Neutral Citation Number: [2018] EWCA 84 (Civ)

Case Nos: A3/2017/0907, 0908, and 0909

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
THE FINANCIAL LIST
THE HONOURABLE MRS JUSTICE ROSE
Claim No: FL-2016-000015

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL
Date: 01/02/2018

Before:
SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
LADY JUSTICE GLOSTER
and
LORD JUSTICE McCOMBE

B E T W E E N

SINGULARIS HOLDINGS LIMITED
(IN OFFICIAL LIQUIDATION)
(A COMPANY INCORPORATED IN THE CAYMAN ISLANDS)

Claimant / Respondent

and

DAIWA CAPITAL MARKETS EUROPE LIMITED

Defendant / Appellant

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Mr John McCaughran QC and Mr Michael Watkins (instructed by Ashurst LLP) appeared for the appellant

Mr Robert Miles QC and Mr Andrew de Mestre (instructed by Jenner & Block London LLP) appeared for the respondent

Hearing dates: 18th and 19th December 2017

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JUDGMENT

Sir Geoffrey Vos, Chancellor of the High Court:

Introduction

1. The central question in this appeal is whether the defence of illegality is available to allow a bank to defeat a claim in negligence and breach of contract brought by its corporate customer. The claim arises from the fact that the bank paid away large sums at the instigation of the sole shareholder and the director of the customer who had "the dominant influence" over its affairs. It is common ground that the shareholder director was acting fraudulently and the primary question is whether, in those circumstances, his knowledge should be attributed to the bank's corporate customer. If it should, then the secondary question is whether the customer's claim should be barred under the three-tier test adumbrated by the Supreme Court in *Patel v. Mirza* [2016] UKSC 42 ("*Patel v. Mirza*"). There are subsidiary questions raised by the appellant bank on contributory negligence, whether the scope of the duty that it owed extended to protect the creditors of the customer, and whether it should anyway succeed in an equal and opposite claim in deceit against the customer.

2. The director the attribution of whose knowledge is in issue was Mr Maan Al Sanea ("Mr Al Sanea"). He ran the affairs of Singularis Holdings Limited, the claimant and respondent to this appeal, which is now in liquidation in the Cayman Islands ("Singularis" or the "company"). On the primary question of attribution, the appellant and defendant, Daiwa Capital Markets Europe Limited ("Daiwa"), has sought to rely on various *dicta* taken from the speeches of the House of Lords in *Stone & Rolls Ltd v. Moore Stephens (a firm)* [2009] 1 AC 1391 ("*Stone & Rolls*"). Daiwa acknowledged, however, that Lord Neuberger had said in the Supreme Court (supported by the majority) in *Bilta (UK) Ltd (in liquidation) v. Nazir (No 2)* [2016] AC 1 ("*Bilta*") that the decision in *Stone & Rolls* should not be looked at again (see paragraph 30 of his judgment in that case).

3. In brief outline, Mrs Justice Rose gave judgment on 16th February 2017 after a 3-week trial in favour of Singularis against Daiwa in the sum of US$152,804,925. Daiwa is the London subsidiary of a Japanese investment bank and brokerage company, Daiwa Securities SMBC Co Ltd. In 2006, Daiwa entered into a lending relationship with Saad Investment Company Ltd, which was part of the Saad group, a Saudi Arabian conglomerate owned by Mr Al Sanea. On 3rd December 2006, Singularis was incorporated in the Cayman Islands (originally under the name "Saad Investments Finance Company (No. 7) Limited"). The company was set up to manage Mr Al Sanea's personal assets, and was not part of the Saad group. At all relevant times, as I have said, Mr Al Sanea was its sole shareholder. Its directors included Mr Al Sanea, his wife, his daughter, Mr Omer El Mardi (who had previously worked at the World Bank, the United Nations, and as a judge in Sudan) ("Mr El Mardi"), Mr Christopher Hart (who had worked at Scandinavian Bank, Bank of America and Citibank before joining the Saad group) ("Mr Hart"), Mr Maan Al-Zayer (who had worked at National Commercial Bank before joining the Saad Group) and Mr Michael Alexander (a US attorney).

4. The judge held that Mr Al Sanea must have known that Singularis was on the verge of insolvency at the time the payments were made, and therefore had a duty to act in the best interests of the company's creditors. Mr Al Sanea was thereby precluded from ratifying the payments as its sole shareholder. The judge rejected Singularis's case that bank employees had dishonestly authorised the payments, but held them to have done so negligently. Accordingly, Daiwa was in breach of the duty of care

adumbrated by Steyn J in *Barclays Bank plc v. Quincecare Ltd* [1992] 4 All ER 363 ("*Quincecare*"), and it was irrelevant that only Singularis's creditors, who were not owed the duty, suffered a loss. The judge rejected Daiwa's argument that Mr Al Sanea's knowledge and fraud should be attributed to Singularis for four main reasons. First, *Bilta* did not go so far as establishing that, where a company is suing a third party for breach of a duty, the fraudulent conduct of a director is to be attributed to the company if it is a one-man company. Secondly, attribution in this context would denude the *Quincecare* duty of value in situations where it is most needed, and that duty is very different from the duty owed by auditors. Thirdly, *Stone & Rolls*, properly interpreted in the light of *Bilta*, did not lead to a different conclusion. Fourthly, Singularis was in any event not, as a matter of fact, a one-man company in the sense used in *Stone & Rolls* and *Bilta*, notwithstanding that *Berg Sons & Co v. Adams* [1992] BCC 661 ("*Berg*") showed that the presence of an innocent director, who is not involved in running the company, was insufficient to prevent attribution. Here, even though Mr Al Sanea was the dominant influence, the company had a board composed of reputable people and a substantial business.

5. The judge held that Daiwa had breached its duty of care to Singularis in making the payments without any proper inquiry. Any reasonable banker would have realised that there were many obvious signs that Mr Al Sanea was perpetrating a fraud on the company. There were failures at every level within Daiwa. The judge accepted that Daiwa had a "dysfunctional structure leading to a sequence of events where everyone [assumed] that someone else [was] dealing with investigating the disputed payments but no one [troubled] to check whether that [was correct]". All Daiwa's defences failed. The illegality defence failed because Mr Al Sanea's wrongdoing could not be attributed to the company, and vicarious liability did not apply in this context. Moreover, the three-fold test in *Patel v. Mirza* was not satisfied: it would not be contrary to the public interest to allow the claim; denying the claim would have a material negative impact on the growing reliance on banks to help reduce financial crime, and would be a disproportionate response to any wrongdoing on the part of Singularis, particularly where this could be more accurately reflected by reducing its damages for contributory negligence. Daiwa did not have an equal and opposite claim against Singularis for the tort of deceit, on the basis of Evans-Lombe J's decision in *Barings plc v. Coopers & Lybrand* [2003] PNLR 34 ("*Barings*").

6. The judge reduced Daiwa's damages by 25% in respect of Singularis's contributory negligence. The main grounds for the 25% reduction were Singularis's vicarious liability (in this context) for the deceit of Mr Al Sanea, and that its other directors had failed to contact Daiwa at any stage, even though they were aware that the company was "travelling through very rough waters", and that the association of their names with the company would provide a measure of comfort to third parties dealing with it.

7. Against this backdrop, Daiwa raised 5 grounds of appeal as follows:-

   i) The judge was wrong in law to hold that Mr Al Sanea's conduct and state of mind were not attributable to Singularis for the purposes of its claim against Daiwa.

   ii) The judge ought to have held that Daiwa's duty did not extend to protecting the interests of Singularis's creditors and that, in circumstances where the only persons who suffered losses were creditors, for whose exclusive benefit the claim was brought, no claim lay against Daiwa.

iii) The judge should have held that Singularis's claim was defeated by an equal and opposite claim by Daiwa for the tort of deceit.

iv) The judge ought to have held that Singularis's claim was precluded by an illegality defence.

v) Alternatively, if Daiwa was liable to Singularis for breach of duty, the judge erred in law or reached a conclusion that was not reasonably open to her by reducing Singularis's damages by only 25%, rather than by 80% to 100%, under the Law Reform (Contributory Negligence) Act 1945 (the "1945 Act").

8. Before dealing with these grounds of appeal, it is necessary to set out the factual background in a little more detail, and to outline the essential elements of the most important authorities that bear on the appeal.

Factual background

9. On 13th April 2007, Daiwa entered into a global master securities lending agreement with Singularis, under which Daiwa provided loan financing to enable the company to buy shares. The shares stood as security for the loan, and Daiwa was entitled in certain circumstances to top up the value of its security by making margin calls on the company.

10. Daiwa subsequently financed the acquisition by Singularis of shares in financial institutions. Alongside financing from its other lenders, this enabled the company to accumulate an equity portfolio valued at more than US$10 billion by 30th April 2008. Its most significant holdings were in HSBC, BNP Paribas and JP Morgan.

11. Until the end of 2008, and despite the ensuing turmoil in the financial markets, Daiwa's credit reports on Singularis (which were based on the company's audited accounts) suggested that it had ample liquidity to meet any margin calls. This was in no small part due to cash injections totalling about US$7.5 billion into the company made by Mr Al Sanea.

12. In the first half of 2009, however, events took several turns for the worse. In January 2009, Singularis unexpectedly and significantly reduced its shareholdings in HSBC and JP Morgan. This prompted Daiwa, on 19th March 2009, to meet Singularis and Saad Financial Services SA ("SFS"), which provided administrative, investment management and advisory services to the company. The meeting was attended by various Daiwa representatives including credit officer Mr Jonathan Metcalfe ("Mr Metcalfe"), Mr Hart and Mr Mike Wetherall ("Mr Wetherall") from SFS. Daiwa intended to obtain updated financial information on the Saad group, and Singularis's agreement to firm up the collateral arrangements supporting the lending agreement (through restructuring the legal documentation and increasing the level of security). Although Daiwa considered the meeting a positive one, nothing that was promised by Singularis and SFS was ultimately delivered.

13. On 28th May 2009, news emerged that the Al Gosaibi family (of which Mr Al Sanea's wife was part) had defaulted on a US$1 billion debt in Saudi Arabia. On 31st May 2009, Bloomberg reported that Mr Al Sanea's assets had been frozen by the Saudi Arabian Monetary Authority. Daiwa also became aware that the Saad group had written to 40 of its lending banks, seeking to restructure its loans. In the face of clear concerns that Singularis would be unable to meet future margin calls, Daiwa decided

to unwind its current positions with the company. It turned out that it was able to do so amicably and, on 1st June 2009, it reached agreements with third parties to sell all the shares that it was holding as collateral.

