all the evidence at trial. It raised questions of fact and law; and the legal issues would be influenced by the precise scope of the *Quincecare* duty of care (on which banking expertise would be needed). The defendant bank could not show that the claimant had no realistic prospect of successfully establishing causation of loss. In answer to the defendant bank's submission that further checks by the bank would have led to the same outcome - the money being paid out - Mr Masefield submitted that that would depend on the relevant counterfactual for the causation enquiry. He went through some details of the background, in particular drawing my attention to concerns David Steel J had expressed about instructions to the defendant bank for money to be paid out of the depository account. That was in the context of a freezing order that had been granted over the depository account in relation to a claim brought by Energy Venture Partners Ltd against Malabu (see the comments of David Steel J at a hearing on 21 July 2011 (at bundle 3/23/16) and his judgment at [2011] EWHC 2215 (Comm)). This was put forward by Mr Masefield as part of a general submission that, had the defendant bank not paid out the money, one realistic possibility was that the account would have been frozen by court order (perhaps by reason of the defendant bank invoking clause 5.7 of the depository agreement which, according to Mr Masefield, expressly allowed the bank to come to court for a determination of its duties in the event of a dispute or uncertainty as to its duties).

(iii) The 'circularity' issue

19. Mr Masefield submitted that, on the correct interpretation of clause 10.1(a), there was no circularity. The clause was dealing with the customer indemnifying the bank in respect of claims by third parties against the defendant bank, not claims by the customer. If it were not construed in that way, it would conflict with other clauses of the contract (for example, clause 8 on exclusion of the bank to its customer) and indeed would tend to remove any legal liability of the bank to its customer therefore emptying the contract of its content. Even if that were incorrect, it is well-established in the cases that indemnity clauses should be narrowly construed so that general words, as opposed to clear explicit words, are insufficient for an indemnity clause to cover against negligence, including a negligent breach of contract. One was here concerned with the alleged negligence of the defendant bank (and indeed gross negligence was alleged) and yet there were no words in clause 10.1(a) clearly referring to negligence.

3. THE RELEVANT LAW

20. I now set out the relevant law on, first, the *Quincecare* duty of care and, secondly, the interpretation of exemption, indemnity, and entire agreement clauses. As regards the former, the parties disagreed as to whether the *Quincecare* duty of care embodies a duty to make enquiries. As regards the latter, the parties were largely in agreement as to the legal principles, albeit with differences of emphasis and starting points, but disagreed as to how those legal principles should be applied in interpreting the depository agreement.

(1) The law on the *Quincecare* duty of care

21. The *Quincecare* duty of care was very carefully formulated and explained by Steyn J in *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363. His mode of expression was 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. It is an aspect of the bank's duty of reasonable skill and care in or about executing the customer's orders and therefore arises by reason of an implied term of the contract or under a coextensive duty of care in the tort of negligence.

22. On the facts of the *Quincecare* case, 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 duty to the company. The counterclaim/defence failed because, on the facts, it was held that the bank was not 'put on inquiry': ie it had no reasonable grounds for believing that the chairman's instruction to make the transfer was an attempt to defraud the company. The duty to refrain from payment did not therefore arise.

23. Steyn J set out the position as follows and, given that he was the first judicial expositor of this duty, I make no excuse for citing this long passage from his judgment which repays careful reading (see [1992] 4 All ER 363 at 376-377 with my emphasis):

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.*

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.'

24. Having then decided that, on the facts, the bank was not 'put on inquiry', Steyn J went on briefly to consider the position if the duty had arisen on the facts: ie if the bank had been 'put on inquiry'. He concluded that, in that situation, causation could not in any event have been satisfied because the only conceivable enquiries that the bank would have made would not have alerted the bank to the fraud so that the payments would still have been made and the loss would not have been averted. In his words, in relation to 'the question of causation' (see [1992] 4 All ER 363 at 381):

    'In my judgment, the only inquiries which the bank could conceivably have made would not have alerted the bank to the impending fraud, and would not have averted the loss. For this additional reason the defence must fail.'

25. I was referred to two subsequent cases in which the *Quincecare* duty of care has been discussed. The first was *Lipkin Gorman v Karpnale Ltd* in the Court of Appeal, [1989] 1 WLR 1340. That became a celebrated case in the law of unjust enrichment when it was appealed on separate matters to the House of Lords. But the relevance of the case for present purposes is that the Court of Appeal discussed the duty of care owed by a banker to its customer in terms that are similar to those of Steyn J; and May LJ acknowledged (at 1356) the 'substantial assistance' he had derived from the judgment of Steyn J which, at that stage, had only been reported in *The Times*. On the facts, Cass, a partner in a firm of solicitors, had been drawing on the client account (he was an authorised signatory) to subsidise his addiction to gambling. It was held that the bank, where the client account was held, was not 'put on inquiry' – ie it did not have 'reasonable grounds for believing that Cass was operating the client account in fraud' (to use the words of Parker LJ at 1377) – so that the bank was not in breach of a duty of care by honouring cheques drawn by Cass.

