Singularis Holdings Ltd (in liquidation) v Daiwa Capital Markets Europe Ltd [2019] UKSC 50

Implications for Push Payment Fraud

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Introduction

In *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER, Steyn J held that it was an implied term of the contract between a bank and a customer that the bank would use reasonable care and skill in and about executing the customer's order. This term would be breached if the bank executed the order 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 enquiries as an honest and reasonable man would make. In order to comply with that term, the bank should refrain from executing a customer's 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.

That duty lay quiescent for twenty-five years before being successfully relied upon by Claimants in *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2017] EWHC 257 (Ch), [2018] EWCA Civ 84 and *Federal Republic of Nigeria v J.P. Morgan Chase Bank NA* [2019] EWHC 347 (Comm), [2019] EWCA Civ 1641. In both cases the claims were upheld at first instance. In October 2019, *Nigeria v J.P. Morgan Chase* reached the Court of Appeal and *Singularis Holdings v Daiwa* was upheld by the Supreme Court.

The Facts of *Singularis Holdings v Daiwa*

Mr Al Sanea was the sole shareholder of Singularis Holdings Ltd ("Singularis"). He was also its director, president, chairman and treasurer. There were 6 other directors of Singularis, but they did not exercise any influence over its management. In June and July 2009, Mr Al Sanea issued instructions to Daiwa Capital Europe Ltd ("Daiwa"), the British subsidiary of a Japanese investment bank, to make 8 payments, totalling US$204 million out of Singularis's accounts. In September 2009, Singularis went into compulsory liquidation.

Rose J held that any reasonable banker would have realised that there were "many obvious, even glaring, signs that Mr Al Sinea was perpetrating a fraud on [Singularis]", by using funds belonging to Singularis for his own purposes rather than to benefit Singularis. She identifies

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five signs in particular: (1) Daiwa was well aware of the dire financial problems faced by Mr Al Sanea personally and other companies he controlled; (2) Daiwa was aware that Singularis might have other substantial creditors who had an interest in the money that Mr Al Sanea had asked to be paid away; (3) There was plenty of evidence to put Daiwa on notice that there was something seriously wrong with the way Mr Al Sanea was operating the Singularis account; (4) in respect of the five payments which Mr Al Sanea instructed Singularis to make to Saad Specialist Hospital Company, the judge found that Daiwa was alive to the possibility that the agreement between Singularis and Saad Specialist Hospital Company was a sham; (5) there was a striking contrast in the way the payments in question had been handled and the way in which Daiwa dealt with other requests for payment. Rose J found that what had happened in the Bank was that everyone had left the issue to everyone else. "Everyone recognised that the account needed to be closely monitored … But no one in fact exercised care or caution or monitored the account themselves and no one checked that anyone else was actually doing any exercising or monitoring either". Given those clear findings of fact, Rose J found that Daiwa was in breach of its duty of care to Singularis, but that Singularis was 25% liable for its losses because of its own contributory negligence.

The Decision of the Supreme Court

In *Singularis Holdings v Daiwa*, the Defendant Bank did not mount a full-frontal attack on the existence of the *Quincecare* duty. Instead, the Bank put forward arguments which, if accepted, would have left the duty of care existing only in theory but not in practice (§35). One argument was that because Mr Al Sanea's instructions constituted a fraud on Singularis, they were illegal payments and therefore Singularis could not recover against Daiwa. The Supreme Court gave this argument short shrift, pointing out that as "the purpose of the prohibition of breach of fiduciary obligation was to protect the company from becoming the victim of the wrongful exercise of power by officers of the company", it was allowing the claim to succeed rather than preventing it from doing so which would further the purpose of the law (§16). A second argument was that Daiwa's claim should fail because it was seeking to recover damages for harm which it had, through Mr Al Sanea, inflicted on itself. The Supreme Court rejected this argument as well. Lady Hale, giving the sole judgment of the court, said: "the purpose of the *Quincecare* duty is to protect a bank's customers from the harm caused by people for whom the customer is, one way or another, responsible" (§23). Because the duty exists for this purpose, it is not defeated by the assertion that the Bank would have a claim in deceit against the company whose officer committed the fraud (§24-§25). Nor could the Bank succeed in an argument that the fraud was attributable to the company. The Supreme Court swept away the muddle created by the previous decisions of *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39; [2009] 1 AC 1391 and *Bilta (UK) Ltd v Nazir (No.2)* [2015] UKSC 23; [2016] AC 1. The Supreme Court held that there was no rule of law to the effect that "the dishonesty of the controlling mind in a 'one-man company' could be attributed to the company" (§33). Whether or not that is the case depends on "the context and the purpose for which the attribution is relevant" (§34).