14. On 2nd and 3rd June 2009, the credit rating agencies Moody's and Standard & Poors cut their ratings on the Saad group to junk and D (default) respectively, before withdrawing them completely due to lack of information.

15. On 4th June 2009, Daiwa completed the sales of the shares that it was holding as collateral. The proceeds, together with some of the cash margin in Singularis's client account, were used to repay the outstanding sums owed by the company to Daiwa, after which US$204 million remained in Singularis's client account with Daiwa.

16. On 5th June 2009, Daiwa's Head of Compliance Division, Mr David Wright ("Mr Wright"), sent an email to various employees, including the Head of the Compliance Department, Mr Christopher Hudson ("Mr Hudson"), and Mr Metcalfe, which read:-

> "As you are all aware the SAAD group and some of the related individuals and entities have been experiencing well publicised problems including downgrades and the freezing of bank accounts. Under these circumstances can I re-emphasise the need for care and caution in terms of any activity on their accounts with us. Singularis have reasonably large sums of client money lodged with us and we need to ensure we maintain appropriate oversight of both further deposits and requests for payments … We should therefore ensure that any funds received relate to normal business activities and, if they are unsolicited, can clearly be linked back to their normal investment business … Clearly any payment requests we receive must be properly authorised and be 'appropriate' in the context of our business relationship with them. If there are any doubts or concerns please contact compliance or legal …".

17. On 12th June 2009, Daiwa received Swift instructions to make payments of US$10 million and US$3 million from Singularis's account to Saad Specialist Hospital Company ("SSHC"), a Saad group company wholly owned by Mr Al Sanea, which operated a hospital in Saudi Arabia. Both payments were approved by Mr Hudson without any investigation, and Mr Metcalfe also approved the larger payment without querying its basis.

18. On 16th June 2009, Daiwa received a request to transfer US$180 million from Singularis's account to SSHC. This time Mr Metcalfe asked Mr Wetherall of SFS about the reason for the payment. In response, Mr Wetherall sent documentation which purportedly showed that the payment represented part settlement of a debt owed by Singularis to a company called Saad Trading. After consulting with Mr Roger Massey, Head of the Legal and Transaction Management Division and company secretary of Daiwa, Mr Metcalfe asked Mr Wetherall what corporate benefit Saad Trading derived from redirecting this debt to SSHC. Mr Wetherall responded with three bills of sale purporting to show that Singularis had historically been holding shares on trust for Saad Trading, and that Saad Trading had sold the shares to Singularis in early 2009. However, when the payment had still not been made by 18th June 2009, Mr Wetherall provided a completely different explanation for it: he sent Mr Metcalfe a document which purported to record an agreement whereby Singularis undertook to pay on written demand all running and administrative costs for the hospital in Saudi Arabia for 2009 (the "hospital expenses agreement"), and an invoice

for US$180 million pursuant to that agreement. Mr Metcalfe responded shortly afterwards that these documents satisfied Daiwa's compliance team (though it is unclear who he actually spoke to about them). Daiwa made the payment.

19. On 1st July 2009, there were requests for payments of US$1.09 million and US$2.935 million from Singularis's account, this time to be directed to HSH Nordbank AG for the benefit of Saad Air (A320 No 2) Ltd and Saad Air (A340-600) Ltd (together "Saad Air"). Mr Hudson approved both payments without querying their purpose or seeking any information about Saad Air or its connection to Singularis.

20. On 8th July 2009, Daiwa received a payment request for US$5.2 million from Singularis's account to SSHC, supported by an invoice purportedly pursuant to the hospital expenses agreement. Mr Metcalfe authorised the payment without making further queries or notifying Daiwa's senior management.

21. On 20th and 27th July 2009, requests were received for payments from Singularis's account of US$1.093 million to Saad Air and US$1.1749 million to SSHC, respectively. Both were approved by Mr Hudson without checking their basis. The balance of the client account was thus reduced to zero.

22. On 24th July 2009, the Grand Court of the Cayman Islands made a worldwide freezing order against the assets of the Saad group.

23. On 20th August 2009, Mr Al Sanea, in his capacity as its sole shareholder, placed the company in voluntary liquidation, and joint liquidators were appointed on 24th August 2009. On 18th September 2009, following a petition by Saad Investment Co Ltd ("SICL"), one of Singularis's creditors, the Grand Court of the Cayman Islands made an order that the liquidation would continue under its supervision, and appointed three Grant Thornton partners as joint official liquidators. The aggregate claims of the company's creditors ran into the hundreds of millions of dollars, and remained at this level by the time of trial.

24. On 18th July 2014, Singularis (acting by its joint official liquidators) issued a claim form against Daiwa for approximately US$204 million, the amount removed from its client account by the 8 payments described above. The claim was put on two alternative bases:-

    i) First, that Daiwa (through Mr Metcalfe and Mr Hudson) dishonestly assisted Mr Al Sanea's breach of fiduciary duty in removing the money from Singularis for the benefit of himself or other Saad group companies, to the detriment of the company's creditors.

    ii) Secondly, that Daiwa breached the duty of care it owed to Singularis, by authorising the payments having negligently failed to realise that Mr Al Sanea was committing a fraud on the company and misappropriating its money.

Rose J's judgment

25. Rose J held that there had been a misappropriation of Singularis's assets and breach of fiduciary duty by Mr Al Sanea when he gave instructions to make the payments described above. Those made to Saad Air were not legitimate expenses properly incurred by Singularis, and the hospital expenses agreement was a sham (paragraphs 119-127). Because Mr Al Sanea must have known that Singularis was insolvent or on

the verge of insolvency, and therefore had a duty to act in the best interests of the company's creditors, he was precluded from ratifying the payments as its sole shareholder (paragraphs 128-137). Nor was Mr Al Sanea entitled to make the payments to release Singularis's debts to him (paragraphs 138-142).

26. Rose J then held that the first basis of Singularis's claim failed: applying the test in *Twinsectra Ltd v. Yardley* [2002] UKHL 12, neither Mr Metcalfe nor Mr Hudson had acted dishonestly in authorising the payments, even in the sense of turning a blind eye to the very obvious shortcomings in the materials provided to them. Rather, they did not understand, despite Mr Wright's email of 5th June 2009, what they actually had to do in order for Daiwa to fulfil its obligations to Singularis, because management had not properly explained this to them (paragraphs 143-162).

27. In relation to the second basis of Singularis's claim (to which this appeal relates), the judge began by considering the scope of a bank's duty under *Lipkin Gorman v. Karpnale Ltd* [1989] 1 WLR 1340 ("*Lipkin Gorman*") and *Quincecare* (paragraphs 163-170). She concluded on the basis of these cases that Daiwa did owe a duty of care to Singularis in respect of the money in its client account (paragraph 190). In reaching this conclusion, she considered it irrelevant that only Singularis's creditors, who were not owed the duty, suffered a loss, because the claim was brought by the company and there was no principle of law requiring a court to consider what a claimant will do with the money if it succeeds in its claim (paragraphs 172-173).

28. Further, the judge rejected Daiwa's argument that Mr Al Sanea's fraudulent actions should be attributed to Singularis because of his control over the company, and thus Singularis should be precluded from bringing the claim, because:-

   i) There was no principle of law that, where a company is suing a third party for breach of a duty, the fraudulent conduct of a director was to be attributed to the company if it were a one-man company. The *ratio* of *Bilta* was not that broad; rather, it was that the answer to any question of attribution was to be found in the context and the purpose for which attribution was contended (paragraphs 180-183).

   ii) If, in the context of a claim by a company against a bank for breach of the *Quincecare* duty, the director's fraud could be attributed to the company in order to defeat the claim, this would denude the duty of value in situations where it is most needed. The duty was predicated on the person suspected of fraud being a trusted employee or officer, and was very different from the duty on auditors to report to shareholders about the company's affairs (paragraph 184).

   iii) No contrary conclusion could be gleaned from *Stone & Rolls*, which was considered by the Supreme Court in *Bilta* to be a case with no majority *ratio decidendi*, and which could only stand as authority in relation to its own particular facts. Further, the court in *Stone & Rolls* was dealing with a very different duty from that owed by Daiwa in the present case (paragraphs 185-187).

   iv) In any event, Singularis was not a one-man company in the sense used in *Stone & Rolls* and *Bilta*. It had other directors, including professional and experienced businessmen who were not relatives of Mr Al Sanea (paragraph 188). Although these directors did "not appear to have performed any

supervisory function even when the fortunes of [the company] started to decline", and there did not appear to have been any board meeting held in 2008 and 2009 (it was accepted on appeal that there had in fact been two short board meetings at the end of 2008), and *Berg* demonstrated that it might still be possible to attribute a dominant director's knowledge to a company where there was an innocent and supine director, whether there actually was attribution in any particular case was a question of fact and degree. This case differed from *Berg* because Singularis had a board of reputable people (rather than just a single supine director) and a substantial business (paragraph 189). The judge concluded on this point as follows:-

> "I make no finding as to whether the directors [other than Mr Al Sanea] at any stage exercised any influence over the management of the company but I cannot make any findings either that they were complicit in the misappropriation of the money – there is no reason why they should have been. Therefore, on the facts this defence fails."

29. Having found that Daiwa was under a duty of care to Singularis, Rose J had "no hesitation" in finding that it breached this duty by making the payments without any or any proper inquiry. Any reasonable banker would have realised that there were many obvious, even glaring, signs that Mr Al Sanea was perpetrating a fraud on the company (paragraph 192). There was a failure at every level within Daiwa, from Mr Metcalfe and Mr Hudson up to senior management (paragraph 202).