26. The second case is *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2018] EWCA Civ 84, [2018] 1 WLR 2777. 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 Sanea's instructions to bank accounts in the names of three other companies within the group. This was a fraud by Sanea on the claimant company. The claimant's liquidators successfully argued, inter alia, that the defendant had been in breach of its *Quincecare* duty of care. The major question on appeal, which was decided in the claimant liquidators' favour (subject to a reduction for contributory negligence), was whether Sanea's illegal conduct should be attributed to the claimant so that illegality was a defence to the claim. But a subsidiary question on the appeal was whether the *Quincecare* duty of care applied where only the claimant company's creditors stood to benefit from the claim (because the claimant was insolvent). The important point for our purposes is that, in holding in favour of the claimant on this question, the Court of Appeal (the leading judgment being given by Sir Geoffrey Vos C, with whom Gloster and McCombe LJJ agreed) succinctly explained the *Quincecare* duty of care, and contrasted it with the duty of care owed by an auditor. Sir Geoffrey Vos C said the following, at [87]-[88]:

    'The [Quincecare] duty was to protect the funds held in Singularis's account from fraudulent disposition, and the fact that vindicating that right will benefit only creditors rather than the company itself is nothing to the point… That duty is a binary one to stop payments from being made out of the customer's bank account in certain very limited circumstances. It 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.'

27. It is relevant to note that, of the three cases, this is the only one in which the claimant succeeded in its claim based on a *Quincecare* duty of care: ie it is the only case of the three in which the bank was held to have the necessary reasonable grounds for believing that the payments were defrauding the customer (and causation of loss was also satisfied). I should add that, although Mr Masefield submitted that Sir Geoffrey Vos C's reference to a 'binary' duty was because the *Quincecare* duty was an 'on-off' duty (to pay or not to pay) and did not impose a duty of enquiry, there is much to be said for Ms Phelps' submission that, putting that description in its context, Sir Geoffrey Vos C was talking about who the duty was owed to, not the content of the duty: ie it was owed only to the customer and, in contrast to the scope of an auditor's duty of care, not to any wider class.

28. These three cases make clear that the core of the *Quincecare* duty of care is the negative duty on a bank to refrain from making a payment (despite an instruction on behalf of its customer to do so) where it has reasonable grounds for believing that that payment is part of a scheme to defraud the customer. What is not entirely clear is whether, in addition to that core duty, a bank with such reasonable grounds has a duty to make reasonable enquiries so as to ascertain whether or not there is substance to those reasonable grounds. I strongly incline to the view (although, as will become clear at paragraphs 47-50 below, I do not ultimately need to decide this) that Ms Phelps is correct in her submission that the cases do envisage there as being an additional duty of enquiry.

29. In support of this additional duty of enquiry, Ms Phelps invoked, for example, the following passages from the three cases we have referred to above (with Ms Phelps' emphasis).

From Steyn J in the *Quincecare* case:

"*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?"* (at 376d-e).

"*[One of the factors to be considered is] the scope and means for making reasonable inquiries"* (at 377b).

"*I propose to examine only those matters which could arguably be said to be known to the Hull branch, or which **they should, on the basis of what was known, have inquired about**."* (at 380b-c).

From *Lipkin Gorman v Karpnale Ltd*:

"*… it is, in my opinion, only when the circumstances are such that any reasonable cashier would hesitate to pay a cheque at once and refer it to his or her superior, and*

*when any reasonable superior would hesitate to authorise payment **without inquiry**, that a cheque should not be paid immediately on presentation **and such inquiry made**."* (at 1356E-F, per May LJ).

"*A single telephone call to Mr Gorman, one of the partners in the plaintiff firm of solicitors, would have brought the whole enterprise to a close. Was there any **duty on the bank to make such as call**? Rather more searching inquiry by the bank of Cass about where he was obtaining his funds with which to gamble, even to the extent of which they were aware, might well also have had the same effect. Was there any **duty on the bank to make that inquiry** until the truth was out?"* (at 1357C, per May LJ).

"*I think that if Mr Fox [the bank manager] had or ought to have learned of the frequent and substantial withdrawals by Cass in cash from the clients' account even the limited duty of care to which he was subject would have **required him to tell Mr Gorman**."* (at 1358, per May LJ).

*"The question must be whether, if a reasonable and honest banker knew of the relevant facts, he would have considered that there was a serious or real possibility, albeit not amounting to a probability, that its customers might be being defrauded, or, in this case, that there was a serious or real possibility that Cass was drawing on the client account and using the funds so obtained for his own and not the solicitors' or beneficiaries' purposes. That, at least, the customer must establish. If it is established, then in my view a reasonable banker would be in breach of duty if he continued to pay cheques **without inquiry**."* (at 1378B, per Parker LJ).

From Sir Geoffrey Vos C in the *Singularis Holdings* case:

"*The judge held that Daiwa had breached its duty of care to Singularis in making the payment **without any proper inquiry**."* (at [5] citing Rose J at first instance [2017] EWHC 257 (Ch), [2017] 1 Lloyd's Rep 226, [164].)

