



Neutral Citation Number: [2019] EWCA Civ 1641

Case No: A4/2019/0718

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
Professor Andrew Burrows QC (sitting as a Deputy Judge of the High Court)
[2019] EWHC 347 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/10/2019

Before :

LORD JUSTICE BAKER
LADY JUSTICE ROSE
and
SIR BERNARD RIX

Between :

JP MORGAN CHASE BANK, N.A.

Appellant

- and -

THE FEDERAL REPUBLIC OF NIGERIA

Respondent

**Rosalind Phelps QC and David Murray (instructed by Freshfields Bruckhaus
Deringer LLP) for the Appellant**
**Roger Masefield QC and Richard Blakeley (instructed by Reynolds Porter
Chamberlain LLP) for the Respondent**

Hearing dates : 24 and 25 July 2019

Approved Judgment

Lady Justice Rose:

1. The Respondent to this appeal, the Federal Republic of Nigeria ('the FRN'), has brought a claim against the Appellant bank ('Morgan Chase' or 'the Bank') to recover the sum of US\$875,740,000 which was held in a depository account in the FRN's name with Morgan Chase. Morgan Chase paid out the money in the account in three transfers which together comprised the whole of the deposited sum. It is common ground that those transfers were made on the instruction of the persons authorised to give those instructions under the terms governing the operation of the depository account. The FRN claims, however, that the payments were made in breach of the *Quincecare* duty of care which they say Morgan Chase owed to the FRN as its client. That duty is named after the case of *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363 in which this duty of care was first described ('*Quincecare*').
2. The FRN's claim was commenced on 29 November 2017. After the service of Amended Particulars of Claim and an Amended Defence in July 2018, Morgan Chase applied for summary judgment on its Defence and/or to strike out the claim as having no prospect of success. Prof Andrew Burrows QC (sitting as a Deputy High Court Judge) dismissed that application for reasons set out in his judgment handed down on 21 February 2019 and reported at [2019] EWHC 347 (Comm). At paragraph 6 of his judgment, the judge summarised the test that the court should apply on an application for summary judgment under CPR 24.2, citing the well-known cases of *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]. Morgan Chase does not take issue with the judge's conclusion that the central points to be derived from those cases are that the burden of proof rests on Morgan Chase; the court must consider whether the FRN's claim has a 'realistic' as opposed to a 'fanciful' prospect of success; the court should not conduct a mini trial; and that if there is a short point of law or contractual construction and the court is satisfied that it has before it all the evidence necessary to determine that issue, the court should grasp the nettle and decide the point.

The background

3. The opening of the depository account with Morgan Chase was one step in a long-running dispute about an offshore Nigerian oilfield known as OPL 245. In April 1998, the rights to exploit OPL 245 had been awarded by the FRN to Malabu Oil and Gas Nigeria Ltd ('Malabu'), which was beneficially owned by the then Minister of Petroleum, Chief Daniel Etete. Two years later in 2001 the Government of Nigeria rescinded that award and a year later the right to exploit OPL 245 was granted to a subsidiary of the oil company Shell in exchange for a payment from Shell to the FRN of US\$210 million. A dispute over the ownership of the rights then arose and in 2003 the FRN opened an escrow account with Morgan Chase into which Shell paid US\$210 million. The money sat there for several years. In 2006 there was a settlement agreement pursuant to which the licence to exploit OPL 245 was purportedly awarded again to Malabu. That award was challenged by Shell and there were various judicial and arbitral proceedings in the following years. By 2010 therefore Malabu was claiming to be the owner of the licence either pursuant to the original award in 1998 or under the 2006 settlement agreement but the Shell parties

were also claiming that they were entitled to the rights because of the grant or purported grant of rights to them in 2003.

4. The litigation was supposed to be brought to an end by three agreements entered into on 29 April 2011. The following is a simplified account but is all that is needed for our purposes. The first agreement, called the Block 245 Malabu Resolution Agreement, was between the FRN and Malabu under which Malabu agreed to waive all its claims to OPL 245 in return for a payment from the Nigerian Government of just over US\$1 billion. The second agreement, called the Block 245 Resolution Agreement, was between the Nigerian Government, the Nigerian National Petroleum Corporation and three companies who had been part of the consortium led by Shell hoping to exploit the rights. Under the second agreement the Government agreed to allocate the rights to exploit OPL 245 to those Shell and other subsidiaries in exchange for payment by Shell and others to the Government of the same sum, that is just over US\$1 billion, which would then be paid to Malabu under the first agreement. The third agreement, called the Block 245 SNUD Resolution Agreement, was a settlement of the litigation between the Nigerian Government and the Shell parties over the ownership of the disputed rights. It was the second agreement, the Block 245 Resolution Agreement between the Nigerian Government and the potential Shell consortium, which gave rise to the need for a depository account with Morgan Chase.
5. The terms for the operation of the depository account were set out in an agreement dated 20 May 2011 between the FRN as Depositor and the London branch of Morgan Chase as Depository. The terms were, Morgan Chase submits, deliberately tailored to the specific function for which the account was opened namely to receive the US\$1 billion from Shell and then pay it out on the instruction of the Government of Nigeria to those entitled to receive it under the agreements settling the overall dispute.
6. The recitals to the depository agreement referred to the resolution agreement dated 29 April 2011 in respect of OPL 245 (that is the Block 245 Malabu Resolution Agreement) under which the Depositor had certain obligations. It provided that the Depository would open an account entitled Federal Republic of Nigeria Depository Account and accept a deposit of the cash into that account. The depository agreement set out various release conditions which had to be satisfied before Morgan Chase could pay out from the account. These took the form of written instructions using a template contained in a schedule to the agreement to be used by the Depositor to instruct the Depository to release part of the cash to such beneficiary as was specified in the release notice. This would be followed by a telephone call back to the persons designated by the FRN so that they could confirm the written instructions. On 24 May 2011 the sum of US\$1,092,040,000 was transferred into the Depository Account.
7. On 16 August 2011, Morgan Chase received instructions from the Minister of Finance and the Accountant General of the FRN, who were authorised signatories on the depository account. On 23 August 2011 Morgan Chase made two transfers in compliance with those instructions. The transfers were of \$401,540,000 and \$400,000,000 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, Morgan Chase acting again on instructions by authorised signatories of the FRN 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.

8. According to the FRN's pleaded case in these proceedings, as it stood for the purposes of the strike out application, it is alleged that these payments were made in breach of Morgan Chase's contractual and tortious *Quincecare* duty of care. It is alleged that Morgan Chase had been put on inquiry that these requested transfers were part of a corrupt scheme by which the FRN was being defrauded when it paid out those three amounts irrevocably to the accounts in the name of Malabu. It is alleged further that the fraudulent and corrupt scheme of which these payments were part reached the very highest levels in the Nigerian state. There is no allegation that Morgan Chase knew about or was in any way involved in the alleged fraud, but it is said that the Bank should have realised that it could not trust the senior Nigerian officials from whom it took instructions. The FRN claims that Morgan Chase should not have made the payments it was instructed to make and it is therefore liable to pay damages to the FRN in the same sum as the payments that were made.
9. Since the judge was disposing of a summary judgment application, he had to assume that the FRN would be able to prove the facts alleged in its Particulars of Claim. He said at paragraph 16 of the judgment that he therefore proceeded on the basis that:
 - i) the FRN has been defrauded of the money paid out by Morgan Chase from the depository account by way of a fraudulent and corrupt scheme;
 - ii) before the payments were made, Morgan Chase had been put on inquiry about the circumstances of the instructions to pay out the money, that is to say Morgan Chase had reasonable grounds for believing that the payment instructions it received were part of an attempt to defraud the FRN; and
 - iii) despite being on inquiry, Morgan Chase had gone ahead and made the payments.
10. The application turned, as does this appeal, largely on the issue of whether the terms of the depository agreement between the parties governing the operation of the depository account had the effect either that the *Quincecare* duty never arose in the circumstances of this particular client/bank relationship or that liability for any breach of that duty was excluded. The judge recorded the fact that he had been urged by both parties to 'grasp the nettle' when it came to construing the terms of the depository agreement. His task was to decide the proper construction of the agreement and not just to decide whether one or other proposed construction was arguable. The judge held that none of the clauses relied on by Morgan Chase provided a defence so as to render the claim liable to be struck out. He also rejected a second argument raised by Morgan Chase based on causation. The Bank argued that the FRN had no realistic prospect of showing that any breach of the *Quincecare* duty had caused the loss because they could not show that the payments out would have been avoided had the *Quincecare* duty been complied with. The judge held that that was an issue that needed to go to trial and there is no appeal against that aspect of his judgment. Morgan Chase does challenge the judge's decision on the third argument put before him which was that one of the clauses in the depository agreement entitled Morgan Chase to be indemnified by the FRN against any claim by the FRN so that the claim failed for circularity. That issue was also one where the court had been invited to grasp the nettle since it was also an issue of the interpretation of the terms of the depository agreement.

