

Legal Updates from the Eversheds Sutherland Lawyer Development Team

B-Brief

Supreme Court decision on Quincecare duty, defence of illegality and corporate attribution

8 November 2019

Singularis Holdings Ltd (In Official Liquidation)
(A Company Incorporated in the Cayman
Islands) (Respondent) v Daiwa Capital Markets
Europe Ltd (Appellant)



Background

- Singularis, the claimant (C), was registered in the Cayman Islands to manage personal assets of Mr Al Sanea (AS)
- AS was sole shareholder, a director, chairman and treasurer of C. There were 6 other directors but none exercised any influence
- C held US\$204m on deposit with Daiwa, the defendant bank (D)
- In 2009 AS, as an authorised signatory, instructed D to make payments totalling US\$204m out of C's account. D made the payments
- It was common ground that AS was acting fraudulently
- C went into liquidation and in 2014, acting by its liquidators, issued a claim against D for:
 - (1) dishonest assistance in the breach of fiduciary duty by AS
 - (2) breach of *Quincecare* duty of care to C by giving effect to the payment instructions
- Case is significant in 3 areas: the *Quincecare* duty of care; test for attribution; and the illegality defence

Decision of High Court

- Quincecare duty – *“a banker must refrain from executing an order if and for as long as the bank 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”* Steyn J – Barclays Bank plc v Quincecare [1992]
- Rose J dismissed claim for dishonest assistance but held D had breached its Quincecare duty of care because *“any reasonable banker would have realised that there were many obvious, even glaring, signs that AS was perpetrating a fraud”*
- D’s case was that a fraudulent company was claiming damages for its own fraud from the victim. D argued such a claim was barred by illegality - it would be contrary to public policy to enforce claim
- Held the dishonest conduct of AS should not be attributed to C so as to provide D with a defence of illegality. Though Rose J did reduce the damages payable by 25% for C’s contributory negligence, in part to reflect the failure of the other directors to control AS
- D appealed

Court of Appeal decision

- Court of Appeal dismissed appeal
- The fraudulent state of mind of AS could not be attributed to C
- Even if it could, claim would still have succeeded because D's negligence caused the loss
- 25% contributory negligence was reasonable
- D appealed to Supreme Court
- Two key issues
 - Could the fraud of AS, who was the "dominant influence over the affairs of the company" be attributed to the company?
 - If so, is the claim defeated on the grounds of illegality, lack of causation or by an equal and opposite claim against the company in deceit?
- This B-Brief focuses on the issues of attribution and illegality
- For further detail on the application of the Quincecare duty, see judgments of the High Court and Court of Appeal

Decision of Supreme Court - Attribution

- A company has a separate legal personality from its shareholders and directors – *Salomon v Salomon* [1897]
- So when are acts of individuals treated as acts of the company?
- The primary rules of attribution are found in the articles of association but not every act on behalf of a company is the subject of a board resolution so principles of agency and vicarious liability usually govern day to day activities – *Meridian Global* [1995] referred
- When can you attribute knowledge of a fraudulent director to the company? That depends on the context and purpose for which the attribution is relevant
- Context here was the Quincecare duty, which was to protect C against misappropriation of funds by a trusted agent. In those circumstances fraud of AS could not be attributed to C, otherwise the Quincecare duty would be stripped of any value
- There is no principle of law that where a 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” - *Stone & Rolls v Moore Stephens* [2009] distinguished
- In any event, C was not a one-man company, it had 6 other reputable directors

Decision of Supreme Court – Illegality

- Three-fold test for a successful illegality defence set out in *Patel v Mirza* [2016]
- Necessary to consider (a) underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of claim (b) any other relevant public policy on which the denial of the claim may have an impact and (c) whether denial of the claim would be a proportionate response
- **Underlying purpose** – denial of the Quincecare duty claim would not enhance the purpose of the prohibition – e.g. the prohibition against breach of fiduciary duty
- **Public policy** – denial of claim would have a material impact on growing reliance on banks/financial institutions to play an important role in reducing/uncovering financial crime
- **Proportionality** – denial of claim would be a disproportionate response to any wrongdoing by C. A deduction for contributory negligence was more appropriate
- Illegality defence not made out

Learning points

- There is a high threshold for a bank to be put on inquiry under the Quincecare duty
- This is the first successful claim for breach of the Quincecare duty
- Any decision on application of the illegality defence depends on the circumstances of the case
- In the context of the Quincecare duty, this case shows the challenges financial institutions may face in making out an illegality defence given the Supreme Court's comments on the role of financial institutions in detecting financial crime
- Decision clarifies the test for corporate attribution
- Confirms that the House of Lords decision in *Stone & Rolls v Moore Stephens [2009]* can “finally be laid to rest” – para 34, Supreme Court judgment

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WARNING

- B-Brief is a selective signposting tool, the purpose of which is to highlight the main aspects of a case and consider the key learning points.
- For the purpose of abbreviation and presentation, this note may consider only one part of a multi-issue judgment, or contain a high level overview of the main aspects of the case.
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