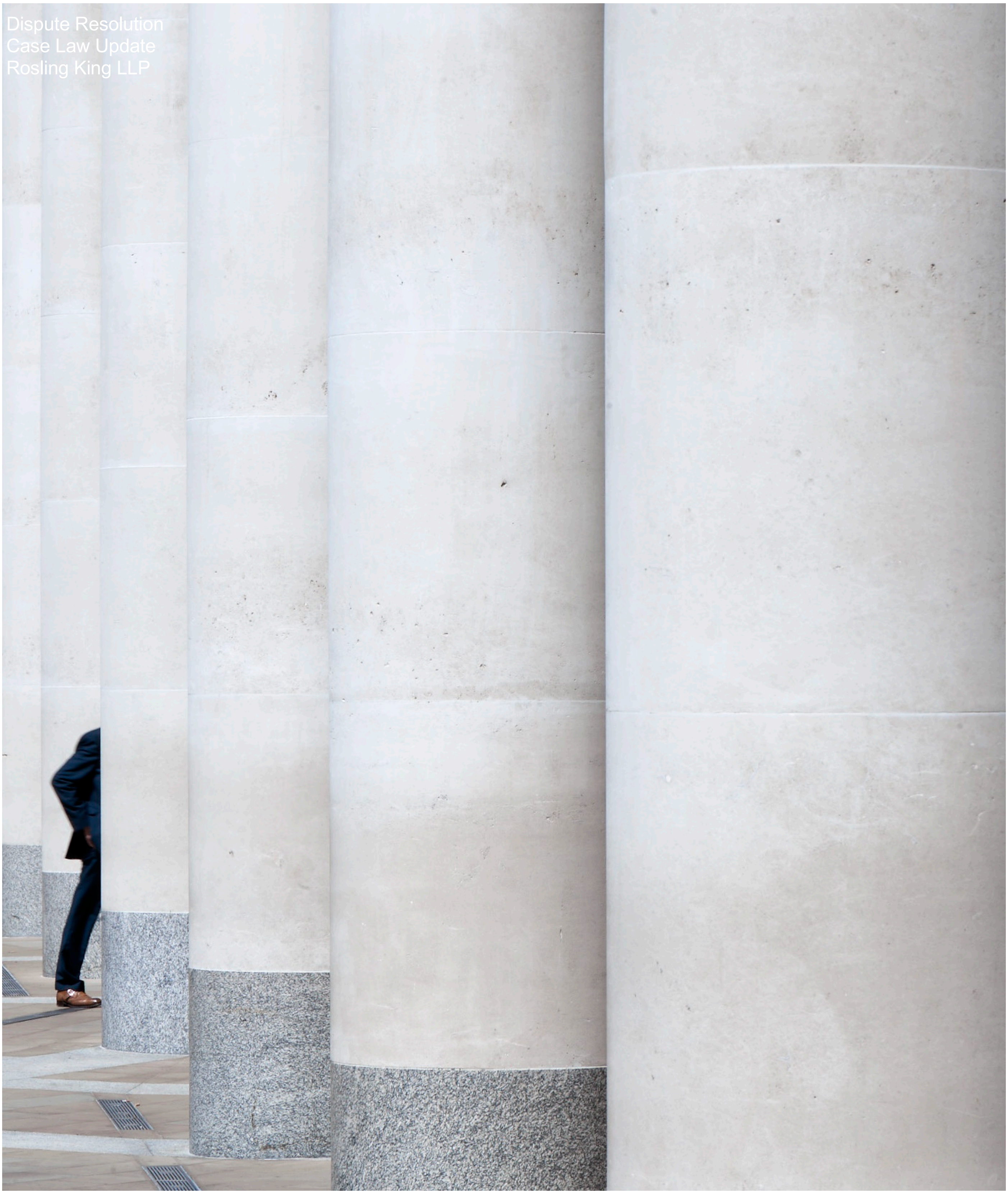
Dispute Resolution
Case Law Update
Rosling King LLP

Background

Singularis Holdings Ltd ("**Singularis**") was a company set up to manage the personal assets of Mr Al Sanea, who was its sole shareholder and one of its directors. In 2007, Daiwa Capital Markets Europe Ltd ("**Daiwa**") entered into a stock financing agreement with Singularis. Between 12 June and 27 July 2009, Mr Al Sanea instructed Daiwa to make eight payments, totalling approximately USD 204 million.