*'[The duty is] a duty not to pay away money in a customer's account **without proper inquiry**.'* (at [87).

30. To recognise such a duty of enquiry would be in line with sound policy. In the fight to combat fraud, banks with the relevant reasonable grounds for belief should not sit back and do nothing. Moreover, the duty of enquiry on banks would not be unduly onerous because it would always be limited by what an ordinary prudent banker would regard as reasonable enquiries in a situation where there are reasonable grounds for believing that the customer is being defrauded.

31. But even assuming that Ms Phelps is correct in her submission that a bank with the relevant reasonable grounds for belief has a duty of care to make reasonable enquiries, it would be potentially misleading to go on from that to describe the *Quincecare* duty of care as a duty of care to make enquiries/to investigate. The core of the *Quincecare* duty is, as Steyn J set it out, a negative duty not to pay while the bank has the relevant reasonable grounds. A positive duty of enquiry/investigation would be additional to that. In any event, a bank, which is acting honestly and *without* reasonable grounds for believing that its customer is being defrauded, has no duty of care to enquire/investigate. In other words, there is no duty of care to enquire/investigate prior to the point in time when the bank has reasonable grounds for believing that its customer is being defrauded.

I shall return to these issues at paragraphs 47-50 below where I deal with the interpretation of clauses 7.2 and 7.4.

(2) The law on the interpretation of exemption, indemnity, and entire agreement clauses

32. I have elsewhere summarised the modern approach in English law to contractual interpretation: see, eg, *Greenhouse v Paysafe Financial Services Ltd* [2018] EWHC 3296 (Comm) at [11]. The modern approach is to ascertain the meaning of the words used by applying an objective and contextual approach. One must ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. But the words used by the parties are of primary importance so that one must be careful to avoid placing too much weight on business common sense or purpose at the expense of the words used; and one must be astute not to rewrite the contract so as to protect one of the parties from having entered into a bad bargain. Important cases of the House of Lords and Supreme Court articulating the modern approach include *Investments Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, HL, especially at 912-913 (*per* Lord Hoffmann giving the leading speech), *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900, *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173.

33. In this case I am particularly concerned with applying the modern approach to contractual interpretation to the interpretation of exemption, indemnity and entire agreement clauses (see, respectively, clauses 8, 10 and 5 of the depository agreement). The submissions of counsel raised two topical questions of legal principle. First, in interpreting exemption and indemnity clauses, what is the present status of the *contra proferentem* rule? Secondly, does an entire agreement clause operate to exclude terms implied by law?

(i) The interpretation of exemption and indemnity clauses: what is the present status of the contra proferentem *rule?*

34. When Lord Hoffmann set out the modern approach to contractual interpretation in *Investment Compensation Scheme v West Bromwich*, he said, at 912: ‘Almost all the old intellectual baggage of “legal” interpretation has been discarded’. One question that arises, therefore, is whether the traditional rule of interpretation *contra proferentem* survives and in what form. In the context of exemption clauses that rule was to the effect that an exemption clause should be construed strictly against the person who drew up the exemption clause or was relying on it. But the recent authorities – see, especially, *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd’s Rep 61, at [11], [58]-[67], [95], [116]; *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75, [2010] QB 27, at [23]; *Capita (Bamstead 2011) Ltd v FRIB Group Ltd* [2015] EWCA Civ 1310, [2016] QB 835, at [10]; *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128, [2016] 1 CLC 573, at [18]-[21] (and see generally *Chitty on Contracts* (ed Beale) (33rd edn, 2018) paras 15-012 – 15-020) – indicate that the law is as follows:

i. The ambiguity of who is the 'proferens' (is it the person who drew up the exemption or the person relying on it?) means that reference to a *contra proferentem* rule is problematic.

ii. In any event, the modern objective and contextual approach to the meaning of the words, with business common sense and purpose also being relevant in some cases, renders it unnecessary to regard there as being a separate *contra proferentem* rule.

iii. Applying the modern approach, the force of what was the *contra proferentem* rule is embraced by recognising that a party is unlikely to have agreed to give up a valuable right that it would otherwise have had without clear words. And as Moore-Bick LJ put it in the *Stocznia* case, at [23], 'The more valuable the right, the clearer the language will need to be'. So, for example, clear words will generally be needed before a court will conclude that the agreement excludes a party's liability for its own negligence. The well-known principles in *Canada Steamship Lines Ltd v The King* [1952] AC 192 (that general words, not explicitly mentioning negligence, will not exclude or indemnify against negligence unless that is the only possible liability) should be regarded as a flexible guide and not as a rigid code.

35. I should add for completeness that the passing of the Unfair Contract Terms Act 1977 (and see now the Consumer Rights Act 2015) adds a further reason for not distorting standard principles of interpretation in the context of exemption clauses (and indemnity clauses in consumer contracts) given the power conferred on the courts by the legislature to strike down such clauses as unreasonable.

(ii) The interpretation of an entire agreement clause: are terms implied by law excluded?