11. There are six grounds of appeal raised by Morgan Chase. Ground 1 concerns the ambit and nature of the *Quincecare* duty. Ground 2 concerns the judge's approach in general to the interpretation of the contractual terms. Grounds 3 to 6 focus on the proper interpretation of particular terms of the depository agreement.

Ground 1: the ambit and nature of the *Quincecare* duty

12. In *Quincecare*, Barclays Bank had loaned £400,000 to a company, Quincecare, formed to purchase four chemist shops. The chairman of the company caused about £340,000 to be drawn down and misapplied the money for his dishonest purposes. Barclays sued Quincecare and the guarantor of the debt for repayment of the loan. Quincecare and the guarantor raised a defence that Barclays had paid out the money in breach of its duties to Quincecare as its customer. Steyn J said that the most substantial issue in the case was whether Barclays had been put on notice that the chairman was acting for his own benefit or for an unauthorised purpose. He held first that it is an implied term of the contract between a bank and the customer that the banker will exercise reasonable skill and care in and about executing the customer's orders. Steyn J said that in approaching the problem, everything will depend on the facts of the particular case. The relationship between a banker and customer in respect of the drawing and payment of cheques was a relationship of principal and agent. There was no logical or sensible reason for holding that bankers are immune from the elementary obligation to exercise reasonable care and skill in carrying out the instructions of their principal when executing the customer's orders. He recognised however that that duty to exercise reasonable skill and care "must generally speaking be subordinate to the bank's other conflicting contractual duties" (pages 376 – 377). He went on:

"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.”

13. Steyn J’s judgment in *Quincecare* was considered by the Court of Appeal in *Lipkin Gorman (a firm) v Karpnale Limited* [1989] 1 WLR 1340 (‘*Lipkin*’). In that case Mr Cass, a partner in the appellant firm of solicitors, withdrew a large amount of money from the solicitors’ bank account for which he was a signatory and lost it gambling at a casino. The trial judge held that the bank’s manager had either shut his eyes to the obvious or had wilfully or recklessly failed to make the proper inquiries as to the use of the funds. He held that the bank had been in breach of its duty to the solicitors and was liable as a constructive trustee of the money. The Court of Appeal allowed the bank’s appeal. Parker LJ held that it was not necessary for the customer to show a want of probity on the part of the bank in order to establish a breach of the bank’s duty of care. He said at pages 1377-1378:

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

14. Parker LJ went on:

“I would not, however, accept that a bank could always properly pay if it had reasonable grounds for a belief falling short of probability. The question must be whether, if a reasonable and honest banker knew of the relevant facts, he would have considered that there was a serious or real possibility albeit not amounting to a probability that its customer might be being defrauded, or, in this case, that there was a serious or real possibility that Cass was drawing on the client account and using the funds so obtained for his own and not the solicitors’ or beneficiaries’ purposes. That, at least, the customer must establish. If it is established, then in my view a reasonable banker would be in breach of duty if he continued to pay cheques without inquiry. He could not simply sit back and ignore the situation.”

15. I considered the application of the *Quincecare* duty in *Singularis Holdings v Daiwa Capital Markets Europe Ltd* [2017] EWHC 257 (Ch), [2017] 1 BCLC 625, the first

case in which damages were awarded for a breach of the duty (*'Singularis'*). In that case Daiwa paid out sums from an account used to hold collateral for *Singularis'* investments and any proceeds of sale of those investments. The payments were made on the instruction of Mr Al Sanea who was the sole shareholder and the only active director of *Singularis*. The payment instructions were highly suspicious and Daiwa did make lengthy inquiries as to the purpose of at least some of the payments in order to satisfy itself that they were legitimate. It failed, however, to act upon glaring signs that the purported reasons given by the agent of Mr Al Sanea for the payments were a sham. On appeal, ([2018] EWCA Civ 84, [2018] 1 WLR 2777) the finding that Daiwa had been in breach of the *Quincecare* duty was not challenged and the appeal focused, broadly, on the availability of defences arising from the fact that the fraudster had been the sole shareholder and a director of the defrauded claimant company. There was no detailed analysis in this Court of the content of the *Quincecare* duty. The appeal was dismissed; a further appeal to the Supreme Court on the question of the attribution of Mr Al Sanea's fraud to the claimant company was heard on 23 and 24 July 2019 and judgment is pending.

16. Ms Phelps appearing for Morgan Chase argued that the judge fell into error by describing the *Quincecare* duty as primarily a duty on the part of a bank not to pay out in accordance with the suspicious instruction. At paragraph 28 of his judgment, Prof Burrows said that the trilogy of cases *Quincecare*, *Lipkin* and *Singularis*:

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

17. The judge said at paragraph 30 that such a duty of enquiry would be in line with sound policy because in the fight to combat fraud, banks should not sit back and do nothing. 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. However, even if there were such an additional duty, he said, it would be “potentially misleading” to describe the *Quincecare* duty as a duty of care to make enquiries or to investigate. The core of the *Quincecare* duty is the negative duty not to pay and any positive duty of enquiry or investigation would be additional to that.
18. Morgan Chase argues that the judge's inclination to the view that there was an additional duty of enquiry forming part of the *Quincecare* duty was right but he was wrong then to relegate that additional duty to be subsidiary to the primary or “core” negative duty not to make the payment. This in turn led him into error when deciding whether express provisions of the depository agreement which provided that Morgan Chase was not under any duty to investigate matters were inconsistent with the existence of the *Quincecare* duty. Ms Phelps relied on a large number of instances in

the judgments in the trilogy of earlier cases where the judges had referred to the duty on a bank to make inquiries of the customer or not to pay without proper inquiry. These were set out by Prof Burrows in paragraph 29 of the judgment under appeal. She also referred us to two cases which were discussed by Steyn J in *Quincecare* to show that the duty to enquire was in fact a duty to enquire of someone else within the entity that comprises the customer to establish whether the payment requested by the authorised signatory to the account really should be made: see *Selangor United Rubber Estates Ltd v Cradock and others (No 3)* [1968] 1 WLR 1555 and *Groves Raffin Construction Ltd and another v Bank of Nova Scotia* [1976] 1 Lloyd's Rep 374. She drew from these cases that the *Quincecare* duty is at its heart a duty of enquiry which necessarily involves a bank not only pausing and refusing to pay out on the mandate but checking with the customer what its true intentions are.