In August 2019, Singularis entered into voluntary liquidation and on 18 July 2014 Singularis, acting through its liquidators, brought claims against Daiwa for the full amount of the payments. The claims were made on two bases: (1) Daiwa's dishonest assistance in Mr Al Sanea's breach of fiduciary duty in misapplying company funds (the "**dishonest assistance claim**"); and (2) Daiwa's breach of the Quincecare duty owed to Singularis by acting on the payment instructions (the "**negligence claim**").

The High Court dismissed the dishonest assistance claim, as Daiwa's employees had acted honestly. However, the negligence claim was upheld, with a 25% deduction made to reflect the contributory fault of Mr Al Sanea and Singularis' inactive directors. Daiwa appealed against the finding of liability on the negligence claim. The Court of Appeal unanimously dismissed the appeal, finding that Mr Al Sanea's fraudulent state of mind could not be attributed to Singularis, and, in any event, Daiwa's negligence had caused the loss, therefore the claim for breach of the Quincecare duty was not defeated by the defence of illegality, lack of causation or a countervailing claim in deceit. Daiwa appealed to the Supreme Court.

The Decision

The Supreme Court dismissed the appeal, finding that Daiwa breached its Quincecare duty to Singularis when it processed fraudulent payments, and rejecting Daiwa's arguments on attribution, illegality and causation/counter-vailing claim in deceit.

Illegality

Daiwa argued that Mr Al Sanea's fraud should be attributed to Singularis. The Supreme Court rejected the illegality defence on two grounds, namely that Mr Al Sanea's fraud could not be attributed to Singularis and, in any event, the test for a successful illegality defence was not met by Daiwa. The Court considered that to prevent Singularis from recovering the payments would undermine the Quincecare duty of care, the purpose of fiduciary duties and would not be a proportionate response, considering Daiwa's breaches were so extensive and the fraud so obvious. The Court found that to deny the claim, would be undermining the public interest in requiring financial institutions to play an important role in uncovering financial crimes. The Court commented that "*the Quincecare duty strikes a careful balance between the interests of the customer and those of the bank and denying the claim would not enhance the integrity of the law*".

Attribution

The Supreme Court emphasised the principle that a company has separate legal identity from its shareholders and directors. Therefore, the fraud of Mr Al Sanea is not to be attributed to Singularis itself, and even if it were theoretically, none of the defences advanced by Daiwa would succeed. The Supreme Court commented that the context in this case was a breach by Daiwa of its Quincecare duty of care owed to Singularis, and the very purpose of the Quincecare duty is to protect a company (Singularis) against just the sort of misappropriation of funds by a trusted agent (Mr Al Sanea) that took place here. The Supreme Court concluded that to attribute the fraud/misappropriation of funds by Mr Al Sanea to Singularis would be to "*denude the Quincecare duty of care of any value in cases where it is most needed*".

Causation/countervailing claim in Deceit

The Supreme Court rejected Daiwa's argument that Singularis' loss was caused by its own fault and not by the fault of Daiwa. The purpose of the Quincecare duty is to protect a bank's customers from the harm caused by people for whom is the customer is responsible. The Supreme Court found that the fraudulent instruction to Daiwa gave rise to the duty of care, which Daiwa then breached, causing the loss. Daiwa acted in breach of its Quincecare duty of care, and it was that breach, and not Mr Al Sanea's misrepresentations, which gave rise to Daiwa's exposure and the loss caused to Singularis. Put simply, had Daiwa not acted in breach of its Quincecare duty, the money would still be in Singularis' account. The Supreme Court quoted the Court of Appeal's finding that "*the existence of the fraud was a precondition for Singularis'' claim based on breach of Daiwa's Quincecare duty… 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*".

Commentary

The Supreme Court's comments in Singularis on the Quincecare duty and its public policy value demonstrate that financial institutions bear a share of the responsibility for detecting financial crime and tackling fraud, and if they fail to do so, can bear a share of the blame. The Supreme Court's judgment raises the prospect of a much higher duty of care burden on financial institutions when dealing with corporate clients. The decision seeks to develop the law in relation to the nature and scope of the duties owed by financial institutions to corporate clients where fraud is suspected.

The Court emphasised throughout its judgment that Daiwa should have realised that something suspicious was going on and suspended payment until it had made reasonable enquiries to satisfy itself that the payments were to be properly made, satisfying the Quincecare duty. Singularis (and its creditors) had been the victim of Daiwa's negligence. The outcome in Singularis clarifies when the illegality defence will be available in response to a Quincecare claim, highlighting that it will become increasingly difficult for financial institutions to defend these claims.

For further information, please contact Georgina Squire or the Partner with whom you usually deal.