Does a third party owe a duty of care to a beneficiary?

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Establishing that a duty of care is owed to a beneficiary by a third party (i.e. someone other than the trustee or a person with whom the beneficiary has a contract) is not a straightforward exercise. In practice, it will usually require the beneficiary to show either that there has been an assumption of responsibility by the third party towards the beneficiary or that denying such a duty would lead to an absence of accountability on the part of the third party by analogy with the approach in *White v Jones*.[1]

This important issue for private client and trust lawyers was recently considered in depth by the Privy Council in *JP SPC 4 v Royal Bank of Scotland International Ltd.*[2] The decision provides a useful discussion of the relevant considerations and the general approach the Courts will take when deciding whether a duty of care exists.

The claimant was an investment fund based in the Cayman Islands which established a scheme by which investors were to lend money to solicitors for the pursuit of litigation. The loans were to be advanced and repaid through an Isle of Man company, called Synergy, using bank accounts Synergy held with RBS. The claimant issued proceedings against RBS in the Isle of Man for the recovery of losses which it alleged to have suffered as a result of a fraud carried out by Synergy and its owners. Under the fraud, money beneficially owned by the claimant was paid out of Synergy's

1 [1995] 2 AC 207
2 [2022] UKPC 18, [2022] 3 WLR 261

accounts with RBS for the benefit of its owners rather than for the loans the scheme was intended to make.

RBS applied for summary judgment/strike out on the basis that it did not owe a duty of care to the claimant. This issue made it all the way up to the Privy Council.

Importantly, for the purposes of the application, it was assumed (reflecting the claimant's factual case): (i) that RBS knew (or ought to have known) that the claimant was the beneficial owner of the moneys in the accounts; and (ii) the circumstances were such that a reasonable banker would have had grounds for considering that there was a real possibility that the claimant was being defrauded.

When approaching whether a duty of care is owed, Courts will usually consider first whether such a duty falls within an established category of duties based on existing authority and, if not, whether such a duty should be found by way of incremental development of the law. This was the approach the Privy Council also followed.

The Privy Council considered first the *Quincecare*[3] duty of care which is a duty owed specifically by a bank to its customer (arising as an aspect of a bank's implied contractual duty and co-extensive tortious duty of care) to refrain from executing a customer's order if the bank has reasonable grounds for believing that the order is an attempt to defraud the customer. This basis for a duty to the claimant was rejected because the Privy Council confirmed that the *Quincecare* duty is owed only to a bank's customer which in the present case was Synergy and not the claimant.

The claimant also relied on the decision of *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA*[4] in which Peter Gibson J had accepted that:

> *'where a paying bank is on notice that its customer is a fiduciary in respect of moneys in an account with the bank it owes a duty of care to the persons beneficially interested in those moneys, as soon as the bank is put on such notice'.*

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3 *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363

4 [1993] 1 WLR 509 at [349]. This is a decision better known for its (now discredited) five-fold classification of the scale of knowledge in relation to dishonest assistance.

However, whilst *Baden* clearly supported the claimant's position, the Privy Council considered it was clear that in the light of subsequent developments in the law of negligence, *Baden* no longer represented good law. This was because Peter Gibson J had based his decision on the two-stage approach to determining whether a duty of care was owed as laid down in *Anns v Merton London BC*,[5] i.e. (i) whether it was reasonably foreseeable to the defendant that the claimant would be likely to suffer loss from the defendant's careless conduct; and if so (ii) were there good policy reasons why that prima facie duty should be negatived or limited. However, *Anns v Merton* and the approach it espoused had long since been overruled.[6]

The Privy Council considered whether a duty of care based on an 'assumption of responsibility' by RBS towards the claimant should be held to exist. The factors which have particular relevance in determining whether there has been an assumption of responsibility in relation to a task or service include: (i) the purpose of the task or service and whether it is for the benefit of the claimant; (ii) the defendant's knowledge and whether it knows (or ought to know) that the claimant will be relying on it to act with reasonable care; and (iii) the reasonableness of the claimant's reliance. In the present case, the claimant had pleaded no factual basis (and there was no evidence) on which a duty of care based on an assumption of responsibility could be established.

Turning to the incremental development of the law, the claimant argued that a duty of care should be held to exist by analogy with the decision of *White v Jones* (and similar cases), otherwise there would be a lacuna. However, the Privy Council considered that there was no lacuna in the present case because RBS's customer, Synergy, had a valid claim for negligence against RBS under which, if successful, Synergy would have been entitled to recover the loss suffered by the claimant for whom it was trustee. It did not matter that, in practice, Synergy was unlikely to bring an action against RBS. Furthermore, the claimant would have a claim to recover its loss against Synergy for breach of fiduciary duty. Therefore, *White v Jones* was distinguishable and there was no need for the law to fashion a remedy.

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5 [1978] AC 728

6 See *Murphy v Brentwood DC* [1991] 1 AC 398

Therefore, the Privy Council (upholding the decision of the Staff of Government (Appeal Division)) concluded that no duty of care was owed by RBS to the claimant.

The key lessons from this important decision for those looking to establish that a third party owes a duty of care to a beneficiary (in a category not already covered by existing case law) are:

(1) A duty of care may be owed to a beneficiary by a third party on the basis of an 'assumption of responsibility'. This is likely to require that the service provided by the third party is for the benefit of the beneficiary and that the beneficiary (to the third party's knowledge) reasonably relies on the third party to exercise reasonable care. Importantly, the test for establishing a duty based on an assumption of responsibility is objective. Therefore, it will normally need to be shown that there were relevant exchanges crossing the line between the third party and the beneficiary.

(2) If one can show that there is truly a lacuna in legal accountability – by analogy with *White v Jones* – then that will provide a good basis for establishing a duty of care owed to a beneficiary. However, the Courts will consider carefully whether that is the case, taking account of other avenues of relief.

(3) The scope of duties owed by banks are increasingly well developed. The Courts are reluctant to extend those duties in a way which risks placing an unacceptable burden on banks going outside of their contractual relationship with their customers. The Courts' reluctance may be less forceful in relation to other service providers.

(4) The Courts will also be reluctant to impose a duty of care where to do so would cut across the requirements of accessory liability. In order to establish accessory liability for assisting in a breach of fiduciary duty, one must prove dishonesty[7]. On the assumption that there had been a breach of fiduciary duty by Synergy to the claimant, if RBS was liable to the claimant for the tort of negligence, this would be tantamount to holding RBS liable for having negligently assisted a breach of fiduciary duty.

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[7] *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378; *Twinsectra Ltd v Yardley* [2002] 2 AC 164; *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476.

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