19. By the end of the hearing before us, it was not entirely clear whether the judge's treatment of the duty to make inquiries as not being a core part of the *Quincecare* duty was a free-standing ground of appeal or whether it was a precursor to the argument that the clauses which state that Morgan Chase is not obliged to carry out investigations were inconsistent with the existence of the *Quincecare* duty. In any event it is convenient to deal with the submissions here.
20. The very different factual circumstances in which the *Quincecare* duty was considered in *Quincecare*, *Lipkin* and *Singularis* show that the question of what a bank should do when it is put on inquiry that a payment instruction ought not to be executed will vary according to the particular facts of the case. In *Lipkin*, May LJ accepted (at page 1357) that a single phone call from the bank to one of the partners in the solicitors' firm would have brought Mr Cass' fraudulent enterprise to a close. However, he held that there was no duty on the bank to make that call. To do so would have been a breach of the bank's duty to Mr Cass because Mr Cass had his own personal account with the bank and the suspicions about his uncontrolled gambling addiction arose from the operation of his personal account. In that case, therefore, there was the additional factor of a duty of confidentiality owed by the bank to Mr Cass as the holder of a separate bank account that affected the content of the bank's duty to its solicitor client. In *Quincecare*, Steyn J recorded the evidence of the Barclays witness that if he had suspected that the payment requested was part of a fraud, he would have made further inquiries not of the authorised signatory but of the solicitors to whom he was being asked to transfer the money: he would "have put up with the embarrassment." (page 376-377). In *Singularis*, Daiwa would have had difficulty in finding someone within the client company other than Mr Al Sanea with whom it could check the propriety of the payments it was instructed to make. That may be the situation in this case where Morgan Chase may argue that it could not know who (if anyone) within the senior levels of the Nigerian Government was not tainted by involvement in the alleged fraud, given that it obtained express approval for the payments from the Attorney General of Nigeria via the High Commission in London. In the particular circumstances in *Singularis*, what Daiwa ought to have done was insist on paying the money into an ordinary bank deposit account in the name of the company rather than paying it away to other companies within the corporate group. That is unlikely to have been an option for Morgan Chase.
21. There may be other circumstances, such as where a suspicious activity report needs to be made to the National Crime Agency, where a bank is prohibited from raising the

matter with the client. That is a factor that arises here because Morgan Chase filed six suspicious activity reports in respect of the payment instructions and received consent from the Agency to make the payments. In other cases, once the bank informs the authorised signatory that it is not going to execute the payment, the signatory may withdraw the instruction so that further inquiries as to the purpose of the payment are unnecessary. In most cases, the reconciliation of the conflicting duties owed by the bank to which Steyn J referred in *Quincecare* will require something more from the bank than simply deciding not to comply with a payment instruction. The bank will usually be anxious to resolve its concerns, not least so as to minimise the risk of incurring a liability to its client for any loss arising from the non-payment. At the trial of this action the trial judge will, if he or she finds that the *Quincecare* duty arose on the facts, be in a better position than this court now to determine what Morgan Chase should have done if it had decided not to execute the instructions given to it to transfer the money to Malabu. That analysis may also be necessary to resolve the causation issue to which I referred earlier.

22. I do not see that it is useful to describe some parts of the *Quincecare* duty as being core and some parts of it as being separate or subsidiary or additional. Nor do I think it is helpful for this court to give an indication as to what factors are likely to be relevant to the trial judge's overall assessment of what the Bank should have done. That will become clear once the findings of fact in the case are made. In any event, Prof Burrows said in paragraphs 47 to 50 of his judgment that the question whether the Bank was under a duty of inquiry as well as under a duty not to pay did not need to be resolved in order for him to dispose of the application. That was because he held that the clauses do not apply at all where the Bank has reasonable grounds for believing that the customer is being defrauded. Ground 1 of the appeal therefore fails. I consider the significance of this further in relation to the construction of the contractual provisions in the depository agreement when I address Morgan Chase's submissions on those clauses.

Ground 2: the judge's approach to construing the depository agreement

23. The provisions of the depository agreement are long and convoluted. I have set out the full wording of the terms in contention in an Appendix to this judgment because it is important to see where the sentences which Morgan Chase picks out fit in to the contractual scheme. Ms Phelps helpfully divided the clauses into four groups:
- i) The entire agreement clause, that is clause 5.1. Morgan Chase says that the wording of this clause makes clear that it was not undertaking any implied duties in respect of the cash in the depository account.
 - ii) The clauses which define and delimit the primary obligations undertaken by Morgan Chase under the depository agreement. These are clauses 7.2, 7.4, 5.8 and 11.5. Morgan Chase says that these, properly interpreted, are inconsistent with there being a tortious *Quincecare* duty and so have the effect of preventing that duty from being part of the rights and obligations under the depository agreement.
 - iii) An exemption clause, that is clause 8.2(d), which Morgan Chase says expressly relieves it from liability when it acted on what it believed in good faith to be the instructions of its customer.

- iv) An indemnity provision, that is clause 10.1(a), under which the FRN agreed to indemnify Morgan Chase in respect of all losses caused by the Bank following instructions by which the Bank was authorised to act pursuant to the depository agreement. This is the clause which gives rise to the circularity defence that if the FRN is liable to indemnify Morgan Chase for any damages that Morgan Chase has to pay the FRN, there is no value in the claim proceeding.
24. Mr Masefield QC appearing with Mr Blakeley for the FRN accepted that the terms of the depository agreement might modify the *Quincecare* duty. He accepted, at least for the purposes of the appeal, that in order to make good their claim, the FRN would have to allege and prove gross negligence. He told us that there is no allegation of dishonesty made against Morgan Chase, at least on the current state of the pleaded case, although there is an allegation of lack of good faith in the context of defeating the exclusion clause in clause 8.2(d).
25. By Ground 2, Morgan Chase raises some preliminary points about the approach that the judge took to construing the contract, before descending to a detailed analysis of the words used. First, Morgan Chase argues that the judge went wrong early on in his judgment when he said at paragraph 39 that the assumptions that he was required to make meant that *prima facie* the Bank owed a *Quincecare* duty of care to the FRN. That would be an incorrect approach if it increased the burden on Morgan Chase to overcome some kind of presumption that the *Quincecare* duty applied. The correct approach would be to look at the contractual terms and construe them according to ordinary principles as at the date of the agreement. The scope of Morgan Chase's liability depends on the proper interpretation of the terms and cannot be affected by any presumption that might have arisen from facts that occurred later.
26. I agree that it is important to approach the construction of the wording on the basis of what the parties meant at the time the contract was concluded and not in the light of later events. Despite what the judge said at paragraph 39, I do not accept Morgan Chase's criticism that the judge's approach to the construction of the contractual terms was coloured by any agreed or assumed facts or that he applied a presumption that the *Quincecare* duty had arisen. I do not read the judgment as showing that he approached the matter with any presumption as to whether the *Quincecare* duty applied. On the contrary, he made it clear at paragraph 40 that he was applying the law on contractual interpretation as he had set it out in paragraphs 32 to 37 of the judgment.
27. The second general point was that the judge, Morgan Chase submits, wrongly applied a 'clear words' threshold when considering the proper interpretation of the contract. During the course of argument, Ms Phelps accepted that a 'clear words' test would be appropriate when considering the proper construction of the entire agreement clause, the exclusion clause and the indemnity clause. Her criticism therefore was restricted to the judge's approach to the second group of clauses described above, namely those which are said to be inconsistent with the existence of the *Quincecare* duty. Ms Phelps relied on two cases to support her proposition that the 'clear words' test appropriate for the construction of clauses excluding liability for breach of an obligation is not used when the court is construing clauses said to be inconsistent with the existence of that obligation: *Eagle Star Life Assurance Co Ltd v Griggs and Mills* [1998] 1 Lloyd's Rep 256 and *The County Homesearch Co (Thames & Chilterns) Ltd*

v Cowham [2008] EWCA Civ 26, [2008] 1 WLR 909. She criticised the passage in the judgment where the judge referred to sections 13 and 16 of the Supply of Goods and Services Act 1982. He described those sections as spelling out the common law rule that an implied term cannot be inconsistent with the express terms of the contract. He accepted that the duty of care in tort may be shaped by, and can be excluded by, contractual terms but went on:

“40. ... 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.”