30. The judge then held that the complete defences advanced by Daiwa were insufficient to defeat Singularis's claim in negligence. In particular:-

    i) The illegality defence failed because Mr Al Sanea's dishonest conduct could not be attributed to the company (paragraph 215). Rose J elaborated on her reasoning set out above, stating that, although there was no board meeting during 2009, and Mr Al Sanea was "the only director who took an active part in the management and operation of Singularis so far as these events are concerned", that was not the relevant test. Further, this case differed from *Stone & Rolls* because Singularis was not created purely to perpetuate a fraud, but rather carried out a substantial and legitimate business over a number of years (paragraph 212). The issue of whether legal responsibility for Mr Al Sanea's actions could attach to Singularis by means of vicarious liability did not arise, because cases involving the directing mind of the company differ from those involving a relatively junior employee (paragraph 214).

    ii) In any event, each of the three stages of the test in *Patel v. Mirza* pointed firmly in favour of rejecting the illegality defence. The purposes of the prohibitions on directors' fraud and breaches of fiduciary duty would not be enhanced by allowing Singularis's claim, since neither allowing nor denying it would be likely to affect the conduct of dishonest directors (paragraph 218). Denying the claim, however, would have a material negative impact on the growing reliance on banks to help reduce financial crime (paragraph 219), and would also be a disproportionate response to any wrongdoing on the part of Singularis, particularly where this could be more accurately reflected by reducing the damages payable by Daiwa on account of Singularis's contributory negligence (paragraph 220).

iii) Daiwa's argument that it had an equal and opposite claim against Singularis for the tort of deceit (for which purpose the company accepted that it would be vicariously liable for Mr Al Sanea's actions) was rejected. Evans-Lombe J's reasoning in *Barings* was applied: Daiwa breached its *Quincecare* duty to Singularis and it was Daiwa's breach, rather than Mr Al Sanea's misrepresentations, that caused Daiwa to be exposed to the claim for the company's losses (paragraphs 221-228).

iv) The defence that, had Daiwa insisted on the money being paid into one of Singularis's own accounts, Mr Al Sanea would have found another way to misappropriate it, was rejected on the facts (paragraphs 229-231).

v) The exclusion clause in Daiwa's standard terms of business for liability other than that caused by its gross negligence, wilful default or fraud failed to protect it because, on the facts, the standard terms had not been sent to Singularis (paragraphs 232-242).

31. Finally, Rose J considered the question of contributory negligence, concluding that the quantum of Daiwa's liability should be reduced by 25% under the 1945 Act (paragraph 250). She referred to *Barings* and to *Reeves v. Commissioner of Police for the Metropolis* [2000] 1 AC 360 ("*Reeves*"), saying that "the duty owed by Daiwa here is different from the duty owed by the auditors to Barings because the very thing that Daiwa were supposed to protect Singularis from was the deliberate wrongdoing of Mr Al Sanea" and "[t]he situation here is less extreme than the situation in Reeves's case" (paragraph 250). The contributory negligence arose from (i) vicarious liability for Mr Al Sanea's fraudulent conduct (paragraphs 243 and 249) and (ii) the failure of Singularis's other directors to contact Daiwa at any stage, despite them doubtless being aware that the company was travelling through very rough waters, and that their names being lent to the company would have provided a measure of comfort to third parties dealing with it (paragraph 251). Mr Wetherall's involvement was not treated as separate from the conduct of Mr Al Sanea, and therefore no further deduction was made in respect of it (paragraph 251).

The issues raised by this appeal

32. Despite the fact that Daiwa puts its case on this appeal on the basis of the 5 grounds that I have already set out, it seems to me that these grounds, as they have actually been argued, in fact raise the following 6 main issues:-

i) Should Mr Al Sanea's fraudulent knowledge and conduct be attributed to Singularis so as to bar its claim on grounds of illegality?

ii) If so, should Singularis's claim be barred by the illegality defence, applying the test in *Patel v. Mirza*?

iii) If not, is Singularis's claim defeated by lack of causation, because the company (with Mr Al Sanea's fraud attributed to it) was not relying on Daiwa's performance of its duty?

iv) If not, is the claim defeated by an equal and opposite claim by Daiwa against Singularis (with Mr Al Sanea's fraud attributed to it) for the tort of deceit?

v) Does the *Quincecare* duty apply where only the creditors of a company, to whom it is not directly owed, stand to benefit from it in practice?

vi) Was the judge's assessment of contributory negligence an error of law or wholly outside the range of reasonable possibilities?

33. Before dealing with these issues, it is useful, as I have said, to summarise the main authorities on which the parties rely in relation to Daiwa's duty of care, attribution and illegality.

Authorities relating to Daiwa's duty of care

Quincecare

34. This was a claim brought by Barclays Bank against Quincecare. The chairman of Quincecare had misappropriated more than £340,000 of a £400,000 loan made by Barclays to Quincecare, and the bank sought to recover this amount. Its claim ultimately succeeded, because it had no reason to suspect fraud. The case is significant, however, because of Steyn J's analysis of the nature of the duty of care owed by a bank to its customer at pages 376-377, as follows:-

> "Primarily, the relationship between a banker and customer is that of debtor and creditor. But *quoad* the drawing and payment of the customer's cheques as against the money of the customer's in the banker's hands the relationship is that of principal and agent: see *Westminster Bank Ltd v Hilton* (1926) 43 TLR 124 at 126 per Lord Atkinson. … *Prima facie* every agent for reward is also bound to exercise reasonable care and skill in carrying out the instructions of his principal: *Bowstead* p 144. There is no logical or sensible reason for holding that bankers are immune from such an elementary obligation. In my judgment it is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing the customer's orders…
>
> Given that the bank owes a legal duty to exercise reasonable care in and about executing a customer's order to transfer money, it is nevertheless a duty which must generally speaking be subordinate to the bank's other conflicting contractual duties. *Ex hypothesi* one is considering a case where the bank received a valid and proper order which it is *prima facie* bound to execute promptly on pain of incurring liability for consequential loss to the customer. How are these conflicting duties to be reconciled in a case where the customer suffers loss because it is subsequently established that the order to transfer money was an act of misappropriation of money by the director or officer? If the bank executes the order knowing it to be dishonestly given, shutting its eyes to the obvious fact of the dishonesty, or acting recklessly in failing to make such inquiries as an honest and reasonable man would make, no problem arises: the bank will plainly be liable. But in real life such a stark situation seldom arises. The critical question is: what lesser state of knowledge on the part of the bank will oblige the bank to make inquiries as to the legitimacy of the order? In judging where the line is to be drawn there are countervailing policy considerations. The law should not impose too burdensome an obligation on bankers, which hampers the effective transacting of banking business unnecessarily. On the other hand, the law should guard against the

> facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties. To hold that a bank is only liable when it has displayed a lack of probity would be much too restrictive an approach. On the other hand, to impose liability whenever speculation might suggest dishonesty would impose wholly impractical standards on bankers. In my judgment the sensible compromise, which strikes a fair balance between competing considerations, is simply to say that a banker must refrain from executing an order if and for as long as the banker 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 … And, the external standard of the likely perception of an ordinary prudent banker is the governing one. That in my judgment is not too high a standard…
>
> Having stated what appears to me to be the governing principle, it may be useful to consider briefly how one should approach the problem. Everything will no doubt depend on the particular facts of each case. Factors such as the standing of the corporate customer, the bank's knowledge of the signatory, the amount involved, the need for a prompt transfer, the presence of unusual features, and the scope and means for making reasonable inquiries may be relevant. But there is one particular factor which will often be decisive. That is the consideration that, in the absence of telling indications to the contrary, a banker will usually approach a suggestion that a director of a corporate customer is trying to defraud the company with an initial reaction of instinctive disbelief… [I]t is right to say that trust, not distrust, is… the basis of a bank's dealings with its customers. And full weight must be given to this consideration before one is entitled, in a given case, to conclude that the banker had reasonable grounds for thinking that the order was part of a fraudulent scheme to defraud the company".

Lipkin Gorman

35. In *Lipkin Gorman*, a partner at a firm of solicitors withdrew more than £200,000 from a client account, and lost it gambling at a casino. The solicitors brought a claim against both the casino and the bank where the client account was held. At first instance, the judge held that the bank had breached its duty to the solicitors, by making the payment without having made proper inquiries as to the use of funds. This holding was overturned on appeal. In the following passage at pages 1356-1357, May LJ referred with approval to Steyn J's analysis in *Quincecare*, which had been decided between the trial and the appeal:-

> "For my part I would hesitate to try to lay down any detailed rules in this context. In the simple case of a current account in credit the basic obligation on the banker is to pay his customer's cheques in accordance with his mandate. Having in mind the vast numbers of cheques which are presented for payment every day in this country, whether over a bank counter or through the clearing bank, it is, in my opinion, only when the circumstances are such that any reasonable cashier would hesitate to pay a cheque at once and refer it to his or her superior, and when any reasonable superior would hesitate to authorise payment without inquiry, that a cheque should not be paid immediately on presentation and such inquiry made. Further, it would,

I think, be only in rare circumstances, and only when any reasonable bank manager would do the same, that a manager should instruct his staff to refer all or some of his customers' cheques to him before they are paid. In this analysis I have respectfully derived substantial assistance from the material parts of the judgment of Steyn J. in [*Quincecare*].

I then next consider whether it was shown that the bank was in breach of its contract with the solicitors, that is to say whether it was shown that it failed to exercise that degree of care towards its customer which the law required, as I have just discussed ... I think that the judge was wrong to conclude that the bank … committed any breach of the limited duty of care which it owed to the solicitors, its current account customers".

36. At pages 1377-1378, before reaching the same conclusion, Parker LJ expressed the bank's duty of care as follows:-

"If a reasonable banker would have had reasonable grounds for believing that [the partner solicitor] was operating the client account in fraud, then, in continuing to pay the cash cheques without inquiry the bank would, in my view, be negligent and thus liable for breach of contract…

The question must be whether, if a reasonable and honest banker knew of the relevant facts, he would have considered that there was a serious or real possibility, albeit not amounting to a probability, that its customer might be being defrauded … That, at least, the customer must establish. If it is established, then in my view a reasonable banker would be in breach of duty if he continued to pay cheques without inquiry."

Authorities relevant to attribution and the illegality defence

Bilta

37. In *Bilta*, a company in liquidation brought claims against its former directors, a third party company, and the chief executive of that company. At first instance, it was held that (i) the defendants were parties to an unlawful means conspiracy to injure Bilta by a fraudulent scheme, which involved the directors breaching their fiduciary duties, and the third party company and its chief executive dishonestly assisting them, and (ii) none of the defendants could attribute the directors' fraudulent conduct to Bilta to avail themselves of the illegality defence. This second holding was appealed by the third party company and its chief executive. Their appeal was dismissed first by this court, and then by the Supreme Court.

38. It is important to note at the outset what the Supreme Court had to say about the status of *Stone & Rolls*. Lord Neuberger (with whom Lords Clarke and Carnwath, and Lord Mance, save in relation to a point that is not relevant for present purposes, agreed) delivered the majority judgment. He said at paragraphs 24 and 30 that:-

"…I am of the view that, so far as it is to be regarded as strictly binding authority, *Stone & Rolls* is best treated as a case which solely decided that the Court of Appeal was right to conclude that, on the facts of the particular case, the illegality defence succeeded and that the claim should be struck

> out… [T]he time has come in my view for us to hold that the decision in *Stone & Rolls* should, as Lord Denning MR graphically put it in relation to another case … be put "on one side in a pile and marked 'not to be looked at again'"".