36. In relation to clause 5, I was referred to two cases dealing with the law on the question of whether an entire agreement clause excludes implied terms – *AXA Sun Life Services v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep 1, at [41] and *Great Elephant Corp v Trafigura Beheer BV* [2012] EWHC 1745 (Comm), [2012] 2 Lloyd's Rep 503, at [88]-[91] (reversed on appeal on a different point: [2013] EWCA Civ 905, [2014] 1 Lloyd's Rep 1) – and to passages on this question in *Chitty on Contracts* at para 14-019 and Lewison, *The Interpretation of Contracts* (6th edn, 2015) p 156.

37. The correct approach here is in line with what I have set out in paragraph 34 above in relation to exemption and indemnity clauses. One must, as ever, apply the modern approach to contractual interpretation (see paragraph 32 above). It is unnecessary to regard there as being a separate rule for the interpretation of an entire agreement clause. However, where the entire agreement clause will have the effect of excluding an implied term that would otherwise arise, one should recognise that a party is unlikely to have agreed to give up a valuable right that it would otherwise have had without clear words. The more valuable the right, the clearer the words will need to be. It follows that an entire agreement clause may or may not exclude an implied term. This will primarily depend on the words used, in their context, but it will also be relevant to consider, for example, the nature of the implied term. So it may be that a term implied by law, at common law or by statute, as opposed to some terms implied by fact or by custom, confers a particularly

valuable right so that it is unlikely that a party has agreed to give up that right other than by clear wording. In our case, it is not in dispute that the *Quincecare* duty of care arises either by reason of a term implied by law at common law – because necessary to the particular type of contract or relationship, applying the test in, for example, *Liverpool CC v Irwin* [1977] AC 239 – or by reason of a term implied by s 13 of the Supply of Goods and Services Act 1982; or it arises in tort. It is plain that the right that would otherwise be conferred is of considerable value to the customer – hence the implication by law or the imposition by tort – so that clear wording is needed to exclude it.

4. THE REASONS WHY THE APPLICATION FOR SUMMARY JUDGMENT FAILS

38. Having outlined the parties' submissions, and having articulated the relevant law, I can now explain why the defendant bank's application for reverse summary judgment (or striking out) fails. I shall take each of the three grounds in turn. The first will take the most time.

(1) The 'no *Quincecare* duty of care' issue

39. In line with the allegations made by the claimant in the Re-amended Particulars of Claim and in the witness statement of Jonathan Cary (dated 26 October 2018), it is not in dispute that I must assume on this application that the claimant has a realistic prospect of successfully establishing at trial that the defendant bank had reasonable grounds for believing that the payments out were part of an attempt to defraud the claimant: ie that the defendant bank was 'put on inquiry'. Prima facie that means that the bank owed a *Quincecare* duty of care to the claimant; and there is no good reason of principle or policy why that duty of care should be confined to current accounts and should not apply to the depository account in this case. That duty of care entailed that the defendant bank could not simply follow the mandate of abiding by the instructions given by the claimant because the bank's duty of care, at its core, was to protect the claimant against being defrauded by not paying out unless and until it was 'off inquiry': ie unless and until those reasonable grounds, for believing that the payment out was part of an attempt to defraud the customer, no longer existed. Indeed, as was forcefully said by Mr Masefield, if the defendant bank's submissions were correct, and the depository agreement, on its true interpretation, meant that no *Quincecare* duty of care was owed in this case, it would appear that the defendant bank, while still reasonably believing that the payment out was an attempt to defraud its customer, should have gone ahead (or at least was entitled to go ahead) and paid out those huge sums of money. Mr Masefield submitted that that would have been an extraordinary contract for the claimant to have entered into and I accept that, at the very least, it would have been an imprudent contract for the claimant.

40. Applying the law on contractual interpretation set out at paragraphs 32-37 above, the depository agreement was not inconsistent with and did not exclude, either generally or by particular terms, the *Quincecare* duty of care. That duty, as we have seen (see paragraphs 21-23 above) is a specific manifestation of the duty of care owed by a banker to its customer in relation to instructions. It is imposed as an implied term of law by common law or by statute under s 13 of the Supply of Goods and Services Act 1982 or is imposed by the tort of negligence. The duty is imposed by law for good policy reasons, not least to encourage banks to help combat fraud, and it gives the customer a valuable right. It is of course possible that the *Quincecare* duty may not arise because it is inconsistent with the express terms of the contract or it may be excluded by an exemption

clause. It is trite common law that an implied term cannot be inconsistent with an express term; and that idea is spelt out, as regards the s 13 implied term, in s 16 of the Supply of Goods and Services Act 1982. Similarly, the duty of care in tort may be shaped by, and can be excluded by, contractual terms. But given that the *Quincecare* duty of care is imposed for good policy reasons and is a valuable right for the customer, clear wording, including clear inconsistency, will be needed before a court concludes that that duty of care does not arise. In my view, there is no such clear wording in the depository agreement whether looked at generally or in focussing on particular clauses.