28. This, Morgan Chase said, placed an unacceptable gloss on the test for construing contractual clauses to see if they are inconsistent with an implied term.
29. I do not accept that the judge applied the ‘clear words’ test when considering whether certain clauses in the depository agreement were inconsistent with the existence of the *Quincecare* duty. Looking at the paragraphs in the judgment in which the judge set out the principles of what he described as ‘the modern approach in English law to contractual interpretation’, his analysis appears to me entirely correct. In paragraph 32 he sets out the principles derived from the well-known line of authority: *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, *Arnold v Britton* [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] AC 1173. The relevance of his discussion in paragraphs 33 and 34 of the present status of the *contra proferentem* rule is expressly limited by him to the interpretation of exemption, indemnity and entire agreement clauses, that is clauses 8, 10 and 5 of the depository agreement. As Mr Masefield pointed out, the judge uses the phrase ‘clear words’ only in his subsequent analysis of those clauses and does not use the phrase where he is dealing with the four clauses which are said to be inconsistent with the *Quincecare* duty. The judge did not fall into error by applying too stringent a test at any stage in his analysis of the contractual position. I do not therefore need to decide whether it would have been an error of law in the light of *Gilbert-Ash* and the subsequent cases I discuss below to require ‘clear words’ where a supposedly inconsistent clause (outside clauses 5, 8 and 10) is relied on to prevent a valuable right from arising.
30. Thirdly, Morgan Chase criticises the judge for failing to give proper weight to the context and commercial purpose of the depository agreement. However, all the factors that it relies on, such as that it was a single purpose account with detailed and narrow depository release conditions are recited by the judge in paragraph 11 of his judgment. Finally, Morgan Chase argues that the judge failed to take a step back and consider the cumulative effect of the clauses on which they rely as limiting the responsibilities that the Bank was taking on as Depository. That submission simply cannot stand with what the judge said at paragraph 41 that he had had the benefit, which he regarded as important in applying the modern objective and contextual approach to interpretation, of reading the full depository agreement and the full clauses from which the specific terms or parts of terms had been extracted. There is no basis for saying that he failed to take these into account as appropriate. There is no merit, therefore, in Morgan Chase’s general criticisms of the judge’s approach to contractual interpretation.

Grounds 3 to 6: the proper construction of the terms of the depository agreement

31. I now turn to a consideration of the wording of the four different kinds of clause that Morgan Chase relies on as negating or excluding the existence of the *Quincecare* duty in this particular banker/client relationship.

(1) Clause 5.1: the entire agreement clause

32. Clause 5.1 of the Depository Agreement reads:

“5.1 The duties and obligations of the Depository in respect of the Depository Cash shall be determined solely by the express provisions 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 the 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.”

33. It is the first sentence of that clause, particularly the statement that Morgan Chase's duties and obligations are “determined solely by the express provisions” of the depository agreement, which the Bank argues means that there is no room in this relationship for implied terms or tortious duties such as the *Quincecare* duty. Ms Phelps accepted that clause 5.1 was limited to restricting duties and obligations of Morgan Chase in respect of the depository cash as the opening sentence makes clear. It was not seeking to shut out other implied duties. But she placed emphasis on the use of the words “express” and “solely” as circumscribing the source of the obligations of Morgan Chase in respect of the money in the account.
34. The judge dealt with the interpretation of clause 5.1 at paragraphs 43 – 45 of his judgment. Having referred to the case law which I describe below, he held that clear words were required to prevent the valuable right conferred by the *Quincecare* duty of care from being included in the obligations imposed on the Bank. He noted that there was no express mention in clause 5.1 of implied terms or tortious liability being excluded. If, as Morgan Chase appeared to be arguing, the effect of clause 5.1 was to exclude all manifestations of the Bank's implied duty of care to its customer in respect of the depository cash, that would be “an alarming interpretation”. It would also be inconsistent with other clauses in the depository agreement which expressly excluded other forms of tortious liability, indicating that the parties did not intend clause 5.1 already to have excluded such liability. At paragraph 44(iv) he therefore read clause 5.1, in its context, as:

“... 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.”

Clause 5.1 (entire agreement clause): discussion

35. The case law is clearly against Morgan Chase on this point. The principal case on which the FRN relies is *Gilbert-Ash (Northern) v Ltd Modern Engineering (Bristol) Ltd* [1974] AC 689. That case concerned whether a term in a sub-contracting agreement to carry out building work ousted the right of the main contractor to set off an un-liquidated cross claim against sums due from him to the subcontractor under interim certificates. It was argued that the express terms of the agreement allowed the deduction of liquidated or admitted claims but not of amounts which had been quantified by the main contractor himself. Lord Diplock described the right that the common law gives to a person for whom work has been done to defend himself against a claim for the price by setting up a breach of warranty as amounting to a substantive defence at common law. He said (at page 717H):

“It is, of course, open to parties to a contract for sale of goods or for work and labour or for both to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law ... But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption.”

36. Thus, in a building contract one starts from the position that each party is to be entitled to all those remedies for its breach which would arise by operation of law. To rebut that, Lord Diplock said “one must be able to find in the contract clear unequivocal words in which the parties have expressed their agreement that this remedy shall not be available in respect of breaches of that particular contract.” (at page 718F). Mr Masefield submitted that the decision of the House of Lords in *Gilbert-Ash* remains good law following the development of the modern approach to the construction of commercial contracts. He referred to the more recent case of *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75, [2010] QB 27. That case concerned three contracts for the sale of vessels to the purchaser. The seller repudiated the contract and the question arose whether the buyer was entitled to recover not simply the first instalment of the price that had been paid on signature but also damages for the loss of his bargain. The seller contended that a term of the contract excluded the right to damages for loss of bargain in the event that the contract was terminated by the buyer for repudiatory breach. Moore-Bick LJ (with whom Smith and Ward LJ agreed) said that a contract in those terms did not strike him as the kind of agreement that would be likely to commend itself to any purchaser because the contract would be so unbalanced in relation to the consequences of termination for breach as to cause one to question whether that can have been what the parties intended: see paragraph 21. He referred to *Gilbert-Ash*, saying that any person approaching negotiations with a view to entering into a legally binding contract is to be taken to know that the law gives him a right to recover damages for loss of his bargain if the other party commits a repudiatory breach. That is of course a valuable right. Moore-Bick LJ rejected counsel’s submission that since *Gilbert-Ash* the law had developed in favour of a greater willingness to give the words of exclusion clauses the meaning which the words used would naturally bear:

“23. ... I would accept that, but I would not accept his suggestion that as the law stands today there are two competing approaches struggling for supremacy: one requiring clear express words, the other favouring the natural meaning of the words used. It is important to remember that any clause in a contract must be construed in the context in which one finds it, both the immediate context of the other terms and the wider context of the transaction as a whole. The court is unlikely to be satisfied that a party to a contract has abandoned valuable rights arising by operation of law unless the terms of the contract make it sufficiently clear that that was intended. The more valuable the right, the clearer the language will need to be.”