Lords Toulson and Hodge, although differing from the majority on other points, agreed at paragraph 154 that:-

> "*Stone & Rolls* should be regarded as a case which has no majority *ratio decidendi*. It stands as authority for the point which it decided, namely that on the facts of that case no claim lay against the auditors, but nothing more".

Bilta must, in the light of these *dicta*, be regarded as the leading authority on attribution in the context of an illegality defence.

39. The first point that emerges from the majority judgments in *Bilta* is that the answer to the attribution question depends on the context and purpose for which attribution is contended. At paragraph 9 of his judgment, Lord Neuberger said:-

> "I agree with Lord Mance JSC's analysis at paras 37–44 of his judgment, that the question is simply an open one: whether or not it is appropriate to attribute an action by, or a state of mind of, a company director or agent to the company or the agent's principal in relation to a particular claim against the company or the principal must depend on the nature and factual context of the claim in question …"

Lord Mance said this at paragraph 41:-

> "As Lord Hoffmann made clear in *Meridian Global* [[1995] 2 AC 500] the key to any question of attribution is ultimately always to be found in considerations of context and purpose. The question is: whose act or knowledge or state of mind is for the purpose of the relevant rule to count as the act, knowledge or state of mind of the company?"

40. At paragraphs 21 to 30 of his judgment, Lord Neuberger considered the proper analysis of *Stone & Rolls*. He did so, however, by reference to detailed passages from Lord Sumption's judgment. Accordingly, Lord Neuberger's approach cannot be properly understood without first explaining Lord Sumption's conclusions.

41. Lord Sumption first explained the three authoritative propositions on which Lord Phillips and Lord Walker had agreed in *Stone & Rolls*, as follows at paragraph 80 of his judgment:-

> "The first was that the illegality defence is available against a company only where it was directly, as opposed to vicariously, responsible for it… Secondly, the majority was agreed in rejecting the primary argument of the auditors that once it was shown that the directing mind and will of a company (whether generally or for the relevant purpose) had caused it to defraud a third party and that the company was relying on that fraud to found its cause of action, the illegality defence necessarily barred the claim. Both Lord Phillips (para 63) and Lord Walker (para 173) rejected this submission as too broad, because it would involve the attribution of the

agent's dishonesty to the company even if there were innocent directors or shareholders. Accordingly, both of them regarded it as critical that Stone & Rolls was a "one-man company", ie a company in which, whether there was one or more than one controller, there were no innocent directors or shareholders. Third, Lord Phillips and Lord Walker were agreed that, as between a "one-man" company and a third party, the latter could raise the illegality defence on account of the agent's dishonesty, at any rate where it was not itself involved in the dishonesty."

42. Lord Sumption then explained the three different situations in which attribution may arise as follows at paragraphs 86 and 87:-

> "86. The problem posed by the authorities is that until the Court of Appeal's decision in this case, they have generally treated the imputation of dishonesty to a company as being governed by tests dependent primarily on the nature of the company's relationship with the dishonest agent, the result of which is then applied universally. This was the point made by Lord Walker in *Stone & Rolls* at para 145, from which he resiled in [*Moulin Global Eyecare Trading Ltd v. Inland Revenue Comr* (2014) 17 HKCFAR 218]. The fundamental point made by the Court of Appeal in this case and the Court of Final Appeal in *Moulin* is that, while the basic rules of attribution may apply regardless of the nature of the claim or the parties involved, the breach of duty exception does not. I agree with this. It reflects the fact that the rules of attribution are derived from the law of agency, whereas the fraud exception, like the illegality defence which it qualifies, is a rule of public policy. Viewed as a question of public policy, there is a fundamental difference between the case of an agent relying on his own dishonest performance of his agency to defeat a claim by his principal for his breach of duty; and that of a third party who is not privy to the fraud but is sued for negligently failing to prevent the principal from committing it.
>
> 87. There are three situations in which the question of attribution may arise. First, a third party may sue the company for a wrong such as fraud which involves a mental element. Secondly, the company may sue either its directors for the breach of duty involved in causing it to commit that fraud, or third parties acting in concert with them, or (as in the present case) both. Third, the company may sue a third party who was not involved in the directors' breach of duty for an indemnity against its consequences."

43. Lord Sumption then dealt at paragraphs 91 and 92 with the third situation, in which the company was suing a third party, as follows:-

> "91. The position is different where the company is suing a third party who was not involved in the directors' breach of duty for an indemnity against its consequences. In the first place, the defendant in that case, although presumably in breach of his own distinct duty, is not seeking to attribute his own wrong or state of mind to the company or to rely on his breach of duty to avoid liability. Secondly, as between the company and the outside world, there is no principled reason not to identify it with its directing mind in the ordinary way. For a person, whether natural or corporate, who is culpable of fraud to say to an innocent but negligent outsider that he should have stopped him in his dishonest enterprise is as clear a case for the application

> of the illegality defence as one could have. *Stone & Rolls* was a case of just this kind. Leaving aside the admittedly important question of the scope of an auditor's duty, if the illegality defence had not applied in that case, it could only have been because (i) the company was treated in point of law as a mindless automaton, or (ii) the defence could never apply to companies even in circumstances where it would have applied to natural persons. Neither proposition is consistent with established principle.
>
> 92. The technique of applying the general rules of agency and then an exception for cases directly founded on a breach of duty to the company is a valuable tool of analysis, but it is no more than that. Another way of putting the same point is to treat it as illustrating the broader point made by Lord Hoffmann in *Meridian Global* that the attribution of legal responsibility for the act of an agent depends on the purpose for which attribution is relevant. Where the purpose of attribution is to apportion responsibility between a company and its agents so as to determine their rights and liabilities to each other, the result will not necessarily be the same as it is in a case where the purpose is to apportion responsibility between the company and a third party".

44. This last sentence, of course, concerned the position of directors who were not complicit in the fraud, although there were in fact no such directors in *Bilta* itself.

45. Lord Neuberger expressed the following views on Lord Sumption's three propositions cited above:-

> "25 … With the exception of the first, I agree with what [Lord Sumption] says about them, although even the second and third propositions are supported by only three of the judgments at least one of which is by no means in harmony with the other two.
>
> 26. Subject to that, I agree that the second and third of the propositions which Lord Sumption JSC identifies in his para 80 can be extracted from three of the judgments in *Stone & Rolls*. Those propositions concern the circumstances in which an illegality defence can be run against a company when its directing mind and will have fraudulently caused loss to a third party and it is relying on the fraud in a claim against a third party. The second proposition, with which I agree, is that the defence is not available where there are innocent shareholders (or, it appears, directors). The third proposition, with which I also agree, is that the defence is available, albeit only on some occasions (not in this case, but in *Stone & Rolls* itself) where there are no innocent shareholders or directors.
>
> 27. I need say no more about the second proposition, which appears to me to be clearly well founded. As to the third proposition, I agree with Lords Toulson and Hodge JJSC that it appears to be supported (at least in relation to a company in sound financial health at the relevant time) by the reasoning in the clear judgment of Hobhouse J in [*Berg*], which was referred to with approval and quoted from in *Stone & Rolls* by Lord Phillips of Worth Matravers (at paras 77–79) and Lord Walker (at paras 150, 158–161), and indeed by Lord Mance, dissenting (at paras 258–260).

> 28. However, I note that Lord Mance suggests that it should be an open question whether the third proposition would apply to preclude a claim against auditors where, at the relevant audit date, the company concerned was in or near insolvency. While it appears that the third proposition, as extracted from three judgments in *Stone & Rolls*, would so apply, I have come to the conclusion that, on this appeal at least, we should not purport definitively to confirm that it has that effect. I am of the view that we ought not shut the point out, in the light of (a) our conclusion that attribution is highly context-specific (see para 9 above), (b) Lord Walker's change of mind (see para 22 above), (c) the fact that the three judgments in *Stone & Rolls* which support the third proposition) are not in harmony (in the passages cited at the end of para 27 above), and (d) the fact that the third proposition is in any event not an absolute rule (see the end of para 26 above).
>
> 29. I cannot agree that the first proposition identified by Lord Sumption JSC, namely that the illegality defence is only available where the company is directly, as opposed to vicariously, responsible for the illegality, can be derived from *Stone & Rolls* (whether or not the proposition is correct in law, which I would leave entirely open, although I see its attraction). I agree that, in paras 27–28, Lord Phillips accepted that the illegality defence is available against a company only where it was directly, as opposed to vicariously, responsible for it, albeit that that was ultimately an obiter conclusion. More importantly, I do not think that Lord Walker accepted that proposition at paras 132–133: he merely identified an issue as to whether the company was "primarily … liable for the fraud practised on KB, or was merely vicariously liable for the fraud of Mr Stojevic", but as he then went on to accept that the Court of Appeal "was clearly right in holding that" the company "was primarily … liable", he did not have to address the point in question."

46. The correct reading of this passage, and of the passages from Lord Sumption's judgment cited above, were the subject of detailed submissions by the parties, to which I will return in due course. It is significant, however, to mention two matters immediately.

    i) The first is that, when Lord Sumption stated his third proposition in paragraph 80, to the effect that "as between a "one-man" company and a third party, the latter could raise the illegality defence on account of the agent's dishonesty, at any rate where it was not itself involved in the dishonesty", he was referring to the kind of 'one-man company' he had just defined, namely "a company in which, whether there was one or more than one controller, there were no innocent directors or shareholders". Accordingly, the majority in Bilta must be taken only to have been agreeing in paragraph 26 with what Lord Neuberger said there, namely that "the defence [of illegality] is available, albeit only on some occasions (not in [*Bilta*], but in *Stone & Rolls* itself) where there are no innocent shareholders or directors".

    ii) The second matter is to note that, at paragraph 91 of his judgment in *Bilta*, where Lord Sumption was considering again his third proposition from paragraph 80, and his third situation from paragraph 87, he expressed the position differently by saying "as between the company and the outside world,

there is no principled reason not to identify [the company] with its directing mind in the ordinary way". The majority in *Bilta* is not, in my judgment, to be taken as having agreed with this proposition, upon which Daiwa placed considerable reliance in support of its appeal. The majority quite clearly only agreed that the defence of illegality was available on some occasions where there were no innocent shareholders or directors.