41. I now turn to the particular clauses in the depository agreement relied on by the defendant bank. Before I do so, I should make clear the perhaps obvious point that I have had the benefit – which is important in applying the modern objective and *contextual* approach to interpretation – of reading the full depository agreement and the full clauses from which these specific terms, or parts of terms, have here been extracted.

(i) Clause 5.1

42. *'5.1 The duties and obligations of the Depository in respect of the Depository Cash shall be determined solely by the express terms of this Agreement. The Depository has no knowledge of the terms and provisions of any separate agreement or any agreement relating to the Depositor's Obligations, and shall have no responsibility for compliance by the Depositor with terms of any other agreement, or for ensuring that the terms of any such agreement are reflected in this Agreement and shall have no duties to anyone other than the Depositor.'*

43. 'Entire agreement' clauses come in many forms and one may describe this as an 'entire agreement' clause. The question at issue concerns the first sentence. Does that sentence, with its words 'express terms', exclude the *Quincecare* duty of care given that that duty of care arises either by operation of a term implied by law (whether at common law or under statute) or under the tort of negligence?

44. I have set out at paragraphs 36-37 above, the law on the interpretation of entire agreement clauses, and the question of whether implied terms are excluded. Applying that law, the first sentence of clause 5.1 does not exclude the *Quincecare* duty of care implied term, or the imposition of that duty of care by the tort of negligence, for the following reasons:

   i. Clear words are required to exclude the valuable right conferred by the *Quincecare* duty of care. But there is no express mention of implied terms, including terms implied by law, being excluded; nor is there any mention of the operation of the tort of negligence being excluded.

   ii. If one were to interpret the reference to 'express' terms of the contract as ruling out a *Quincecare* duty of care, it would also operate to rule out (because there are no other relevant express terms) all other manifestations of a bank's implied duty of care to its customer in respect of the depository cash; and all other liabilities imposed in tort or in equity (in respect of the depository cash) including, for example, the tort of deceit or knowing receipt or dishonest assistance or breach of confidence. That would be an alarming interpretation given that it would deprive the customer of many valuable rights.

iii. The ruling out of tort duties would be inconsistent with other clauses in the contract. For example, clause 8.1 limits liability to the customer for 'fraud' or 'gross negligence' but there is nothing in the express terms of the contract prohibiting such conduct: it must follow that at least some tort liability is not being excluded. Again that clause goes on to refer expressly to obligations in tort: ie it limits the bank's liability for indirect or consequential loss for liability under the agreement 'or for obligations relating to this Agreement (including… obligations in tort)'. Excluding breach of confidence (in respect of the depository cash) would also be inconsistent with clauses 2.2 and 5.9 which assume that there would otherwise be a liability for breach of confidence. Again clause 19 on the Governing Law envisages there as being non-contractual obligations. It reads *'This Agreement and any non contractual obligation arising out of it, is governed by, and shall be construed in accordance with, English law.'*

iv. The relevant context, in applying the required objective and contextual approach to the interpretation of the first sentence of clause 5.1, includes the context of the full clause. In other words, one should not interpret the first sentence in isolation. Looked at as a whole, clause 5.1 is seeking to make clear that the terms of this contract, and no other agreement, govern. In other words, one cannot go outside the provisions of this agreement (for example, to the resolution agreements of 29 April 2011 which are mentioned in the preamble/recital on page 1 of the agreement) to determine what the parties have agreed.

v. Although the word 'express' could equally well not have been included, the correct interpretation is that this was emphasising that the relevant terms are those of this contract and no other.

45. In reaching this conclusion on clause 5.1, I have not found it necessary to resolve the question whether, as Ms Phelps tentatively submitted, some of what Teare J said in *Great Elephant Corp v Trafigura Beheeer BV* [2012] EWHC 1745 (Comm), [2012] 2 Lloyd's Rep 503, at [90] – a case I have referred to in paragraph 36 above – cannot stand in the light of the apparent criticism made by the Supreme Court in *Marks and Spencer plc v BNP Paribas Services Trust Company (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 of some of Lord Hoffmann's reasoning in *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988. Teare J was considering an entire agreement clause which included the following words: 'Each party further acknowledges that it will only be entitled to remedies in respect of breach of the express terms of the contract…' Part of Teare J's reasoning in deciding that an implied term by law under s 12 of the Sale of Goods Act 1979 was not excluded by that clause was that, applying *Belize Telecom*, implied terms merely 'spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean' (Teare J at [21], citing Lord Hoffmann]). In other words, in a high level sense, a reference to express terms included, and did not exclude, implied terms because the two types of term go together in answering the essential single question (as Lord Hoffmann saw it) which is what the contract, read in context, would be reasonably understood to mean. I merely note – because it may possibly make a difference to the analysis – that *Belize Telecom* and the *Marks and Spencer* case were both concerned with terms implied by fact – that is, a term based on the parties' common intentions objectively understood and to which the well-established 'officious bystander' and 'business efficacy' tests apply – rather than terms

implied by law (whether at common law or by statute). We are here concerned only with terms implied by law.