37. Both *Gilbert-Ash and Stocznia Gdynia* concerned remedies for breach but the same principle has been held to apply to primary obligations. In *Seadrill Management Services Ltd and another v OAO Gazprom* [2010] EWCA Civ 691, [2010] 1 CLC 934 (*‘Seadrill’*), the contract concerned the provision of a drilling rig for the purpose of drilling an exploratory well in the Bay of Bengal. The rig was damaged on deployment. Gazprom which had hired the rig withheld payment of the hire and purported to terminate the contract alleging that the damage to the rig had been caused by those working for the rig’s owner and operator Seadrill. The question arose whether the rig owner Seadrill was in breach of an implied obligation to operate the rig with reasonable skill and care. That obligation would be implied into the contract pursuant to section 13 of the Supply of Goods and Services Act 1982. The contract between them contained para 501 which provided that except for such obligations and liabilities specifically assumed by the rig operator, the hirer would be solely responsible and assumed liability for all consequences of operations by both parties. Seadrill argued that that language operated to exclude the duty of Seadrill to use reasonable skill and care when operating the rig because the contract imposed responsibility for losses occurring in the course of operations on Gazprom regardless of the cause. That necessarily negated any obligation on Seadrill’s part to carry out the work with reasonable skill and care.
38. Moore-Bick LJ (with whom Lloyd and Ward LJJ agreed) noted (at 27) that the primary obligation was that under which Seadrill undertook responsibility for the operation of the rig in order to perform the services provided for by the contract. He said: (emphasis added)

“28. ... When para 501 refers to obligations and liabilities which the contractor has “specifically assumed” it must naturally refer to the obligations which arise out of the express terms of the contract *with all the incidents which the law ordinarily attaches to them, since those incidents are inherent in them*. It may, of course, be possible for the parties to agree otherwise, but unless they have done so, they can only be presumed to have accepted that the ordinary incidents apply. To proceed on any other basis would make commercial life impossible. To say, therefore, that under this form of contract the contractor specifically assumes an obligation to operate the

rig but does not specifically assume an obligation to do so carefully is to approach the question from the wrong end. Prima facie it assumes the obligation as expressed and all that the law attaches to it, unless there is agreement to the contrary.”

39. Moore-Bick LJ said that the trial judge was right, following the observation of Lord Diplock in *Gilbert-Ash* to ask himself whether the language of the relevant clauses “demonstrates with sufficient clarity that the parties do intend the operator to give up rights to which he would otherwise be entitled under the general law” (see 29). He described the principle encapsulated in Lord Diplock’s dictum as essentially one of common sense; “parties do not normally give up valuable rights without making it clear that they intend to do so”. The wording of para 501 was not inconsistent with the existence of an obligation on the part of Seadrill to operate the rig with reasonable skill and care.
40. Applying those principles to the present appeal, the *Quincecare* duty is one aspect of a bank’s overall duty to exercise reasonable skill and care in the services it provides. It can therefore properly be described as one of the incidents which the law ordinarily attaches to the relationship between the bank and the client and it is a duty which is inherent in that relationship. It is not therefore negated by the existence of a clause which narrows down the obligations of the bank to the basic obligation of holding the money and executing instructions received because the obligation to perform those functions with reasonable skill and care is part and parcel of that basic obligation – indeed to use the wording of clause 5.1, it is an obligation which is “determined” by the express provisions of the depository agreement. It is not, of course, impossible for a bank and its client to agree that the *Quincecare* duty would not arise and that the bank should be entitled to pay out on instruction of the authorised signatory even if it suspects the payment is in furtherance of a fraud which that signatory is seeking to perpetrate on its client. But the first sentence of clause 5.1 is nowhere near clear enough to indicate that the FRN and Morgan Chase intended that to be the case in relation to the depository cash.
41. I further agree with the judge that other clauses in the depository agreement indicate that the parties recognised that tortious duties and other terms implied by law still applied to their relationship even if they were not express provisions of the depository agreement itself.
42. Clause 8.1 is an exclusion clause which provides that Morgan Chase shall not be liable to the FRN for any loss suffered by the FRN by reason of, amongst other things, the Bank’s actions or omissions, destruction or mis-delivery of the cash or by any act or omission of any person not affiliated with Morgan Chase. At the end of the clause there is a carve out from the exclusion if the loss is “caused by the fraud, gross negligence or wilful misconduct” of Morgan Chase. In that event, the Bank’s liability will be limited to the market value of the cash at the date of discovery of the loss. As the judge pointed out, there is nothing in the express terms of the depository agreement which prohibits all those actions and omissions which might cause loss to the counterparty. It must follow that the obligation which is excluded in part by clause 8.1 is a tortious obligation which arises by operation of law and is not excluded by the entire agreement clause. I do not agree with Ms Phelps’ argument that this provision does not tell one anything about the underlying liabilities but is rather talking about what sorts of conduct will entitle or disentitle Morgan Chase from reliance on the

exclusion in clause 8.1. The judge was right to regard this as inconsistent with the interpretation of the opening sentence of clause 5.1 for which Morgan Chase contends.

43. Clauses 2.2 and 5.9 authorise Morgan Chase to disclose information with respect to the account, the parties or any transaction in six different circumstances set out in the clauses. Again, the judge was right to say that the circumstances in which disclosure is permitted by these clauses must have been included in the agreement to provide exceptions from an implied duty of confidentiality. That duty is not expressed in the provisions of the depository agreement itself but must arise by operation of law. I do not agree that this can be dismissed as simply “belt and braces” and strictly unnecessary because of clause 5.1.
44. Clause 19 of the depository agreement deals with governing law and refers to the agreement “and any non-contractual obligations arising out of it” being governed by English law. This envisages that there are non-contractual obligations arising from the agreement despite the wording of the opening sentence of clause 5.1.
45. Ms Phelps submitted that this interpretation of clause 5.1 was not correct. First, she argued that if all that the parties had wanted to achieve was to exclude the potential application of any other agreements, the clause would have worked perfectly well with the first sentence left out. That opening sentence must perform some additional function. She countered the judge’s reference to these other clauses as presupposing that tortious duties still arose despite that opening sentence of clause 5.1 by referring to clause 8.3. Clause 8.3 provides: (emphasis added)

“8.3 The Depository shall be liable only for reasonably foreseeable loss or damage which the Depositor suffers or incurs arising from the Depository's gross negligence or wilful misconduct and shall not be liable for any other loss or damage of any nature. For the purposes of this section “reasonably foreseeable loss or damage” is loss or damage of a kind which the Depository should reasonably have foreseen at the date of the signature by the Party of this Agreement for as a serious possibility in the event of the breach in question occurring and which arises in the ordinary course of things. *Nothing in this Agreement (including clauses 5.1, 8.1 and 8.2) is intended to exclude or restrict any duty or liability of the Depository to the Depositor in respect of fraud on the part of the Depository,*”
46. There was a further clause in similar terms in a schedule to the agreement, providing that nothing in the agreement including clauses 5.1, 8.1 or 8.2 was intended to exclude any duty or liability which Morgan Chase is prohibited by regulatory rules from excluding. Ms Phelps argued that those savings for liability for fraud or for breach of regulatory rules would not be necessary if clause 5.1 had only the limited scope that the judge held. Those savings also meant that the judge was wrong to base his decision in part on a concern that Morgan Chase would be relieved of liability for fraud, since that was clearly not the case in the light of the final sentence of clause 8.3. The obvious implication of those words was that clause 5.1 was actually doing the job she said it was doing.

47. I do not see that the final sentence of clause 8.3 helps in construing the first sentence of clause 5.1. It is true that in the light of that clause, the depository agreement does not purport to exclude liability for fraud but it says nothing about the effect or lack of it of clause 5.1 on tortious duties other than those relating to fraud. The desire to give some content to the first sentence of the clause does not justify giving it a meaning that is completely unrelated to and much more wide ranging than the remainder of the clause.
48. I therefore conclude that the judge was right to hold that clause 5.1 did not prevent the *Quincecare* duty from arising in this case.