Having dismissed those arguments, and other policy arguments put forward by Daiwa, the Supreme Court upheld Rose J's decision that Singularis was entitled to recover damages against Daiwa for breach of duty of care (subject to the 25% reduction because of contributory negligence). "Daiwa should have realised that something suspicious was going on and suspended payment until it had made reasonable enquiries to satisfy itself that the payments were properly to be made." Had it done so, it would have confirmed that the payments were fraudulent.

The Facts of Nigeria v J.P. Morgan Chase

In *Nigeria v Morgan Chase*, Nigeria alleged that it was entitled to recover US$875 million which had been held in a deposit account with the Defendant Bank. The money had been paid out by the Bank on the instruction of authorised persons. Nigeria alleged that the payments by the Bank had been made in breach of its *Quincecare* duty of care. The Bank applied for summary judgment dismissing Nigeria's claim. The court refused the Bank's application, holding that the core of the *Quincecare* duty was an obligation on the Bank to refrain from making a payment where it had reasonable grounds for believing that the payment was part of a fraudulent scheme.

The Court of Appeal rejected the Bank's appeal against the judge's refusal to grant summary judgment. The Court of Appeal held that the *Quincecare* duty usually required a bank to do more than merely refuse to comply with a payment instruction. Instead, in most cases, the bank would be under an obligation to take steps to resolve its concerns. Whilst the Court of Appeal accepted that it would be theoretically open to the bank to exclude the *Quincecare* duty, in practice very clear words would be required.

The implications for Authorised Push Payment Fraud

One of the most rapidly growing areas of fraud is authorised push payment fraud. Instead of hacking into a customer's details and initiating payment instructions by fraudulently impersonating the customer, an authorised push payment fraud occurs when a fraudster, by impersonating a bank, a payee or other agency, induces the customer to make a payment under a false premise.

On 28 May 2019, a voluntary code known as the Contingent Reimbursement Model Code for Authorised Push Payment Scams (the "CRM Code") came into force. The CRM Code only applies to:

(1) payments executed across the Faster Payments or CHAPS systems;

(2) transactions between two domestic UK accounts both denominated in GBP;

(3) payments where the payer is a consumer, a micro-enterprise or a small charity.

Because of their size, neither Singularis nor Nigeria would have been eligible to benefit from the CRM Code, even if it had been in force at the time when the fraudulent payments were made.

What role might the *Quincecare* duty of care have in respect of authorised push payment fraud? If a bank owes a duty of care to protect its customers against fraud committed by one of their directors or employees, there is no reason in principle why a bank should not owe a similar duty of care to protect its customers against succumbing to sophisticated fraud by outsiders. To the contrary, if a company is able to recover damages when the fraud against it has been committed by its sole shareholder and main executive officer, *a fortiori* a company ought to be able to recover when its officers or employees, acting in good faith, have been tricked by a sophisticated fraudster. The answer to the potential objection that this gives customers a free rein to act carelessly is the same answer as that given in *Singularis Holdings* itself: in cases where the customers are partly to blame, the courts can reflect this by finding the customers liable for contributory negligence to an appropriate extent.

Even though the *Quincecare* duty only applies to a paying bank, given that fraudsters routinely transfer monies from one bank account to another, a bank into which the proceeds of a fraud are received before being paid out may also be held liable on appropriate facts in future.

Conclusions

The Supreme Court's decision in *Singularis Holdings v Daiwa* places the *Quincecare* duty of care on a firm legal footing. Henceforth it is clear that banks owe a duty to take reasonable care to protect their customers from losses caused by payments which the bank ought to have realised were fraudulent. This duty plainly applies where the fraud was committed by an officer or employee of the company, but the rationale of the Supreme Court's decision opens the door for the duty to be invoked in the increasingly common scenario of authorised push payment fraud.

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