(ii) Clauses 7.2 and 7.4

46. *'7.2 The Depository shall be under no duty to enquire into or investigate the validity, accuracy or content of any instruction or other communication.'*
'7.4 The Depository need not act upon instructions which it reasonably believes to be contrary to law, regulation or market practice but is under no duty to investigate whether any instructions comply with any applicable law, regulation or market practice.'

47. These clauses are consistent with, at least, the core *Quincecare* duty of care. I have considered in detail above (see paragraphs 21-31) what the *Quincecare* duty of care requires. I have explained that, at its core, the *Quincecare* duty of care imposes a negative duty not to pay (ie to refrain from paying) despite compliant instructions where the bank has reasonable grounds (assessed according to the standards of an ordinary prudent banker) for believing that to make the payment would defraud its customer. I have also explained that, in line with what has been said in the three cases on the *Quincecare* duty and as a matter of policy, I am strongly inclined to the view that, once the bank has those reasonable grounds for belief (ie it is 'put on inquiry'), the *Quincecare* duty imposes an additional positive duty to make reasonable enquiries: but that, even if that is correct, it would be potentially misleading to describe the *Quincecare* duty of care as a duty to enquire/investigate not least because there is no duty of care on an honest bank to enquire or investigate prior to the point at which the bank has the relevant reasonable grounds for belief.

48. The correct interpretation of clauses 7.2 and 7.4 is that, apart from the opening sentence in clause 7.4 (which is plainly consistent with a *Quincecare* duty of care), they do not apply at all where the bank has reasonable grounds for believing that the customer is being defrauded. In other words, the references to there being no duty to enquire or investigate are making clear, consistently with the law as I have summarised it in the last paragraph, that there is no duty of care to enquire or investigate prior to the point at which the bank has the relevant reasonable grounds for belief. Put another way still, clauses 7.2 and 7.4 are consistent with the *Quincecare* duty of care even if it is correct that that duty of care imposes an additional positive duty to enquire/investigate along with the core negative duty not to pay.

49. But even if I am wrong on that interpretation, clauses 7.2 and 7.4 are consistent with the core *Quincecare* duty of care and would only go as far as excluding any additional positive duty to enquire or investigate. One might say that the draftsperson has explicitly drawn a distinction between, on the one hand, paying out where the bank has reasonable grounds for believing that the instructions are contrary to law - where the bank is expressly not bound to act upon instructions and, applying *Quincecare*, would be bound not to pay out - and, on the other hand, an additional duty to enquire or investigate which is excluded. Put another way, on this interpretation what clauses 7.2 and 7.4 are doing is modifying the *Quincecare* duty of care by excluding any additional duty to enquire or investigate while leaving in place the core negative duty. Such a modification would produce no difficulty for the claimant if, as I understand it – see, for example, the claimant's skeleton argument at paragraph 46 – the claimant is alleging only a breach of that core negative duty. It would only be if the claimant were alleging that there was a

duty to make enquiries that clauses 7.2 and 7.4 would bite on the claim (admittedly the last sentence of paragraph 56 of the Re-amended Particulars of Claim still refers to the defendant needing to make further enquiries; and see also paragraph 32.2 of the claimant's Reply). Even then, clauses 7.2 and 7.4 would only bite on the claim to the extent of knocking out an additional positive duty to enquire or investigate: the core negative duty not to pay would be left intact.

50. I consider the interpretation in paragraph 48 to be the correct one. But even if I am wrong about that, I would adopt the alternative interpretation in paragraph 49 which would leave intact the core *Quincecare* duty of care.

(iii) Clauses 5.8 and 11.5

51. *'5.8 The Depositor hereby authorises the Depository to act hereunder notwithstanding that :… (ii) the Depository or any of its divisions, branches or affiliates may be in possession of information tending to show that the instructions received may not be in the best interests of the Depositor and the Depositor agrees that the Depository is not under any duty to disclose any such information.'*

    '11 The Depositor hereby represents and warrants to the Depository on a continuing basis that:
    11.5 …the transactions to be effected under this Agreement will not violate any law, regulation, by-law or rule applicable to it or any agreement by which it is bound or by which any of its assets are affected and it is not restricted under the terms of its constitution or in any other manner from performing its obligations hereunder.'

52. It is hard to see how these clauses impact on whether there is a *Quincecare* duty of care or not. Neither of them is purporting to deal with where the customer is itself the victim of a fraud. Neither indicates that the bank should go ahead with instructions where the bank has reasonable grounds for believing that the customer would be the victim of a fraud if the payment were made. The reference in clause 5.8 to being 'in possession of information' so that the instructions may not be in the 'best interests of the Depositor' is best interpreted as referring to commercial information and to the best commercial interests of the customer and does not cover the different and extreme case where the bank has information giving it reasonable grounds for believing that complying with the instructions would defraud the customer. Clause 11.5 is dealing with regulations 'applicable to it' (ie to the bank) such as the laws of Nigeria and it cannot plausibly be regarded as a reference to the law of fraud where the customer is the victim of that fraud: to deny that would be tantamount to adopting a far-fetched interpretation that the customer is warranting to the bank that the customer is not being defrauded by relevant transactions.