47. Finally, in this connection, it is worth noting that, although Lords Toulson and Hodge agreed with the majority on the outcome of the case, they would have decided it on a different basis. The most relevant sections of their judgment are as follows:-

> "128. It is argued on behalf of the appellants that it would offend against the doctrine of illegality for the claim to succeed. It is said that the fact that the errant directors were in sole control of the company makes it unlawful for the company to enforce their fiduciary duty towards it. If this were the law, it would truly deserve Mr Bumble's epithet — "a ass, a idiot". For it would make a nonsense of the principle which the law has developed for the protection of the creditors of an insolvent company by requiring the directors to act in good faith with proper regard for their interests.
>
> 129. It has been stated many times that the doctrine of illegality has been developed by the courts on the ground of public policy. The context is always important. In the present case the public interest which underlies the duty that the directors of an insolvent company owe for the protection of the interests of the company's creditors, through the instrumentality of the directors' fiduciary duty to the company, requires axiomatically that the law should not place obstacles in the way of its enforcement. To allow the directors to escape liability for breach of their fiduciary duty on the ground that they were in control of the company would undermine the duty in the very circumstances in which it is required. It would not promote the integrity and effectiveness of the law, but would have the reverse effect. The fact that they were in sole control of the company and in a position to act solely for their own benefit at the expense of the creditors, makes it more, not less, important that their legal duty for the protection of the interests of the creditors should be capable of enforcement by the liquidators on behalf of the company.
>
> 130. For that reason in our judgment this appeal falls to be dismissed…
>
> 152. Much of the difficulty of *Stone & Rolls* is that the treatment of the issues was more roundabout, for example with much discussion of principles of attribution. We have already referred to the fact that Lord Phillips considered that the real issue was not about attribution, but about the scope of the auditors' duty, and to Lord Mance's comment that the centrality of this issue had been obscured by the spread of argument over other issues. The centrality of the point was further emphasised by the parallel with [*Berg*] which each of the majority drew in their judgments. That parallel had nothing to do with the fraudulent nature of Stone & Rolls' business. The restricted nature of the auditors' duty and the knowledge of those in charge of the company had the same significance whether the nature of the business was fraudulent (*Stone & Rolls*) or not ([*Berg*]). Likewise, Lord Mance's ground for distinguishing [*Berg*] because the insolvency of *Stone & Rolls* at the time of the statutory audits made all the

difference in his view to the scope of the auditors' duty. We are not of course concerned in this case to revisit the point of disagreement between Lord Mance and the majority on that question. The finding that all whose interests were the subject of the auditors' duty of care knew the facts which the auditors failed to detect was dispositive. The conclusion of the majority that the claim was therefore barred by illegality may be seen as a reflection on the illegal nature of the conduct as a matter of fact and perhaps a perceived need to bring their conclusion within the scope of the issues as argued, but it was not the illegality which on a proper analysis of their reasoning drove the conclusion. As Lord Phillips observed, the fundamental proposition which underlay the reasoning of Lord Walker, Lord Brown and himself was that the auditors owed no duty for the benefit of those for whose benefit the claim was brought. It necessarily followed that the claim should be struck out.

166. … We do not consider the question of attribution to be the real issue in this case. The real issue is simpler: whether it is contrary to public policy that the company, through the liquidators, should enforce for the benefit of its creditors the duty which the directors owed for the protection of the creditors' interests as part of their fiduciary duty to the company. In this respect we echo Lord Phillips's observation in *Stone & Rolls* (para 67) that the real issue was not whether the fraud should be attributed to the company, but whether *ex turpi causa* should defeat the company's claim for breach of the auditors' duty. This, as he said, depends critically on whether the scope of that duty extends to protecting those for whose benefit the claim was brought. The answer to that question in the present case is clear. The directors' fiduciary duty to the company did extend to protecting the interests of those for whose benefit the claim is brought…".

48. In relation to this alternative basis, Lord Neuberger said the following:-

"18. As well as dismissing this appeal on the attribution issue on the same grounds as Lord Sumption JSC, Lords Toulson and Hodge JJSC would also dismiss the appeal on the grounds of statutory policy. They suggest that it would make a nonsense of the statutory duty contained in section 172(3) of the Companies Act 2006 … if directors against whom a claim was brought under that provision could rely on the *ex turpi causa* or illegality defence. That defence would be based on the proposition, relied on by the appellants in this case, that, as the directors in question… were, between them, the sole directors and shareholders of Bilta, their illegal actions must be attributed to the company, and so the defence can run.

19. I agree with Lords Toulson and Hodge JJSC that this argument cannot be correct. Apart from any other reason, it seems to me that Lord Mance JSC must be right in saying in his para 47 that, at least in this connection, the 2006 Act restates duties which were part of the common law. It also appears to me to follow that, if Lords Toulson and Hodge JJSC are right about the proper approach to the illegality principle, then their reasoning in paras 128–130 would be correct. However, I would not go further than that, because, as I have already indicated, this is not an appropriate case in which this court should decide conclusively (in so far as the issue can ever be decided conclusively) on the right approach to the illegality principle".

Patel v. Mirza

49. In *Patel v. Mirza*, the Supreme Court ruled on the correct approach to the illegality principle. The claimant had paid £620,000 to the defendant stockbroker, which the defendant had agreed to bet on the movement of Royal Bank of Scotland shares on the basis of inside information. The scheme was ultimately not carried out, and the claimant sued to recover the money. The illegality defence succeeded at first instance, but failed in this court and in the Supreme Court, with the Supreme Court putting forward a new test for the application of an illegality defence. The judgment of the majority was delivered by Lord Toulson, who expressed the new test as follows:-

> "101 … one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality …
>
> 120 The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate".

First Issue: Should Mr Al Sanea's fraudulent knowledge and conduct be attributed to Singularis so as to bar its claim on grounds of illegality?

50. The central argument advanced by Mr John McCaughran QC, leading counsel for Daiwa, was that the judge had been wrong in law to hold, on the basis of the facts that she found, that Singularis was not a one-man company. The judge had referred to the board of Singularis as being composed of reputable people, but the relevant question was whether the directors other than Mr Al Sanea had actually played any role in the management of the company. They had not, he submitted, on her findings. They had instead neglected their duties. Mr McCaughran asked rhetorically, if Mr Al Sanea's knowledge was not to be attributed to the company, whose knowledge should be so attributed? It could not be that of the other directors who knew nothing, and it made no sense to regard the company as a mindless automaton. As Lord Sumption had said at paragraph 91 of *Bilta*: "if the illegality defence had not applied in [*Stone & Rolls*], it could only have been because (i) the company was treated in point of law as a mindless automaton, or (ii) the defence could never apply to companies even in circumstances where it would have applied to natural persons", and neither proposition was consistent with established principle.

51. Mr McCaughran said that the judge had failed to draw a distinction between the case where an officer or employee is just that, and the situation where the fraudster owns and manages the company. In the latter case, there is a one-man company and it is impossible to see how or why a third party should be liable. He argued that a 'one-man company' was that described by Lord Walker in *Stone & Rolls* at paragraph 161, and repeated by Lords Toulson and Hodge in *Bilta* at paragraph 146, namely "a company which has no individual concerned in its management and ownership other than those who are, or must (because of their reckless indifference) be taken to be, aware of the fraud or breach of duty with which the court is concerned". It followed that, where the only directors of a company not involved in a fraud were supine, that company was properly to be regarded as a 'one-man company'. Mr McCaughran contended that Rose J had made just such findings at paragraphs 189 and 212, when she said that:-

> "[The other directors] do not appear to have performed any kind of supervisory function even when the fortunes of the Saad Group and Singularis started to decline … There is no evidence to show that they were involved in or aware of Mr Al Sanea's actions … Mr Al Sanea was the dominant influence over the affairs of the company … I make no finding as to whether the directors at any stage exercised any influence over the management of the company…
>
> Mr Al Sanea was sole shareholder and also the only director who took an active part in the management and operation of Singularis so far as these events are concerned … there is no evidence of any board meetings during the course of 2009 … very extensive powers were delegated to Mr Al Sanea by the board to take decisions on behalf of the company, including signing powers on the company's accounts…".

That was why, Mr McCaughran argued, the error was one of law in failing to conclude that Singularis was a one-man company.

52. Mr Robert Miles QC, leading counsel for Singularis, submitted in response that the touchstone of a 'one-man company' is not where the other directors are merely supine, but where they are complicit in the fraud, and Rose J was unable to find at paragraph 189 that Singularis's other directors were complicit in Mr Al Sanea's fraud. Further, she said in the same paragraph that she made no finding as to whether they at

any stage exercised any influence over the management of the company. Therefore, even if Mr McCaughran's definition of a 'one-man company' were correct, Daiwa failed to discharge its burden of proof. Finally, Mr Miles submitted that it is clear from *Bilta* that whether or not there is attribution depends to a large extent on context. In this respect, the judge was right to take into account that Mr Al Sanea's wrongdoing only took place over a very short period at the end of Singularis's otherwise legitimate business life, and that its creditors' interests were by that point engaged.

53. As it seems to me, the starting point must be an understanding of what, on authority, is meant by a 'one-man company'. The leading authority is now *Bilta*, and for the reasons explained by Lord Neuberger, previous cases, and *Stone & Rolls* in particular, need to be consulted with caution. I take the meaning of a 'one-man company' from what the majority in *Bilta* agreed, namely "a company in which, whether there was one or more than one controller, there were no innocent directors or shareholders" (see paragraph 80 of Lord Sumption's judgment and paragraph 26 of Lord Neuberger's judgment). Lord Sumption's third proposition, as expressed by the majority (at paragraph 26 of Lord Neuberger's judgment), was that "the [illegality] defence is available, albeit only on some occasions ... where there are no innocent shareholders or directors".

54. In these circumstances, the judge's relevant finding of fact, which has not been challenged was at paragraph 189 where she said that she could not make any "findings either way that they [the other directors, apart from Mr Al Sanea] were complicit in the misappropriation of the money – there is no reason why they should have been". There were, of course, no other shareholders apart from Mr Al Sanea. Accordingly, as it seems to me, taking the law as it was held to be in *Bilta*, the judge made no error of law.

