

UK Supreme Court upholds first successful claim for breach of the “*Quincecare*” duty financial institutions owe their customers

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In *Singularis Holdings Ltd (In Official Liquidation) v Daiwa Capital Markets Europe Ltd* ([2019] UKSC 50), the Supreme Court upheld the first successful claim in negligence by a customer of a financial institution for breach of the so-called *Quincecare* duty of care, in relation to payment instructions given where the financial institution is put “on inquiry” by having reasonable grounds for believing that the instruction was an attempt to misappropriate funds.

The *Quincecare* duty

The duty takes its name from *Barclays Bank plc v Quincecare Ltd*¹. In that case, the Court held that it was an implied term of a contract between a bank and its customer that the bank would use reasonable skill and care in and about executing the customer’s orders.² *Quincecare* established that there would be liability for a financial institution if it executed a payment instruction “*knowing it to be dishonestly given, or shut its eyes to the obvious fact of the dishonesty, or acted recklessly in failing to make such inquiries as an honest and reasonable man would make*” and that a financial institution “*should refrain from executing an order if and for so long as it was put on inquiry by having reasonable grounds for believing that the order was an attempt to misappropriate funds.*”³

Background

The Claimant, Singularis, is a company incorporated in the Cayman Islands set up to manage the personal assets of Maan Al Sanea (the owner of the Saad Group, a Saudi Arabian conglomerate). Mr Al Sanea was at all material times the sole shareholder, a director and also the chairman, president and treasurer of Singularis. Singularis had six other directors, who were reputable people, but did not exercise any influence over the management of the company. As the Supreme Court noted, “*very extensive powers were delegated to Mr Al Sanea to take decisions on behalf of the company, including signing powers over the company’s bank accounts.*”⁴

¹ [1992] 4 All ER 363.

² Subject to the conflicting duty to execute orders promptly in order to avoid causing financial loss to the customer.

³ See paragraph 1 of the judgment.

⁴ See paragraph 2 of the judgment.

The Defendant (and Appellant), Daiwa, is the London subsidiary of a Japanese investment bank and brokerage firm. In 2007, Daiwa entered into a financing arrangement with Singularis to provide Singularis with loan financing to purchase shares (which acted as security for the repayment of the loan). By June 2009, the purchased shares had been sold and the loan from Daiwa had been repaid, leaving Daiwa holding a cash surplus for the account of Singularis coupled with a sum of US\$80m deposited by Singularis in June 2009, bringing the total held on account by Daiwa for Singularis to c. US\$204m.

Between June and July 2009, when it appeared Singularis was running into financial difficulties, Mr Al Sanea (who had the relevant authority as between Daiwa and Singularis to instruct payments and was the “directing mind” and sole shareholder of Singularis) fraudulently deprived Singularis of c. US\$204m by instructing Daiwa to pay it away through eight payments to Saad Group entities. Daiwa made each of these payments as instructed (notwithstanding that Daiwa’s Head of Compliance had reminded colleagues to exercise caution with Singularis in light of the Saad Group’s and related individuals and entities’ well-publicised difficulties).

On 20 June 2009, Mr Al Sanea placed Singularis in voluntary liquidation. On 18 September 2009, the Grand Court of the Cayman Islands made a compulsory winding up order. Joint liquidators were appointed, and on 18 July 2014, Singularis, acting through its joint liquidators, brought a claim against Daiwa for the recovery of the misappropriated funds that were not recovered from Mr Al Sanea and the recipient companies.

The first instance decision

There were two bases for the claim brought at first instance:

- (1) dishonest assistance in Mr Al Sanea’s breach of fiduciary duty in misapplying the company’s funds; and
- (2) breach of the *Quincecare* duty owed by Daiwa to Singularis by giving effect to the payment instructions.

The first instance judge, Rose J, dismissed the dishonest assistance claim finding that Daiwa’s employees had acted honestly. However, she did uphold the negligence claim for breach of the *Quincecare* duty, subject to a 25% deduction to the damages award for the contributory fault of Mr Al Sanea and Singularis’s inactive directors who should have been paying more attention to what Mr Al Sanea was doing. Among other things, Rose J found that any reasonable banker would have realised that there were “*many obvious, even glaring, signs that Mr Al Sanea was perpetrating a fraud*”⁵ on Singularis.

Daiwa appealed the Judge’s decision.

The Court of Appeal’s decision

The Court of Appeal unanimously dismissed Daiwa’s appeal, finding that Mr Al Sanea’s fraudulent state of mind could not be attributed to Singularis, but even if it could, the claim would still have succeeded as Daiwa’s negligence in breaching its *Quincecare* duty caused the loss, and neither the defence of illegality or an equal and opposite claim by Daiwa for Singularis’s deceit defeated Singularis’s claim. The Court of Appeal also found that Rose J’s finding of 25% contributory negligence was reasonable.

The Supreme Court’s Judgment

Daiwa appealed to the Supreme Court on the question of corporate attribution and its consequences. Daiwa argued that Mr Al Sanea was the “controlling mind” of Singularis as it was effectively a “one-man company”. His fraud, Daiwa argued, was to be attributed to Singularis and therefore the claim for breach of Daiwa’s *Quincecare* duty to Singularis was defeated by illegality, the lack of causation, or because of Daiwa’s equal and opposite claim for deceit against Singularis.

