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Going after the bank for failure to guard against fraud: *Singularis Holdings Ltd (In Official Liquidation) (A Company Incorporated in the Cayman Islands) (Respondent) v Daiwa Capital Markets Europe Ltd (Appellant)* [2019] UKSC 50

In a unanimous judgment of a five-strong panel delivered by Lady Hale yesterday, the Supreme Court has upheld the claims brought by the liquidators of Singularis against the London subsidiary of Daiwa Securities Group, agreeing with the High Court and Court of Appeal that the bank breached its duty as a financial institution to guard against fraud. The case is interesting for its discussion of that duty, as well as the circumstances in which a fraudulent director's knowledge will be attributed to a claimant company.

The case centred on a payment of $204 million Daiwa made to third parties at the request of the sole Singularis shareholder, Maan al-Sanea, who at the time faced widely publicised fraud allegations. The issue at hand was the so-called *Quincecare* duty of care (after the 1992 case of *Barclays Bank v Quincecare Ltd*); namely that is an implied term of the contract between a bank and its customer that the bank owes a duty of care not to execute the customer's order if it knows the order to be dishonestly given, shuts its eyes to obvious dishonesty, or acts recklessly in failing to make inquiries.

In 2014 the liquidators of Singularis brought a claim against Daiwa for the full amount of the payments on the basis of dishonest assistance in Mr Al Sanea's breach of fiduciary duty as director of Singularis, and, in the alternative, breach of the *Quincecare* duty by giving effect to the payment instructions. At first instance, Rose J in the High Court dismissed the dishonest assistance claim but held there was a clear breach of the *Quincecare* duty of care. The Court of Appeal agreed.

Before the Supreme Court, Daiwa argued that as Singularis was a one-man company and Mr Al-Sanea its controlling mind and will, his fraud should be attributed to the company. As a result of such attribution, the claim should fail for illegality, lack of causation, or because of a countervailing claim for deceit.

The Supreme Court held that Mr Al Sanea's fraud should not be attributed to the company. Daiwa had relied on the much-maligned House of Lords decision in *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39; [2009] 1 AC 1391, and argument centred on how that case had been interpreted in *Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23; [2016] AC 1. Lady Hale endorsed Rose J's analysis 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… 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*". If there is one key positive to take from this case, it is that "*Stone & Rolls can finally be laid to rest.*"

Further, to attribute the fraud of a 'trusted agent' of the company to the company in the context of Daiwa's *Quincecare* duty of care would denude that duty of any value in precisely the circumstances where it is most needed.

In any event, their Lordships further held that the defences of illegality, causation and the countervailing claim in deceit failed in any event. Interestingly, Rose J had held at first instance that the company's claim ought to be reduced by 25% for contributory negligence. The arguments around illegality,

causation and contributory negligence considerably overlapped, and there is more than a hint in Lady Hale's purposive reasoning that it was preferable for the company's claim to be reduced in this way than denied entirely by operation of a defence to the claim (see para 18).

Lady Hale also endorsed Rose J's reasoning as to a growing public interest in banks and financial institutions playing a part in reducing and uncovering financial crime: "*If a regulated entity could escape from the consequences of failing to identify and prevent financial crime by casting on the customer the illegal conduct of its employees that policy would be undermined*". However, there is a suggestion that the duty as articulated goes *beyond* the recognised regulatory standard to which financial institutions have to adhere. According to one expert witness in the case: "*It does change the recognised level of liability for banks and other financial institutions*." [1]

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[1] https://www.thetimes.co.uk/article/daiwa-ruling-means-banks-must-beef-up-anti-fraud-protection-3lcmdl7gf?utm_source=newsletter&utm_campaign=newsletter_121&utm_medium=email&utm_content=121_7649387&CMP=TNLEmail_118918_7649387_121