(iv) Clause 8.2(d)

53. *'8.2(d) [The Depository shall not be liable to the Depositor for any loss suffered by the Depositor by] the Depository acting on what it in good faith believes to be instructions or in relation to notices, requests, waivers, consents, receipts, or other documents which the Depository in good faith believes to be genuine and to have been given or signed by the appropriate parties.'*

54. Again this does not help the defendant bank in the situation with which we are here dealing for the following reasons:

    i. In deciding on the correct interpretation, I must apply the law on the interpretation of exemption clauses, as set out at paragraph 34 above. This requires there to be clear words if there is to be an exclusion of the valuable right that, on the facts of this case, would otherwise be conferred on the customer by the *Quincecare* duty of care. Here there are no such clear words.

    ii. On its correct interpretation, clause 8.2(d) does not apply to the alleged facts. This clause protects a bank where apparently authorised instructions have not been authorised (eg because someone impersonated one of the authorised officers) or where apparently genuine documents were non-genuine. But in our case it is not alleged that the instructions were unauthorised (ie it is not in dispute that the authorised officers gave the instructions) or that the documents were non-genuine. Rather the allegation is that authorised instructions (and, in so far as relevant, genuine documents) were being used as part of a scheme to defraud the customer. So the correct interpretation of this clause is that it does not exclude the *Quincecare* duty of care in relation to the alleged facts as to fraud in this case.

    iii. Even if I am wrong on that interpretation, a bank, which has reasonable grounds for believing that its customer is being defrauded, and goes ahead with paying out, may not be acting in 'good faith'. Whether that is so or not will be dependent on the precise facts including the knowledge of the bank. That must be a matter for full evidence at trial and one cannot say now that the claimant has no realistic prospect of successfully showing that the defendant bank was not acting in 'good faith'. Ms Phelps submitted that it was not open to the claimant to rely on this point because there has been no pleading by the claimant that the defendant bank was not acting in good faith (although it has pleaded 'gross' negligence at paragraph 107 of the Re-amended Particulars of Claim). I do not agree. The first indication that the defendant bank was relying on clause 8.2(d) was in paragraph 100 of the Amended Defence dated 24 July 2018. The claimant would then have had the opportunity to plead that the defendant bank was not acting in good faith, so that that clause did not apply, in a Reply to that Amended Defence. But that did not happen because the normal timing and sequence for pleadings were overtaken by the defendant bank issuing its summary judgment application on 31 July 2018. Indeed this was one day after a letter from the claimant's solicitors to the defendant bank's solicitors saying that they would be serving an Amended Reply. It follows that, as Mr Masefield submitted, it cannot fairly be held against the claimant that it has not put in an Amended Reply which includes pleading no good faith. Mr Masefield made clear in open court that, in so far as the normal order for pleadings is resumed following this judgment, the claimant will be pleading the 'good faith' point in an Amended Reply. So I reject Ms Phelps' pleading objection.

55. Alongside clause 8.2(d), Ms Phelps relied on the indemnity clause 10(1)(a) as also constituting an exclusion of liability for the defendant bank acting in accordance with its mandate and therefore as excluding a *Quincecare* duty of care. That indemnity clause is set out and considered in more detail below under the circularity issue. Even if treated as excluding the liability of the defendant bank to the claimant, rather than indemnifying the

bank against liability to third parties (see paragraph 63 below), it would not here exempt the defendant bank for the reasons set out at paragraph 64 below.

(v) Conclusion on the 'no Quincecare *duty of care' issue*

56. My conclusion on this first issue is that the defendant bank did owe a *Quincecare* duty of care to the claimant, which was imposed by an implied term in the depository agreement (implied by law at common law and/or under statute) and/or by the tort of negligence. On the correct interpretation of the depository agreement, that *Quincecare* duty of care was neither inconsistent with, nor excluded by, the terms of that agreement.

(2) The 'causation of loss' issue

57. I have explained at paragraph 9 above that, in contrast to the other two issues, this is primarily a factual issue, although also raising some legal issues, and should be approached by directly asking whether the claimant has a realistic prospect of success.

58. In my view, causation of loss in this case, as one would expect in most cases, is plainly one that should go to trial where the court will have the benefit of full evidence. Although Ms Phelps submitted that this was the unusual case where one could now say on causation that the claimant has no realistic prospect of success, I disagree. Indeed the complexity of the underlying facts in this case – and the nature and scale of the alleged fraud – means that, far from it being the unusual case where reverse summary judgment can be given on causation of loss, it is *a fortiori* a case where a court needs to examine all the relevant evidence that would be put forward at a trial in order to make a proper determination on the causation issue.