(2) Clauses 7.2, 7.4, 5.8 and 11.5: clauses inconsistent with the existence of the *Quincecare* duty

49. The first two clauses that Morgan Chase relies on in this part of the case are clauses 7.2 and 7.4. They form part of the section of the depository agreement headed “Instructions from the Depositor”. Clause 7.2 is a very long clause the whole of which is set out in the Appendix to this judgment. The first sentence of the clause itself comprises 156 words. The first part of the first sentence provides that instructions appearing to come from the FRN are conclusively deemed to be valid instructions if reasonably believed by Morgan Chase to be genuinely provided. The second part of the first sentence says that Morgan Chase may decline to act on any such instructions where in the reasonable view of Morgan Chase the instructions suffer from a defect of a kind described there. The third part of the first sentence provides that the FRN shall be responsible for any loss, claim or expense incurred by Morgan Chase in carrying out or attempting to carry out any instructions unless that loss, claim or expense is caused by Morgan Chase’s fraud, negligence or wilful default. After that comes the second sentence on which Morgan Chase relies:

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

50. The rest of clause 7.2 deals with security procedures for authenticating instructions.
51. Along similar lines, clause 7.4 provides:

“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 application law, regulation or market practice. ...”

52. The judge dealt with the construction of these clauses when he held at paragraph 48 that the two clauses were consistent with the *Quincecare* duty, whether or not, in the particular circumstances of the case, that duty includes a duty to make inquiries or to investigate the suspicions that have arisen. He said:

“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.”

Discussion: inconsistent clauses 7.2 and 7.4

53. I have already considered and rejected Ms Phelps’ submission that the judge applied too stringent a test when considering whether the clauses were inconsistent with the existence of the *Quincecare* duty because he plainly did not apply the same ‘clear words’ test as he applied to the entire agreement, exclusion or indemnity clauses. Ms Phelps submits that the wording of the second sentence of clause 7.2 set out above and of clause 7.4 is fundamentally inconsistent with the existence of the *Quincecare* duty. One cannot have a contract which provides that the Bank has no duty to investigate the validity of the payment instructions and at the same time say there is a *Quincecare* implied duty. She accepted that there were limits to the ability of Morgan Chase to comply with instructions which, though properly authenticated, were obviously fraudulent. If the authorised officer had, for example, instructed the payment of monies out of the depository account to a luxury yacht builder or for the purchase of a private jet, the Bank would face liability for fraud or for dishonest assistance in a breach of fiduciary duty. But short of that, it does not make sense to posit that a bank can be under a duty not to pay if it has suspicions about the instructions but not under a corresponding duty to make enquiries about whether those suspicions are well-founded. Ms Phelps submitted that the judge’s interpretation of the clause as simply absolving the Bank from any need to go out to make enquiries and to look for problems when it was not on notice of a possible fraud was not tenable. No one suggests that a banker is under any such duty so there is no need for the clause to absolve it from that duty. The clause means that as long as Morgan Chase complies with the payment instructions and with the rules in the depository agreement about authenticating the instructions, it was not required to go behind those instructions.
54. I agree with the judge’s conclusion as regards clause 7.4. That is, in my view, aimed at making clear that the Bank is not taking on any obligation to make inquiries beyond those needed to authenticate the instructions received but it does not state that that is the case even where the Bank is on notice about the suspicious circumstances of the request for payment. As regards clause 7.2, the totality of the clause - indeed the whole of part 7 of the depository agreement - is concerned with how instructions from the FRN are transmitted, with the arrangements in place for checking that the instructions are what they purport to be and with absolving Morgan Chase of responsibility if the instructions proved not to be “genuine” in the sense that they are given by an impostor and not by the person who is properly authorised to give those instructions in accordance with the terms of the depository agreement. Clause 7.2 is

therefore all about the ‘validity, accuracy or content of any instruction’ in that sense. By including the word ‘validity’ in that second sentence in the middle of the clause, the parties did not intend to expand the ambit of the clause into one which deals with something completely different, namely the circumstances in which Morgan Chase can or must refuse to comply with an instruction which is actually given by the Depositor and is therefore genuine. In any event, clause 7.2 does envisage circumstances in which Morgan Chase will refuse to comply with instructions from the FRN. I agree with the judge that that possibility is consistent with the *Quincecare* duty of care.

55. Ms Phelps showed us passages in the FRN’s pleaded case where they assert that the effect of the overall fraudulent nature of the settlement agreements of which the depository agreement forms a part is that the instructions given to Morgan Chase to pay out the money to Malabu were invalid or not genuine. She submitted that the way the case was put against Morgan Chase in the pleaded case in effect alleges that the Bank should have investigated whether the payment instructions were unlawful. That is precisely what clause 7.4 says they do not have a duty to do. I agree, however, with Mr Masefield’s submission that the pleading is using those terms in a different sense from the sense of clause 7.2 and 7.4 and cannot affect the proper construction of those clauses. I do not accept therefore that clauses 7.2 and 7.4 are inconsistent with the existence of the *Quincecare* duty in this relationship.

Discussion: clauses 5.8 and 11.5

56. The third clause on which Morgan Chase relies as being inconsistent with the existence of the *Quincecare* duty is clause 5.8. This provides, simplified slightly:

“5.8 The Depositor hereby authorises the Depository to act hereunder notwithstanding that: (i) the Depository ... may have a material interest in the transaction or ... a potential conflict of duty or interest ... or (ii) the Depository ... 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.”

57. Ms Phelps said there were two aspects to this clause; first the parties are agreeing that Morgan Chase need not look behind the instructions or concern itself with whether it is on notice as a result of any particular information. The second aspect is that there is no duty to disclose information. This latter provision conflicts in part with the *Quincecare* duty because if that duty requires a bank to go back to the customer to check whether the customer really intended to make the payment, the Bank is inevitably going to be disclosing information about the payment instruction and what it is about that instruction which makes it suspicious. What this clause says is that the Bank is under no obligation to do that.

58. The last clause Morgan Chase relies on as inconsistent with the *Quincecare* duty is clause 11.5 which provides:

“11. The Depositor hereby represents and warrants to the Depository on a continuing basis that: ...

11.5 the execution, delivery and performance of and 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; ...”

59. Ms Phelps argues that the judge was wrong at paragraph 52 of the judgment to say that neither of these clauses assists Morgan Chase.
60. In my judgment clause 5.8 has nothing to do with the Bank policing or not policing the benefits to be derived by the FRN from the performance of the depository agreement. It is a recognition that there may be other parts of the extensive, international Morgan Chase banking group that may be privy, as a result of work they are carrying out for different clients, to information which tends to show that it might not be in the best interests of the FRN for the agreement to be implemented. The effect of clause 5.8 is that the FRN nonetheless authorises Morgan Chase to act in accordance with the agreement. As to clause 11.5, the effect of this is that the FRN is warranting to Morgan Chase that there is nothing in Nigerian law or the Nigerian constitution, or in any other agreements to which it is a party, that means that performing the depository agreement would be unlawful. Those words do not support the contention that the *Quincecare* duty is negated because the FRN is warranting that the settlement agreements are not unlawful.

(3) Clause 8.2(d): exclusion clause

61. If Morgan Chase is wrong about the scope of the depository agreement on its terms negating the imposition of the *Quincecare* duty, then it relies on the exclusion clause in clause 8.2(d). That provides:

“Notwithstanding Clause 8.1, neither the Depository, its affiliates, nor any of their directors, officers or employees, shall in any circumstances be liable to ... the Depositor for any expense, loss or damage suffered by or occasioned to ... the Depositor by:

...