55. Moreover, even if Mr McCaughran were right (which, in my judgment, he was not) to take the definition of 'one-man company' from paragraph 146 of the judgment of Lords Toulson and Hodge in *Bilta*, repeating Lord Walker's formulation in paragraph 161 of *Stone & Rolls*, originating from *Berg*, that would still not help Daiwa. Singularis was not found by the judge to have been "a company which [had] no individual concerned in its management and ownership other than those who [were], or must (because of their reckless indifference) be taken to be, aware of the fraud or breach of duty". None of the other directors was found to have been recklessly indifferent, even if they were contributorily negligent. Moreover, the judge made "no finding as to whether the directors at any stage exercised any influence over the management of the company", having considered a witness statement from Mr El Mardi and a letter from Mr Hart, as well as documentary evidence including the minutes of board meetings. The burden was on Daiwa to show that Singularis's other directors played no role in its management in order to make good its defence, which it seemingly failed to do.

56. There are also other reasons why, on the facts of this case, Rose J was, in my judgment, right to reject Daiwa's argument that Mr Al Sanea's knowledge should be attributed to Singularis. First, as I have already said, the majority in *Bilta* formulated Lord Sumption's third proposition as follows: "the defence is available, **albeit only on some occasions** ... where there are no innocent shareholders or directors" (emphasis added). Paragraph 9 of Lord Neuberger's judgment and paragraph 41 of Lord Mance's judgment make clear that the outcome will always depend on context.

The context here was, as Rose J correctly found in paragraph 212, first that "Singularis was not a company like Stone & Rolls, created purely to perpetrate the fraud. It was established for the purpose of carrying out substantial and legitimate transactions, for which it borrowed substantial sums of money under a variety of funding agreements. It therefore had a large and genuine business carried out over a number of years before the events the court is concerned with here". Secondly, she was right to apply at paragraph 214 the *dictum* of Lords Toulson and Hodge at paragraph 122 in *Bilta* to the effect that "in any case where a defence of illegality is raised, it is necessary to begin by considering the nature of the particular claim brought by the particular claimant and the relationship between the parties". This was what she had been doing at paragraph 184 of her judgment when she said this:-

> "In my judgment it would not be right to [attribute Mr Al Sanea's knowledge to Singularis] because such an attribution would denude the duty [owed by Daiwa] of any value in cases where it is most needed. The duty is only relevant in a situation where the instructions to pay out the money are given by the person who has been entrusted by the company as a signatory on the bank account. If there were no properly authorised instruction to transfer the money, the company would not need to rely on the *Quincecare* duty. The existence of the duty is therefore predicated on the assumption that the person whose fraud is suspected is a trusted employee or officer. So the duty when it arises is a duty to save the company from the fraudulent conduct of that trusted person. This is a very different duty from the duty on auditors to report to shareholders about the affairs of the company".

57. I respectfully agree with this passage. The judge would have been wrong to ignore the context in which the duty and breach arose, and to have looked at Singularis as if its trading history was simply the few weeks in June and July 2009 when the frauds occurred. She did not fall into that trap. Put simply, Singularis, as a corporate entity, had few similarities to Stone & Rolls, and the *Quincecare* claim against Daiwa brought by Singularis had few similarities to the claims made against the auditors in *Stone & Rolls*.

58. Moreover, to refuse attribution in this case is not, as Mr McCaughran submitted, to treat Singularis in point of law as a mindless automaton, or to say that the defence of illegality can never apply to companies where it would have applied to natural persons. Singularis was found on the facts to have a functioning (albeit negligent) and innocent board, even if Mr Al Sanea could be regarded as its directing mind and will. Singularis was not, however, to be equiparated with Mr Al Sanea, and, when the court came to apply the rules of attribution to the defence of illegality raised by Daiwa in response to Singularis's claim, it concluded, correctly in my judgment, that it would have been wrong to attribute Mr Al Sanea's conduct and knowledge to Singularis in the circumstances and for the purposes of that defence for the reasons the judge gave and I have tried shortly to explain.

59. I can close this section of the judgment by saying that, whilst we are of course bound by the authorities I have mentioned, I do not find the concept of a 'one-man company' particularly helpful or illuminating in this context. It is well-established that companies have a separate legal personality (see Lord Macnaghten's speech in *Salomon v. A Salomon & Co Ltd* [1897] AC 22 at page 53, where he also expressed the view that the "nickname" did "not much help in the way of argument"). It is also

well-established that a company may have a directing mind or will (see *Meridian supra*), and that, depending on the context and the purpose of the attribution, the knowledge and conduct of a shareholder or a director may be attributed to the company. The circumstances in which such attribution will be appropriate will be fact sensitive, as has been repeatedly said, but I do not think the evaluation of the facts is much assisted by trying first to decide whether the company in question fits within the parameters of various competing definitions of the term 'one-man company' (c.f. the views expressed by Professor Sarah Worthington in her article "Corporate attribution and agency: back to basics" at (2017) LQR 118). Lord Sumption was obviously right to draw attention to the different possible factual situations in which attribution may occur. I would, however, suggest that there can be no situation in which an attribution can be made without a detailed consideration of the factual context, the nature of the claim being made, and the purpose for which the attribution is sought. That is why I do not accept Mr McCaughran's submission that his appeal on this point was purely on a point of law. In reality, he was challenging the judge's view of the factual context, the nature of the claim being made against Daiwa, and the roles of Mr Al Sanea and his fellow directors in the management of Singularis. His challenge fails, in my judgment, because the judge found the facts in a way that was entirely open to her, those factual findings have quite properly not been challenged, and, as I have already said, the judge made no error of law.

60. In my judgment, Mr Al Sanea's fraudulent knowledge and conduct should not be attributed to Singularis so as to bar its *Quincecare* claim on grounds of illegality.

<u>Second Issue: If so, should Singularis's claim be barred by the illegality defence, applying the test in *Patel v. Mirza*?</u>

61. Mr McCaughran conceded in oral argument that, if he failed on the attribution question, the test adumbrated in *Patel v. Mirza* did not need to be considered, because his submissions on this issue assumed that Mr Al Sanea's fraud was to be attributed to Singularis. In these circumstances, there is no need for us to consider this issue in detail. Since the matter has, however, been fully argued, I will briefly deal with it.

62. Mr McCaughran's submission was that the judge had been wrong at all three stages of the test. With respect to the first stage, it was submitted that the purpose of the prohibitions transgressed was to prevent fraud, breach of fiduciary duty and financial crime, and allowing a claim by a fraudulent company would do nothing to enhance that purpose. As for the second stage, it was submitted that the judge erred at paragraph 219 in finding that "denial of the claim would have a material impact on the growing reliance on banks and other financial institutions to play an important part in reducing and uncovering financial crime". Daiwa was a regulated institution, and, since the regulatory regime already provided a strong incentive for banks to detect financial crime, there was no need for a further incentive in the form of negligence claims. Moreover, the judge had failed to take into account the relevant policy consideration of encouraging non-executive directors to play an active role in the supervision of companies. As regards the third stage, it was submitted that this was a case in which a fraudulent company claimed damages for its own fraud from the victim, and denial of that claim was a proportionate response to the wrongdoing.

63. Mr Miles supported Rose J's evaluation, submitting that denying the claim would have no impact on the conduct of dishonest directors such as Mr Al Sanea. Further, although the existence of a regulatory regime was an underlying public policy that the

judge was correct to consider, it did not point in favour of denying the claim. Finally, allowing an illegality defence in circumstances where a bank had flagrantly breached its *Quincecare* duty would serve to undermine that carefully calibrated duty. Reducing Singularis's damages for contributory negligence was a more proportionate response than denying its claim altogether.

64. In my judgment, the first question to ask is: in what circumstances should an appellate court interfere with a first instance application of the *Patel v. Mirza* test? Both parties submitted that the court should only interfere in a trial judge's decision where the judge made an error of principle or reached a conclusion wholly outside the range of reasonable possibilities, just as is the case in relation to a contributory negligence evaluation (see below).

65. It seems to me quite clear that an appellate court should not interfere merely because it would have taken a different view had it been undertaking the evaluation. The test involves balancing multiple policy considerations and applying a proportionality approach. Accordingly, an appellate court should only interfere if the first instance judge has proceeded on an erroneous legal basis, taken into account matters that were legally irrelevant, or failed to take into account matters that were legally relevant. That would be the approach in any other situation where proportionality was in issue on an appeal and should, therefore, be the case here.

66. Turning, then, to the evaluation of Rose J, it seems to me that she proceeded on the correct legal basis, and took into account the appropriate legally relevant considerations at paragraphs 216-220 of her judgment. I accept Mr Miles's submission that barring Singularis's claim would serve to undermine the carefully calibrated *Quincecare* duty, and would not be a proportionate response, particularly where, as the judge said, Daiwa's breaches were so extensive and the fraud was so obvious. It is true that Rose J did not say that she had taken into account the policy consideration of encouraging non-executive directors to perform their supervisory duties, but Mr McCaughran accepted that the point was not made to her. In any event, I do not think that this factor, whilst possibly something that could have been considered as part of the policy mix, would justify denying Singularis's claim altogether. The neglect of the other directors is properly considered in the context of contributory negligence, as the judge did.

67. Accordingly, had it been necessary to decide the issue, I would have decided that the judge was right to hold that, applying the test in *Patel v. Mirza*, Singularis's claim would not be barred by an illegality defence.

Third Issue: If not, is Singularis's claim nonetheless defeated by lack of causation, because the company (with Mr Al Sanea's fraud attributed to it) was not relying on performance by Daiwa of its duty?

68. This argument again assumes that Mr Al Sanea's fraud is to be attributed to Singularis. Mr McCaughran relied on *Berg*, in which auditors were alleged to have breached their duty to a company to exercise due care and skill in preparing an audit report. Hobhouse J held that the directing mind of the company, to whom the report was directed, already knew the true facts. Therefore, his knowledge was attributed to the company, which meant that the company did not rely on the auditor's report, and the claim failed. The situation here, he submitted, was exactly the same: once

Singularis is identified with Mr Al Sanea's fraud, it is a dishonest company, and was not relying on Daiwa to perform its *Quincecare* duty.

69. Mr Miles characterised Mr McCaughran's submissions as a "forensic sleight of hand". *Berg*, he argued, was decided on the basis not of reliance, but causation: the company had to have an audit, and the auditors breached their duty in performing that audit, but the breach did not cause any loss because the directing mind of the company anyway knew the true facts. The situation here, he submitted, is not analogous: Daiwa's duty was not to provide knowledge, but was simply not to make the payments in question. Had Daiwa performed its duty, the company would not have suffered a loss, therefore causation was established. Further, it is incorrect in this context to attribute Mr Al Sanea's knowledge to Singularis, because the other directors, even if negligent in their own supervisory functions, were relying on Daiwa to perform its duty.