59. It is true that the defendant bank made checks with the Attorney-General of Nigeria and he gave assurance that the money could be paid out. And Ms Phelps submitted that if, as alleged, even the then President of Nigeria was involved in the fraud, it followed that, had the bank been under a duty of care, reasonable checks by it would still have resulted in the money being paid out. But that is a speculative submission. The starting point is that, had the defendant bank complied with its core *Quincecare* duty of care, the payments would not have been made. The determination of what would, or should, then have occurred is dependent on full evidence. I cannot now say what an ordinary prudent bank would have done in those circumstances: that is a matter on which evidence from banking experts would be needed. On the face of it, one plausible possibility would have simply been for the bank – because of continuing reasonable grounds for believing that the payments would defraud the customer - to continue to refrain from making any payment so that the money would have remained in the account. As I have outlined at paragraph 18 above, Mr Masefield submitted that another plausible outcome was that the money would have been frozen in the account by court order. Although Ms Phelps submitted that, if the government were corrupt, there would be no party disputing the payment out, so that interpleader proceedings would not eventuate, and there would be no obvious route to a freezing injunction, I cannot say now that the freezing of the account by court order (perhaps by reason of intervention by the regulatory authorities, such as the Serious Organised Crime Agency) is an unrealistic analysis of what would have happened. It may have been open to the defendant bank to seek directions or a declaration from a court not least by reason of clause 5.7 of the depository agreement which reads as follows (my emphasis):

'5.7 In the event of any dispute between or conflicting claims by any person or persons with respect to the Depository Cash, ***or the Depository is uncertain as to its duties or rights hereunder****, the Depository shall be entitled to apply to a court of law to determine the rights of such persons and meanwhile at its option to refuse to comply with any and all claims, demands or instructions with respect to such Depository Cash or any obligations hereunder so long as such dispute or conflict shall continue.'*

60. In conclusion on this second issue, the defendant bank has failed to establish that the claimant has no realistic prospect of success in proving causation of loss.

(3) The 'circularity' issue

61. This is a question of law in relation to which, as I have explained at paragraph 9 above, I am grasping the nettle and making a decision at this stage.

62. The relevant clause of the depository agreement on this issue is clause 10.1(a) (clause 10 is headed 'Indemnity'). This reads as follows:

'10.1 The Depositor hereby irrevocably and unconditionally agrees on demand to indemnify, and to keep fully and effectively indemnified ... the Depository, and its directors, officers, agents and employees (the "indemnitees") against all costs, claims, losses, liabilities, damages, expenses, fines, penalties, Tax and other matters ("Losses") which may be imposed on, incurred by or asserted against the indemnitees or any of them directly or indirectly in respect of:
(a) the following of any instruction or other directions upon which the indemnitees is authorised to act or rely pursuant to the terms of this Agreement, or arising as a result of entering into this Agreement or their status as holder of the Depository Cash…'

63. On its correct interpretation, there is no circularity problem posed by this clause. This clause does not entitle the defendant bank to be indemnified against the claim by the claimant. Given that clause 8 deals with the exclusion of the liability of the bank to the customer, this clause is best interpreted as dealing with the liability of the bank to third parties. If that were not so, one would have a clash with clause 8: eg clause 8.1 excludes the bank from liability to the customer for action pursuant to the agreement unless caused by the fraud, gross negligence or wilful misconduct of the bank in which event the extent of liability is limited to the market value of the depository cash. But if, by reason of clause 10.1(a), the customer is bound to indemnify the bank in any event, the exception for fraud, gross negligence or wilful misconduct would be undermined.

64. Even if one were to interpret clause 10.1(a) as excluding the liability of the defendant bank to the claimant, rather than indemnifying the defendant bank against liability to third parties, it would not exempt the defendant bank here. I have set out the law on the interpretation of exemption and indemnity clauses at paragraph 34 above. Although to be treated as a flexible guide, rather than as a rigid code, the *Canada Steamship* principles indicate that a court should be reluctant to find that a generally worded clause, rather than an explicit reference to negligence, exempts, or indemnifies against, negligence (which would take away a valuable right). The following of instructions negligently – in breach of a *Quincecare* duty of care – is in my view not covered by the general words of clause 10.1(a) which do not explicitly refer to negligence.

65. In conclusion, therefore, on a correct interpretation of clause 10.1(a) in the depository agreement, the claim does not fail for circularity.

5. CONCLUSIONS

66. My conclusions are therefore as follows:

    i. On the 'no *Quincecare* duty of care' issue, the defendant bank did owe a *Quincecare* duty of care to the claimant, which was imposed by an implied term in the depository agreement (implied by law at common law and/or under statute) and/or by the tort of negligence. On the correct interpretation of the depository agreement, that *Quincecare* duty of care was neither inconsistent with, nor excluded by, the terms of that agreement.

    ii. On the 'causation of loss' issue, the defendant bank has failed to establish that the claimant has no realistic prospect of success in proving causation of loss.

    iii. As regards the 'circularity' issue, on the correct interpretation of clause 10.1(a) in the depository agreement, the claim does not fail for circularity.

    iv. My overall conclusion, therefore, is that the defendant bank has failed to establish that the claimant has no real prospect of success under CPR 24.2.

67. For these reasons, the application for reverse summary judgment under CPR 24.2 fails. It also follows that the Re-amended Particulars of Claim do disclose reasonable grounds for bringing the claim so that the application to strike out under CPR 3.4(2) also fails.

68. It remains for me to thank counsel on both sides for their helpful submissions.