(d) 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;”

62. Ms Phelps accepted that exclusion clauses are still narrowly construed: see *Nobahar-Cookson & anor v Hut Group* [2016] EWCA Civ 128 (*‘Hut Group’*). In that case the parties to a share purchase agreement both made warranty claims against each other. Briggs LJ (with whom Hallett LJ and Moylan J agreed) discussed what role the *contra proferentem* principle now has in the interpretation of exclusion clauses and other clauses in commercial contracts. He said (at 14) that the rule in its classic form was by

no means limited to, or even mainly about exclusion clauses. Rather it was “a rule designed to resolve ambiguities against the party who prepared the document in which the clause appeared, or prepared the particular clause, or against the person for whose benefit the clause operates.” He went on to say that recent decisions about exclusion clauses have continued to affirm the utility of the principle that, if necessary to resolve ambiguity, they should be narrowly construed, including in relation to commercial contracts:

“18. In my judgment the underlying rationale for the principle that, if necessary to resolve ambiguity, exclusion clauses should be narrowly construed has nothing to do with the identification of the *proferens*, either of the document as a whole or of the clause in question. Nor is it a principle derived from the identification of the person seeking to rely upon it. Ambiguity in an exclusion clause may have to be resolved by a narrow construction because an exclusion clause cuts down or detracts from the ambit of some important obligation in a contract, or a remedy conferred by the general law such as (in the present case) an obligation to give effect to a contractual warranty by paying compensation for breach of it. The parties are not likely to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations without using clear words having that effect see [*Gilbert-Ash*] and [*Seadrill*].

19. This approach to exclusion clauses is not now regarded as a presumption, still less as a special rule justifying the giving of a strained meaning to a provision merely because it is an exclusion clause. ... The court must still use its tools of linguistic, contextual, purposive and common sense analysis to discern what the clause really means.”

63. Ultimately Briggs LJ regarded the seriously ambiguous exclusion clause with which the court was faced in *Hut Group* as bearing the narrower of the two competing constructions so that, as he put it in conclusion, “a thoroughly modern recourse to purposive construction happily marches hand in hand with a perhaps more old-fashioned recourse to rules or canons of construction, which continue to assist the court where all else fails”: see para 38.
64. Morgan Chase accepts that clear words are needed if the clause is to be construed as excluding liability for breach of the duty. Prof Burrows rejected the Bank’s reliance on clause 8.2(d), for reasons he set out in paragraph 54. He held that the clause operates only to exclude Morgan Chase’s liability for obeying the instructions of an imposter which it in good faith believes are genuine. That was not the basis of the liability alleged here. He also held that the exclusion was limited to where the Bank acted in good faith. That was an issue in these proceedings which could only be resolved at trial. Ms Phelps did not challenge the latter point; she accepted that the issue of good faith needed to go to trial. But she invited the court to decide whether the judge was right that clause 8.2(d) is limited to liability for complying with inauthentic instructions or whether it goes further.

Discussion: clause 8.2(d)

65. I do not agree that clause 8.2(d) can bear the construction that Morgan Chase proposes. The clause has to be read in the context of section 8 of the depository agreement taken as a whole. Clause 8.1, as we have seen, deals generally with the exclusion of Morgan Chase's liability for its acts or omissions and is limited to excluding liability other than for fraud, gross negligence or wilful misconduct. The Bank's liability for conduct short of fraud is further circumscribed by clause 8.1 which limits the quantum of any claim to the amount of the deposited cash and by clause 8.3 which imposes a narrow definition of what kind of loss and damage is reasonably foreseeable. That creates a more or less coherent provision. Clause 8.2 contains a long list of many other random disasters that might befall the parties from the failure of a settlement system to expropriation or nationalisation of assets, nuclear fusion or fission, or damage to goodwill. One of those is sub-paragraph (d) as set out above. The second part of sub-paragraph (d) is clearly dealing with notices, requests etc which are in good faith believed to be genuine and to be have been given or signed by the appropriate parties. It does not make sense to read the words "acting on what it in good faith believes to be instructions" there as introducing an exclusion of liability which substantially cuts across clause 8.1 and 8.3 and is different in kind from the exclusion created in the second half of the same sub-paragraph. The words are certainly not sufficiently clear to lead me to believe that the parties intended by this subclause to exclude liability for breach of the *Quincecare* duty.

(4) Clause 10.1(a): the indemnity clause

66. The final clause on which Morgan Chase relies is clause 10.1(a) which provides: (emphasis in the original)

"The Depositor hereby irrevocably and unconditionally agrees on demand to indemnify, and keep fully and effectively indemnified, (and on an after Tax basis) 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 [are] 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;"

67. Morgan Chase argues that this clause provides them with a circularity defence because if the Bank is liable to the FRN for a breach of the *Quincecare* duty then that is a liability which is incurred in respect of following any instructions upon which the Bank was authorised to act, was incurred as a result of it having entered into the depository agreement and arose out of its status as holder of the cash in the account.
68. The modern approach to construing indemnity clauses was helpfully described by Popplewell J in *Capita (Banstead 2011) Ltd v RFIB Group Limited* [2014] EWHC

2197 (Comm) where he expressed at para 15 the principles to be derived from the case law:

“(1) A clear intention must appear from the words used before the Court will reach the conclusion that one party has agreed to exempt the other from the consequences of his own negligence or indemnify him against losses so caused. The underlying rationale is that clear words are needed because it is inherently improbable that one party should agree to assume responsibility for the consequences of the other’s negligence ...

(2) The *Canada Steamship* principles are not to be applied mechanistically and ought to be considered as no more than guidelines; the task is always to ascertain what the parties intended in their particular commercial context in accordance with the established principles of construction ... They nevertheless form a useful guide to the approach where the commercial context makes it improbable that in the absence of clear words one party would have agreed to assume responsibility for the relevant negligence of the other.

(3) These principles apply with even greater force to dishonest wrongdoing, because of the inherent improbability of one party assuming responsibility for the consequences of dishonest wrongdoing by the other. The law, on public policy grounds, does not permit a party to exclude liability for the consequences of his own fraud; and if the consequences of fraudulent or dishonest misrepresentation or deceit by his agent are to be excluded, such intention must be expressed in clear and unmistakable terms on the face of the contract. General words will not serve. The language must be such as will alert a commercial party to the extraordinary bargain he is invited to make because in the absence of words which expressly refer to dishonesty the common assumption is that the parties will act honestly ...”

69. The reference there to the *Canada Steamship* principles is a reference to *Canada Steamship Lines v R* [1952] AC 192. Morgan Chase submits that the judge was wrong to hold at paragraph 63 that the clause was limited to indemnifying the Bank against claims by third parties and did not include claims against the Bank by the FRN itself. It may certainly require an indemnity for third party claims but the wording is not limited to that.
70. The difficulty with this submission is that the clause would have the extraordinary effect of causing the victim of the fraud to compensate the Bank which has facilitated the perpetration of that fraud. In *Singularis* I held that the attribution to Singularis of Mr Al Sanea’s fraudulent conduct so as to provide a defence to Daiwa would denude the *Quincecare* duty of any value in cases where it is most needed. The existence of the duty is predicated on the assumption that the person whose fraud is suspected is the person who has been trusted by the bank’s client to be a signatory on the account: see paragraph 184. Sir Geoffrey Vos C (with whom Gloster and McCombe LJJ

agreed) endorsed that conclusion: see paragraph 57 of the Court of Appeal's judgment. I also held that Daiwa did not have an equal and opposite claim in deceit against Singularis, even though Singularis accepted that it was to be treated as vicariously liable for Mr Al Sanea's actions and indeed for the actions of other directors of the company: see paragraph 221. Again, this conclusion was upheld by the Court of Appeal:

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

80. I would, therefore, hold that, even if Mr Al Sanea's fraud were to be attributed to Singularis (which it is not), Singularis's claim cannot be defeated by an equal and opposite claim in deceit by Daiwa against Singularis.”