⁵ See paragraph 11 of the judgment.

(i) Attribution

In its judgment, the Supreme Court provided helpful guidance on when the actions of a dominant personality who owns and controls a company can be attributed to the company itself.

The Court disavowed strongly the notion that the dishonesty of the controlling mind in a so-called “one-man company” can be attributed to the company whatever the context and purpose of the attribution in question. The Court reiterated that the starting point is that a properly incorporated company has an identity and legal personality separate from its subscribers, shareholders and directors.⁶ Companies must of course act through real human beings and so the issue becomes when the acts and intentions of those natural persons are to be treated as the acts and intentions of the company. The Court found that in each case careful consideration of the company’s constitutional documents, the ordinary rules of agency and vicarious liability, and any applicable particular rules of law is required.

In seeking to establish that Mr Al Sanea’s actions were attributable to Singularis, Daiwa cited the controversial authority of *Stone & Rolls*⁷, which the Supreme Court lamented “*has been treated as if it established a rule of law that the dishonesty of the controlling mind in a “one-man company” could be attributed to the company... whatever the context and purpose of the attribution in question.*”⁸ The Supreme Court disapproved of that proposition, instead citing with approval Rose J’s statement that “*there is no principle of law that in any proceedings where the company is suing a third party for breach of a duty owed to it by that third party, the fraudulent conduct of a director is to be attributed to the company if it is a one-man company*” and that “*the answer to any question whether to attribute the knowledge of the fraudulent director to the company is always to be found in consideration of the context and the purpose for which the attribution is relevant*”.⁹ On that basis, the Supreme Court considered that *Stone & Rolls* can finally be laid to rest.¹⁰

What then for attribution of Mr Al Sanea’s fraud to Singularis in the present case where Daiwa was in breach of its *Quincecare* duty to Singularis? The Supreme Court considered that the purpose of the *Quincecare* duty is to protect the company against exactly the kind of misappropriation being considered in this case. By definition, the misappropriation will have been perpetrated by a trusted agent of the company authorised to withdraw its money and to attribute the fraud of that person to the company would be, citing Rose J, to “*denude the duty of any value in cases where it is most needed*”. If Daiwa’s arguments were accepted, there would in effect be no *Quincecare* duty or its breach would have no consequences. The Supreme Court considered that this would be a retrograde step.¹¹

Nonetheless, the Supreme Court found that whether or not the fraud was attributed to Singularis, the defences advanced by Daiwa would fail.

(ii) Illegality

The illegality relied on by Daiwa was (i) in relation to all of the payments, Mr Al Sanea’s breach of fiduciary duty to Singularis; and (ii) in relation to some of the payments, Mr Al Sanea’s provision of documents which he knew to be false.

Although Daiwa’s illegality arguments were predicated on Mr Al Sanea’s fraud being attributed to Singularis, even if attribution were not a pre-requisite, the Court found that denial of the claim would undermine the public interest in requiring banks to play an important part in uncovering financial crime and money laundering, and would be an unfair and disproportionate response to any wrongdoing on Singularis’s part (which could be dealt with more appropriately through a deduction for contributory negligence). Accordingly, an illegality defence was not available to Daiwa.

⁶ As established by the House of Lords in *Salomon v A Salomon and Co Ltd* [1897] AC 22.

⁷ *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39.

⁸ See paragraph 33 of the judgment.

⁹ As held by the Supreme Court in *Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23.

¹⁰ See paragraph 34 of the judgment.

¹¹ See paragraph 35 of the judgment.

(iii) Causation

As to causation, Daiwa's argument put simply was that if the fraud were attributable to Singularis, Singularis's loss was caused by its own fault, and not the breach of Daiwa's *Quincecare* duty. The Supreme Court disagreed. Even if the attribution argument had succeeded, the fraudulent instruction to Daiwa gave rise to the *Quincecare* duty, which Daiwa breached, and it was that breach that caused Singularis's loss. Irrespective of any fault of Singularis, if Daiwa had not breached its duty, the money would have remained in the account for the liquidators and Singularis's creditors.

(iv) Countervailing claim in deceit

Finally, Daiwa argued that because it had an equal and countervailing claim in deceit against Singularis, Singularis's claim in negligence should fail for circularity. Put simply, if Daiwa were able to claim its losses flowing from Singularis's deceit in providing fraudulent instructions, those losses would include Daiwa's losses suffered by exposure to Singularis's claim against it. The Supreme Court rejected this reasoning. Daiwa owed Singularis a duty to guard against being misled into paying away Singularis's money by exactly that kind of fraudulent instruction. The Supreme Court therefore agreed with the Court of Appeal that "*[t]he 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 precondition for its liability.*"¹²

Comment

Financial institutions have an important role to play in reducing and uncovering financial crime and money laundering, which includes making reasonable inquiries before facilitating payments for their customers where there are reasonable grounds to suspect fraud.

Highlighting the importance for financial institutions of ensuring adequate safeguards and processes for payment processing, the Supreme Court has now made it clear that it will not be an adequate defence to a damages claim to rely on the instructions of a company's director where there are reasonable grounds to suspect misappropriation.

For insolvency practitioners, Singularis's joint liquidators' success may encourage claims against financial institutions that have facilitated the misappropriation of funds in the absence of dishonest assistance.

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¹² See paragraph 35 of the judgment.