Banks' Quincecare duty to customers revisited

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In July 2019 we published a briefing note on a case involving a bank's duty of care to protect its customer against fraud by third parties: The Federal Republic of Nigeria v JP Morgan Chase Bank.

The Supreme Court in Singularis Holdings Limited (in Official Liquidation) v Daiwa Capital Markets Europe Ltd [2019] UKSC50 reaffirmed the duty of care owed by financial institutions to its customers.

The Facts

Singularis was incorporated in the Cayman Islands to manage the personal assets of Maan Al Sanea, a Saudi Arabian businessman and the owner of the Saad Group. Mr Al Sanea was the sole shareholder, chairman, president and treasurer of Singularis. He was one of 6 directors, but the only director who exercised any influence over management of the company and had the sole signing powers of the company's bank accounts.

In 2007, Daiwa provided financing to Singularis. Following repayment of the loan, Daiwa held US$204 million on account for the company.

During June and July 2009, Singularis was going through financial difficulties and numerous companies in the Saad Group had their bank accounts frozen. Daiwa's compliance team were warned about authorising payments that did not appear to be related to normal business and to exercise extreme caution. Mr Al Sanea instructed Daiwa to make payments to various accounts of companies which were either wholly owned by Mr Al Sanea or Saad Group entities, eventually emptying its bank account.

Mr Al Sanea placed the company into voluntary liquidation and the Cayman Islands Court subsequently ordered its compulsory winding up and appointed liquidators.

Legal claim

The liquidators brought an action against Daiwa for damages for the misappropriation of Singularis' funds by Mr Al Sanea, for

- dishonest assistance in Mr Al Sanea's breach of fiduciary duty; and
- breach of the bank's *Quincecare* duty

The Judge at first instance dismissed the dishonest assistance claim and held that Daiwa's employees had acted honestly. However she found Daiwa itself was negligent, with Singularis being held 25 per cent liable due to the contributory fault of Mr Al Sanea and the other directors who obviously were not aware of Mr Al Sanea's actions and should have been.

The Court of Appeal dismissed Daiwa's appeal and found that Mr Al Sanea's fraudulent state of mind could not be attributed to Singularis. It noted that even if it could be attributed to the company, the claim would still have succeeded due to Daiwa's negligence causing the loss and therefore it could not have been defeated by any of the defences argued by Daiwa.

Daiwa appealed on the issue of attribution and argued that Singularis was effectively a one-man company, and consequently, Mr Al Sanea's fraud should be attributed to the company.

The Supreme Court unanimously dismissed Daiwa's attribution claim and held that the fraud of Mr Al Sanea was not to be attributed to Singularis. It was noted that Singularis had a number of other directors and therefore was not a one-man company.

The Supreme Court held that the purpose of the *Quincecare* duty is to protect a company from misappropriation of funds of this kind, and by allowing the fraud of a trusted agent of the company to be attributed to the company, it completely removes the duty's practical value.

Daiwa had argued that the breach of its *Quincecare* duty would be defeated by illegality, lack of causation and Daiwa's equal and opposite claim for deceit against Singularis. Each of these defences were rejected by the Supreme Court.

In respect of illegality, the Supreme Court held that denying the claim would undermine the public interest in requiring financial institutions to play a part in uncovering money laundering and financial crime. As to causation, the Supreme Court held that, irrespective of any fault of the company, if Daiwa had not breached its duty, the money would not have been transferred out of Singularis' account and consequently, out of the reach of its creditors.

Conclusion

Although a breach of the *Quincecare* duty will only occur in exceptional circumstances, once breached it appears that the court will not take lightly to attempts to escape this liability. Following this finding against a bank in relation to *Quincecare* duty, defending these claims in the future will be much more difficult.

Singularis has a slightly unusual fact pattern in that its relationship with Daiwa was based on a stock financing agreement, rather than the usual bank/customer relationship, which is more commonly thought of in relation to *Quincecare* duty.

This is a strong decision imposing high standards of care on banks, placing the burden squarely on banks to ensure that they have effective measures to detect and prevent fraudulent or dishonest activity to protect their customers. Unfortunately for banks there is little guidance on how far they need to go in protecting their customers' interests.

Daiwa is likely to be liable for at least US$150 million in damages.

We await the outcome of The Federal Republic of Nigeria v JP Morgan Chase Bank, the bank having failed, for the second time (Court of Appeal ruling in October 2019), to have the claim quashed without a substantive hearing. The claim against JP Morgan is for an eye-watering US$875 million.

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