71. The same applies here. It would need very clear words to establish that the parties intended the indemnity provided in clause 10.1(a) to cover the liability alleged in these proceedings to have been incurred by Morgan Chase to the FRN where the breach is of a duty which is specifically aimed at protecting the customer from the fraud of its trusted employee or officer. The words of the clause do not point to such a conclusion.

Conclusion

72. I therefore find that the judge was right to dismiss the summary judgment application. I have formed no view as to the overall merits of the FRN's claim but there is nothing in the terms of the depository agreement which entitles Morgan Chase to bring the proceedings to an end at this stage.

Sir Bernard Rix:

73. I agree.

Lord Justice Baker:

74. I also agree.

THE FEDERAL REPUBLIC OF NIGERIA

Claimant/Respondent

-and-

JPMORGAN CHASE BANK, N.A.

Defendant/Applicant

APPENDIX TO THE JUDGMENT

**RELEVANT CONTRACTUAL CLAUSES FROM
THE DEPOSITORY AGREEMENT**

5.1 The duties and obligations of the Depository in respect of the Depository Cash shall be determined solely by the express provisions 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 the 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: (i) the Depository or any of its divisions, branches or affiliates may have a material interest in the transaction or that circumstances are such that the Depository may have a potential conflict of duty or interest including the fact that the Depository or any of its affiliates may: (a) provide brokerage or other services to other customers; (b) act in the same transaction as agent for more than one customer; (c) have a material interest in the relevant transaction; or (d) earn profits from any of the activities listed herein; or (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 Any instructions (regardless of the method of communication) given or purporting to be given by the Depositor, notwithstanding any error in transmission or that such instructions may prove not to be genuine, shall be conclusively deemed to be valid instructions from the Depositor to the Depository for the purpose of this Agreement if reasonably believed by the Depository to be genuine provided, however, that the Depository may decline to act on any such instructions where in the reasonable view of the Depository they are insufficient, incomplete, inconsistent as between the Depositor or are not received by the Depository in sufficient time to act thereon or in accordance therewith provided further that, other than by reason of the fraud, negligence or wilful default of the Depository, the Depositor shall be jointly and severally responsible for any loss, claim or expense incurred by the Depository for carrying out or attempting to carry out any instructions of the Depositor. The Depository shall be under no duty to enquire into or investigate the validity, accuracy or content of any instruction or other communication. The Depository and the Depositor may from time to time agree upon a security procedure to be

followed by the Depositor upon the issuance of an instruction and/or by the Depository upon the receipt of an instruction, so as to enable the Depository to verify that such instruction is effective as that of the Parties. A security procedure may require the use of algorithms or other codes, identifying words or numbers, encryption, call back procedures or similar security devices. It is understood that such security procedure is designed to verify the authenticity of, and not to detect errors in, instructions. The Depositor agrees to safeguard such security procedure and to make it available only to authorised persons. Any instruction, the authenticity of which has been verified through such security procedure, shall be effective as that of the Parties. An authenticated SWIFT message issued to the Depository in the name of the any of the Depositor shall be deemed to have been given by an Authorised Person. The Party shall be bound by and adhere to the security procedure advised to it in writing or electronically by the Depository, as may be revised from time to time upon notice to the Parties. The Depository is not obligated to confirm any instructions. If the Parties, other than with respect to security procedures, choose to confirm an instruction, any confirmation must be clearly marked as such, and, if there is any discrepancy between an instruction and a confirmation, the terms of the instruction shall prevail. The Depository may, at its option, use any means to confirm or clarify any request or instruction, even if any agreed security procedure appears to have been followed. If the Depository is not satisfied with any confirmation or clarification, it may decline to honour the instruction.

...

- 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 application law, regulation or market practice. ...

8.1 Neither the Depository, its affiliates, nor any of their directors, officers or employees, shall be liable to either the Depositor for any expense, loss or damage suffered by or occasioned to the Depositor:

- (a) by reason of any action taken or omitted to be taken by any one or all of the Depository, its affiliates, agents, or any directors, officers, employees or agents of such persons pursuant to this Agreement or in connection therewith; or
- (b) in the event of any loss, damage, destruction or mis-delivery of or to the Depository Cash howsoever caused; or
- (c) by any act or omission of any person not affiliated with the Depository,

unless caused by the fraud, gross negligence or wilful misconduct of the Depository, in which event the extent of the liability of the Depository shall be limited to the market value of the Depository Cash at the date of discovery of the loss, and in no circumstances shall the Depository be liable under this Agreement or for obligations relating to this Agreement (including, without limitation, obligations in tort) for any indirect, special, punitive or consequential loss or damages, even if the Depository has been advised of the possibility of such damages, or for any loss of profit, good will or opportunity.

8.2 Notwithstanding Clause 8.1, neither the Depository, its affiliates, nor any of their directors, officers or employees, shall in any circumstances be liable to either the Depositor for any expense, loss or damage suffered by or occasioned to either the Depositor by:

- (a) the insolvency of any Agent or other entity; or
- (b) any act, omission or insolvency of any settlement system; or

- (c) delivery or payment being effected against an expectation of receipt, save where such delivery or payment was contrary to local market practice; or
- (d) 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; or
- (e) the general risks of investing, or investing or holding assets in a particular country, including, but not limited to, losses arising from nationalisation, expropriation or other governmental actions; regulations of the banking or securities industries, including changes in market rules; currency restrictions, devaluations or fluctuations; market conditions affecting the orderly execution of securities transactions or affecting the value of assets; or
- (f) any forces beyond the control of the Depository, including, but not limited to, strikes, work stoppages, acts of war or terrorism, insurrection, revolution, nuclear fusion, fission or radiation, catastrophe, fire, flood or electrical, computer, mechanical or telecommunications failure, or failure of any agent or correspondent, or unavailability of a payment system act of governmental authority, de jure or de facto, legal constraint or acts of God; or
- (g) The Depository shall not in any event be liable for loss of business or profits or goodwill or any indirect or consequential or punitive or special loss or damage, in each case whether or not reasonably foreseeable, even if the Depository has been advised of the likelihood of such loss or damage and whether arising from negligence, breach of contract or otherwise.

8.3 The Depository shall be liable only for reasonably foreseeable loss or damage which the Depositor suffers or incurs arising from the Depository's gross negligence or wilful misconduct and shall not be liable for any other loss or damage of any nature. For the purposes of this section "reasonably foreseeable loss or damage" is loss or damage of a kind which the Depository should reasonably have foreseen at the date of the signature by the Party of this Agreement for as a serious possibility in the event of the breach in question occurring and which arises in the ordinary course of things. Nothing in this Agreement (including clauses 5.1, 8.1 and 8.2) is intended to exclude or restrict any duty or liability of the Depository to the Depositor: in respect of fraud on the part of the Depository.

* * * * *

10.1 The Depositor hereby irrevocably and unconditionally agrees on demand to indemnify, and keep fully and effectively indemnified, (and on or after Tax basis) 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; and
- (b) of a breach by Depositor (or their agents) of their respective obligations, warranties or representations under this Agreement, or otherwise arising under or in connection with this Agreement or the performance of the Depository's obligations (including, without limitation, the costs of the Depository defending itself successfully against alleged fraud, negligence or wilful default), save in respect of the fraud, negligence or wilful default of the Depository and save in

respect of loss arising from the action of any indemnitee for which the Depository is liable pursuant to, and in accordance with, this agreement; ...

* * * * *

11

The Depositor hereby represents and warrants to the Depository on a continuing basis that:

...

11.5 the execution, delivery and performance of and 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; . . .