70. Once again, this issue does not strictly require consideration because it proceeds on the basis of an assumption that Mr Al Sanea's fraud was to be attributed to Singularis, and I have already concluded that it was not to be so attributed. Nonetheless, since the matter was also fully argued, I shall deal briefly with it.

71. In my judgment, the decision in *Berg* does not assist Daiwa in this case, because *Berg* was a different case in every material aspect. First, the duty of care owed by an auditor is of an entirely different character from the *Quincecare* duty owed by Daiwa to its customer, Singularis. The normal duty of an auditor is to report on the accuracy of the financial statements of the company, whereas the *Quincecare* duty is to "refrain from executing an order if and for as long as the banker is 'put on inquiry'". Secondly, while Hobhouse J in *Berg* did hold that the company had not relied on nor had it been misled by anything the auditors had reported (see page 1050e-g of his judgment), that was because the claimant had not made any such allegation, making it very difficult to substantiate its claim. In this case, by contrast, there was no need for Singularis to allege reliance; all it had to allege was that Daiwa had failed in its duty to refrain from making the payments whilst the circumstances put it on inquiry. Moreover, there were in this case innocent directors who were anyway entitled to rely on the due performance of Daiwa's *Quincecare* duty. Thirdly, in *Berg*, Hobhouse J held at page 1070g-h that there was no "causal relationship between the breach of contract [by the auditors] and the alleged losses", because even if the audit certificate had included a "qualification of uncertainty", "it would not have affected the knowledge of the company and its members". Here, in contrast, had Daiwa refused to make the payments, the independent directors would have become aware of Mr Al Sanea's fraud and the losses would have been avoided.

72. Accordingly, even if Mr Al Sanea's fraud were to be attributed to Singularis (which it was not), I would still have rejected Daiwa's argument that Singularis's claim was defeated by a lack of causation. The innocent directors of Singularis were indeed relying on Daiwa for the performance of its *Quincecare* duty.

Fourth Issue: If not, is the claim defeated by an equal and opposite claim by Daiwa against Singularis (with Mr Al Sanea's fraud attributed to it) for the tort of deceit?

73. This argument once again assumes that Mr Al Sanea's fraud is to be attributed to Singularis. Mr McCaughran sought to distinguish Evans-Lombe J's reasoning in

Barings in order to support his argument that Daiwa should be permitted an equal and opposite claim in deceit against Singularis.

74. It is necessary, therefore, first to consider *Barings* in a little more detail. In that case, Barings was suing its auditors for failing to detect a significant fraud by one of its employees, Nick Leeson. The auditors argued that Barings was vicariously liable for the fraud, so as to give them an equal and opposite claim for the tort of deceit, meaning that Barings' claim failed for circuity of action. Evans-Lombe J held at paragraph 720 of his judgment that Barings was vicariously liable for Mr Leeson's fraud, but nonetheless held that the auditors' argument failed for lack of causation. Evans-Lombe J's reasoning in *Barings* was as follows:-

> "727. [Barings] accepted that [Mr Leeson's] representations induced [the auditors] to sign their audit certificate … Therefore the argument turned upon whether, for the purposes of [the auditors'] counterclaim, signature of that certificate was to be treated as the cause of [the auditors'] exposure to suit.
>
> 728. In the case of these two representations, [the auditors] were negligent in failing to detect the falsity of the very representations which they now claim induced them to suffer loss. It would seem surprising if [the auditors] were able to extinguish their liability for that failure by bringing a claim in deceit based on those representations … Almost any auditors' negligence case based on a failure to detect fraud at an audit client will involve deception of the auditors by the fraudster. If the auditor has an automatic and complete defence to any negligence claim by bringing a counterclaim in deceit, it is surprising indeed that the auditors in none of the audit cases I referred to in this judgment took that course. Yet, as [the auditors] admit, this argument "has not been run before"…
>
> 729. There is no doubt that Leeson's deceit, and the signature of the audit certificate which it induced, was a "but for" cause of [the auditors'] exposure. However, going on to the second inquiry described by Lord Nicholls in *Kuwait Airways*, I have no doubt as to my "immediate intuitive response". It is that [the auditors] had a contractual duty to [Barings] to investigate the truth of the representations made to them by Leeson, just as they had a duty to investigate the accuracy of the trial balance provided to them at Leeson's instigation. They failed to investigate either properly, and [Barings] is suing them for breach of that duty. That breach is the cause of their loss. It makes no more sense to say that Leeson's representations were the cause of [the auditors'] liability than to say that his provision to [the auditors] of a misleading trial balance was the cause. Both the trial balance and the representations were merely the subject matter upon which [the auditors] should have exercised their professional skill, and failed to do so. In the words of Lord Steyn in *Smith New Court*, in my view the deceit by Leeson were not "a substantial factor in producing the result" — that is, [the auditors] exposure to suit…
>
> 740. … Clearly an outside third party who was misled by Leeson's false statements into entering into a transaction would be able to recover all losses flowing from that transaction. But [the auditors] were not an outside third party. They were in breach of a pre-existing duty, owed to [Barings], to guard against being misled by just such false statements … To adopt

> Lord Hoffmann's reasoning [in *Environment Agency v. Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22], it is "correct to say, when loss was caused by [[the auditors'] breach of its duty to detect Leeson's deceit, that the loss was caused by the breach of duty", not by the deceit. …
>
> 749. Accordingly, when assessing causation for the purposes of [the auditors'] counterclaim based on representations (i) and (iii), I conclude that I should apply *Empress Car* and *Reeves* and have regard to the policy of the rules concerned. Doing so leads me to conclude that the cause of [the auditors'] exposure to suit was not their signature of the audit certificate which was induced by representations (i) and (iii). It was rather their own negligent failure to detect the falsity of those representations. This is a factor which was not present in the preliminary issue and which explains why the conclusion proves to be different".

75. Mr McCaughran submitted that the distinction between this case and *Barings* is that the knowledge and deceit of Mr Al Sanea is to be attributed to Singularis, whilst Barings was only vicariously liable for Mr Leeson's fraud. This, he argued, was a crucial distinction, because it meant that Singularis was *culpable* for the deceit. The court is faced with equal and opposite claims between a fraudulent party and a negligent party, and the claim of the fraudulent party must, therefore, be denied.

76. Mr Miles submitted that, even if the fraud of Mr Al Sanea were to be attributed to Singularis, this was a distinction without difference. *Barings* was decided on the basis of causation, as Rose J correctly pointed out at paragraphs 225-228 of her judgment, and the same principles should apply regardless of whether Singularis is directly or vicariously liable for Mr Al Sanea's fraud.

77. Once again, in the light of my decision on the first issue, this question does not strictly require determination, but again I will briefly explain my views.

78. In my judgment, Evans-Lombe J's reasoning in *Barings* applies with equal, if not greater, force to the situation in this case. Ordinarily, a third party who was misled by Mr Al Sanea's false statements into entering into a transaction would be able to recover all losses flowing from that transaction. However, Daiwa is not an ordinary third party, in the sense that it was in breach of a pre-existing duty to Singularis to refrain from making the payments whilst the circumstances put it on inquiry. It was this breach of duty, and not Mr Al Sanea's previous deceit, which caused Daiwa's exposure to suit. This conclusion is in keeping with the policy of the rules concerned.

79. The 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 pre-condition for its liability. The distinction that Mr McCaughran seeks to draw between this case and *Barings* is, as Mr Miles argued, a distinction without a difference. The judge was right for the reasons she gave.

80. I would, therefore, hold that, even if Mr Al Sanea's fraud were to be attributed to Singularis (which it is not), Singularis's claim cannot be defeated by an equal and opposite claim in deceit by Daiwa against Singularis.

Fifth Issue: Does the *Quincecare* duty apply where only the creditors of a company, to whom it is not directly owed, stand to benefit from it in practice?

81. The parties agreed that the *Quincecare* duty was in this case owed to Singularis, and not directly to its creditors, even though it was on the verge of insolvency. They also agreed that only Singularis's creditors would in fact benefit from the success of its claim.

82. Against this backdrop, Mr McCaughran argued that the judge was wrong to hold in paragraph 173 of her judgment that there was no principle of law which entitled the court to consider what a party intended to do with the money it recovers, and that the solvency or insolvency of Singularis did not affect that principle. The judge should instead, he submitted, have held that, in circumstances where Singularis's claim was brought for the exclusive benefit of creditors to whom the *Quincecare* duty was not directly owed, no claim lay against Daiwa.

83. Mr McCaughran placed particular reliance on the *dicta* from *Bilta* to which I have already referred. He pointed to what Lords Toulson and Hodge had said at paragraph 152 to the effect that "[a]s Lord Phillips observed [in *Stone & Rolls*], the fundamental proposition which underlay the reasoning of Lord Walker, Lord Brown and himself was that the auditors owed no duty for the benefit of those for whose benefit the claim was brought". At paragraph 166, those judges had expressed the view that the question of attribution was not the real issue in *Bilta*. Instead, the real issue was whether it was contrary to public policy for Bilta, through its liquidators, to enforce for the benefit of its creditors the duty which the directors owed for the protection of the creditors' interests as part of their fiduciary duty to the company. They echoed what Lord Phillips had said at paragraph 67 of *Stone & Rolls* that the real issue there was whether the *ex turpi causa* principle should defeat the company's claim for breach of the auditors' duty. That depended critically on whether the scope of that duty extended to protecting those for whose benefit the claim was brought, namely the creditors. Likewise, Lord Mance had said at paragraph 46 of his judgment in *Bilta* that the scope of the auditor's duty ought to have been the central issue in *Stone & Rolls* (as he had said at paragraph 265 of his speech in that case). As Professor Peter Watts had said in his article "Audit Contracts and Turpitude" (2010) 126 LQR 14, what ultimately divided the judges in *Stone & Rolls* was determining the classes of innocent parties whose interests the contract of audit was designed to protect.

84. Mr Miles submitted that Rose J had been right to reject any general principle that a company cannot bring a claim for a breach of duty owed to it simply because only its creditors will receive the monies recovered. The fact that the stakeholders in Singularis included its creditors, who become prospectively interested in its assets when it was on the verge on insolvency, was, he argued, nothing to the point when considering whether a duty of care was owed. Singularis's perilous financial condition was relevant in the context of breach, which was the way the judge approached the matter.

85. I do not think it is necessary for us to decide between the different views expressed by the majority and the minority in *Bilta* in order to resolve this fifth issue. It is reasonably clear from paragraph 19 of Lord Neuberger's judgment in *Bilta* that the majority did not accept as a general principle what Lords Toulson and Hodge had said at paragraph 166, which echoed what they had said at paragraphs 128-130. The point, therefore, remained open after *Bilta*. The discussion also related specifically to the scope of an auditor's duty, which is not this case.

86. In my judgment, this case can be decided on a more straightforward and well-established basis. It is true that the court must always have regard to the scope of the

duty of care that is relied upon in any particular case, but the scope of the *Quincecare* duty is narrow and well-defined. It is to protect a banker's customer from losing funds held in a bank account with that banker, whilst the circumstances put the banker on enquiry. The scope of this duty is not closely comparable with the scope of the duty owed by an auditor reporting on a company's financial statements. It is of an entirely different character.

87. As Lord Mance made clear in *Bilta*, at paragraph 46, citing Professor Watts's article, what divided the judges in *Stone & Rolls* was determining the classes of innocent parties whose interests the contract of audit was designed to protect. That was not a relevant debate in this case, where the *Quincecare* duty was owed to Singularis and to Singularis alone. It is hard to see how a duty not to pay away money in a customer's account without proper inquiry can vary depending on the state of solvency of the customer. Conversely, it is clear that the circumstances that may put the banker on inquiry may vary according to whether or not, to the banker's knowledge, the customer is solvent or insolvent. In this case, Daiwa would have had less reason to question payments made by the owner of Singularis to himself (or to his other companies) if the company had been completely solvent. However, as the judge found for the reasons she gave at paragraphs 195-197 of her judgment, this was not a case where Daiwa "could have continued to act on Mr Al Sanea's instructions on the basis that he was entitled to move money around his own companies even if there was no particular benefit to the particular entity holding the account". In my judgment, in the circumstances of this case, the solvency of Singularis was relevant to the question of whether Daiwa was in breach of its *Quincecare* duty to the company, but not to the scope of that duty. The duty was to protect the funds held in Singularis's account from fraudulent disposition, and the fact that vindicating that right will benefit only creditors rather than the company itself is nothing to the point.

88. The point was well made as long ago as in 1999 in Lord Hoffmann's lecture to the Chancery Bar Association entitled "Common Sense and Causing Loss". There, Lord Hoffmann dealt with a whole host of cases in different fields in which he explained how the question of causation was answered by working out the scope of the rule of law on which the claim itself was based. When he came, at the end of his lecture, to auditors' negligence, he explained again that the question of causation was once again answered by identifying the scope of the duty of care. He used the case of *Galoo Ltd v. Bright Graeme Murray* [1994] 1 WLR 1360 as an example. There, the audit clients alleged that if the auditors had performed their duties with reasonable care and skill, the insolvency of the companies would have been discovered, and they would have ceased to trade immediately, avoiding subsequent losses. The real questions were, according to Lord Hoffmann: (i) whether the auditors owed a duty to protect future creditors against the possibility that they were unwittingly trading with an insolvent company, and (ii) whether the duty of the auditors ought to have been regarded as protecting the interests of creditors. He thought not. But the point here is that the same questions cannot sensibly be asked in relation to the *Quincecare* duty. That duty is a binary one to stop payments from being made out of the customer's bank account in certain very limited circumstances. It is unlike the duty of an auditor in reporting publicly on a company's financial statements, where any number of potential claimants may wish to claim that they suffered loss as a result of what the auditor said having been inaccurate. The question of the scope of the duty is far more difficult there, because it would create an impossible situation if the duty were to protect everyone from loss. The limited scope of the *Quincecare* duty makes it

obvious that it is only to protect the customer from the loss of its money, and that only the customer can vindicate a claim for breach of it.

89. We are not concerned here with a case in which it has been shown that the fraudster himself will directly benefit. Even if Mr Al Sanea and/or his other companies have claims against Singularis, there are very likely also to be cross-claims that Singularis can raise against Mr Al Sanea and/or his companies. The claims and cross-claims in Singularis's winding up will be dealt with according to the normal rules that apply to insolvent companies. But the identity of those creditors cannot in this situation affect the question of whether the company in liquidation has a claim against Daiwa for breach of its *Quincecare* duty. That was the point the judge was making when she said at paragraph 173 that there was no principle of law which required the court to consider what a party who had a valid cause of action for a loss intended to do with the money.

90. For these reasons, the judge was, I think, right to conclude that the *Quincecare* duty applied, even where only the creditors of a company, to whom it is not directly owed, stood in practice to benefit from the proceedings.

Sixth Issue: Was the judge's assessment of contributory negligence an error of law or wholly outside the range of reasonable possibilities?

91. Section 1(1) of the 1945 Act provides that "[w]here any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage". It was common ground that this court could only interfere in a trial judge's assessment of contributory negligence where the judge made an error of principle or reached a conclusion wholly outside the range of reasonable possibilities (see *Lamoon v. Fry* [2004] EWCA Civ 591 at paragraph 16).

92. Mr McCaughran submitted that the judge made various errors of principle in her approach to contributory negligence, or at least that her assessment of a 25% reduction fell wholly outside the range of reasonable possibilities. The right answer, he said, was between 80% to 100%, meaning that the judge was at "the wrong end of the scale". In support of this contention, he made three principal submissions. First, the judge ought to have started from the position that Singularis's loss was overwhelmingly caused by the fraud of Mr Al Sanea. If only for the purposes of contributory negligence, the company was vicariously liable for this fraud (as was the case in *Barings*). Since Mr Al Sanea was the dominant will of the company, the deduction under this head should have been at least as much as the 50% reduction allowed in *Barings*. Secondly, the judge was wrong to say at paragraph 250 that the situation in the present case was "less extreme" than in *Reeves* (where a deceased, represented by his personal representative claimants, had taken his own life). The suicide in that case was a lawful act, whilst the conduct relied upon here was Mr Al Sanea's unlawful fraud. Finally, Mr McCaughran submitted that the judge was wrong to say in the same paragraph that "… the duty owed here is different from the duty owed by the auditors to Barings because the very thing that Daiwa was supposed to protect Singularis from was the deliberate wrongdoing of Mr Al Sanea", because

Evans-Lombe J had held in *Barings* at paragraphs 728 and 740 that protecting Barings against Mr Leeson's fraud was the very thing that the auditors had undertaken to do.

93. Mr Miles submitted that the judge's conclusion was a reasonable one, with which this court should not interfere. He argued that Mr McCaughran's submissions ignored the egregious nature of Daiwa's breaches of duty, which the judge had correctly taken into account. Further, the judge's contrast with *Reeves* was apt because, unlike the case of a prisoner committing suicide, the duty to avoid the breach of duty in this case was entirely in Daiwa's hands: it could have simply refrained from making the payments. For the same reason, the judge was right to take into account the fact that Daiwa's duty was different from that of an auditor, even if both Daiwa and the auditors in *Barings* had failed to protect the respective claimants from the "very thing" from which they had a duty to protect them.

94. Paragraphs 243, 246 and 251 of the judge's judgment make clear that she correctly took into account, in this context, Singularis's vicarious liability for Mr Al Sanea's fraud, alongside Mr Wetherall's involvement as part and parcel of that fraud. She also considered (in that latter paragraph) the other directors' failure properly to supervise Mr Al Sanea. I have already mentioned her findings on the flagrant nature of Daiwa's breach, against which these factors were balanced.

95. In my judgment, Mr McCaughran's arguments do not get off the ground because he has failed to show either that the judge made any error of principle in her approach to contributory negligence, or that her assessment fell outside the range of reasonable possibilities. The judge took into account all the appropriate factors as elements of contributory negligence, namely the supine nature of the other directors, their failure to control Mr Al Sanea, and Singularis's vicarious liability for his actions, and concluded that the damages should be reduced by 25%.

96. Mr McCaughran's submission on the starting point is not an argument about an error of principle. The fact that Singularis bore responsibility for Mr Al Sanea's fraud was taken into account, but was balanced, correctly in my judgment, against Daiwa's failure to realise that there were many obvious, even glaring, signs that Mr Al Sanea was perpetrating a fraud on Singularis. That was the serious breach of duty in respect of which the *Quincecare* claim lay, and it weighed heavily in the balance against the fraud itself, which was indeed the very thing from which Daiwa had a duty to protect Singularis. The comparisons with *Barings* and *Reeves* are with cases of quite different kinds raising quite different factors. They do not much assist. The judge made her own assessment of "Singularis's share in the responsibility for the damage" under section 1(1) of the 1945 Act, as she was bound to do.

97. For the reasons I have tried shortly to give, I cannot fault the approach taken by the judge. In my judgment, as I have said, she made no error of principle, and did not reach an unreasonable result.

Conclusion

98. There are certain general conclusions that can, I think, properly be drawn from this case, put into a rather broader context. First, we were told by Mr Miles that this is the first case where the court has found against a bank in respect of the *Quincecare* duty. That is because it will be a rare situation for a bank to be put on inquiry; there is a high threshold. But here the judge found, as I have already said, that "any reasonable

banker would have realised that there were many obvious, even glaring, signs that Mr Al Sanea was perpetrating a fraud on the company when he instructed that the money be paid to other parts of his business operations". This case is, therefore, an unusual one, the circumstances of which are unlikely often to arise. Secondly, Daiwa has sought to rely at every level of its argument on the existence of a prior fraud as a reason why it ought to have a successful defence. But this ignores the fact, mentioned several times already, that the prior fraud is itself an essential ingredient of the claim for breach of the *Quincecare* duty. Thirdly, Daiwa has sought to suggest that its liability is inappropriate because it is more onerous than that imposed on an auditor. But, as the judge held, and I have reiterated in this judgment, there is no proper comparison between the duties of auditors and bankers. A banker's duties in respect of properly authorised instructions to make payments are strictly limited. As the passages I have cited above from *Quincecare* and *Lipkin Gorman* show, the banker's duty only arises where, abnormally, the banker is put on inquiry by the particular circumstances. As Steyn J said in *Quincecare*: trust, not distrust, is the basis of a bank's dealings with its customers; and full weight must be given to this consideration before one can conclude that the banker had reasonable grounds for thinking that the order was part of a fraudulent scheme to defraud the company. He continued by saying that the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties. I respectfully agree.

99. For the reasons I have given, therefore, none of Daiwa's arguments in support of its appeal can succeed. The judge was right, and I would dismiss this appeal.

Lady Justice Gloster:

100. I agree.

Lord Justice McCombe:

101. I also agree.