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# Property, Chancery and Commercial Briefing

Welcome to 1 Chancery Lane's Christmas Property, Chancery & Commercial Law briefing. This edition's contributors are all new members of Chambers who are writing for us for the first time. Their contributions reflect the breadth of our expertise at 1 Chancery Lane. Richard Cherry is an experienced housing practitioner and with one of our junior tenants, Richard Collier, has written about the restrictions on landlords serving section 21 notices when they have not complied with the requirements to provide gas safety records to their tenants. Richard Cherry will be appearing before the Court of Appeal in the New Year when it considers this for the first time. Christopher Pask has a strong interest in issues relating to insolvency and has written about the Supreme Court's recent decision in *Singularis* about the attribution of the knowledge of a sole director to his company.

## Gas Safety Records and Section 21 Possession Claims

The tenancy deposit protection requirements, and the inability of a landlord in breach of those requirements to serve a section 21 notice, are now relatively well-understood by landlords. A new problem for landlords is the requirement introduced by the Deregulation Act 2015 to give gas safety records to tenants. This legislation is due to be considered by the Court of Appeal for the first time in January 2020.

### The Gas Safety Record Requirements

Section 21A(1) of the Housing Act 1988, introduced by the Deregulation Act 2015, provides that a landlord may not give a section 21 notice at a time when the landlord is in breach of a 'prescribed requirement'.

Reg 2(1)(b) of the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015/1646 ('the 2015 Regulations') makes one of those prescribed requirements compliance with Reg 36(6) or (7) of the Gas Safety (Installation and Use) Regulations 1998/2451 ('the 1998 Regulations').

The 1998 Regulations require landlords to have a check of any relevant gas appliance (generally a boiler or flue in or serving rented residential property) by a properly qualified person every 12 months (Reg 36(3)(a)).

The landlord must keep a gas safety record of such checks (a 'GSR') containing the information specified in Reg 36(3)(c).

Reg 36(6)(a) requires the landlord to give a copy of each annual GSR to current tenants within 28 days of the date of the check.

Reg 36(6)(b) requires that the most recent GSR is given to any new tenant before the new tenant occupies the premises.

Where the premises are served by a gas appliance which is not actually situated in any room occupied or to be occupied by the tenant the landlord can comply with the requirements of Reg 36(6) by displaying the GSR 'in a prominent position' (Reg 36(7)).

Reg 2 of the 2015 Regulations makes these requirements 'proscribed requirements' but regulation 2(2) provides that:

*For the purposes of section 21A of the Act, the requirement prescribed by paragraph (1)(b) is limited to the requirement on a landlord to give a copy of the relevant record to the tenant and the 28 day period for compliance with that requirement does not apply.*

Caridon Properties Ltd v Shooltz (County Court at Central London, 2 February 2018, unreported)

*Caridon v Shooltz* was the first case concerning section 21A to proceed to Circuit Judge level and concerned whether a failure to comply with the 1998 Regulations could be remedied retrospectively by giving or displaying the GSR before the service of a section 21 notice.

The landlord argued that Reg 2(2) of the 2015 Regulations removed the time for compliance in the 1998 Regulations.

HHJ Luba QC, however, rejected the landlord's argument and held that Reg 36(6)(b) created a 'once and for all obligation' and failure to serve the appropriate GSR before occupation would prevent a landlord from relying on a section 21 notice.

Trecarrell House Ltd v Rouncefield

In this case the landlord had again neither given nor displayed the most recent GSR before the tenant occupied. At first instance the DDJ ordered possession holding that:

1) the 1998 Regulations were not engaged as the boiler was not within the demised property and any pipes in the demised property carried water not gas;
2) if that was wrong, the 2015 Regulations modified the 1998 Regulations to allow compliance with Reg 36(6)(b) by giving a copy of the GSR to the tenant after occupation. There was no absolute time limit on giving the GSR and Parliament could not have intended an omission by a landlord at the outset of the tenancy to be irremediable and prevent reliance on a section 21 notice.

The tenant appealed to the Circuit Judge on the basis that:

1) The DDJ was wrong to consider that the 1998 Regulations did not apply. If a boiler is outside the demised property Reg 36(7) of the 1998 Regulations creates a parallel obligation on Landlord either to display or supply the GSR prior to occupation; and
2) as held by HHJ Luba QC in *Caridon*, the 2015 Regulations do not suspend the requirement for compliance with either Reg 36(6)(b) or 36(7) before occupation begins.

HHJ Carr derived considerable assistance from the judgment of HHJ Luba in *Caridon v Shooltz*. He noted that if the Appellant was correct and the landlord was precluded from relying on a section 21 notice, it did not preclude seeking possession under the grounds in Schedule 2 of the Housing Act 1988.

HHJ Carr considered the reason for the 1998 Regulations was self-evident. A tenant moving in needs to be sure the gas is well-maintained and safe; they would rarely have control over that and the danger to life and limb was all too well-known. He distinguished between the nature of the obligations in Reg 36(6)(a) and (b) in that a tenant considering whether to rent a new property had to decide whether to do so and the knowledge it was safe would be of great importance; a tenant already in occupation should already have had the assurance of that initial GSR and the annual

provision of a GSR was by way of confirmation.

HHJ Carr referred to HHJ Luba QC's reasoning in *Caridon* and adopted his view as to why Reg 2(2) of the 2015 Regulations could not have the meaning argued for by the Landlord. He noted that the 1998 Regulations had been amended since the Deregulation Act 2015 by The Gas Safety (Installation and Use) (Amendment) Regulations 2018 but Regs 36(6) and (7) remained unchanged. Had there been concerns as to unfairness or lack of clarity there had been opportunity for the Secretary of State to amend them.

HHJ Carr therefore allowed the appeal and dismissed the possession claim. The landlord has appealed to the Court of Appeal.

As well as the issue of whether Reg 2(2) of the 2015 Regulations allows a landlord to comply with Reg 36(6)(b) by serving the GSR after a new tenant has commenced occupation, the Court will consider a further point – given the requirement in Reg 36(3)(a) that checks be carried out at intervals of not more than 12 months, does giving the tenant a GSR made more than 12 months after the preceding one comply with Reg 36(6)(a).

By Richard Cherry and Richard Collier

## Attributing Knowledge – Singularis v Daiwa

The recent Supreme Court decision in *Singularis Holdings Ltd v. Daiwa Capital Markets Europe Ltd* [2019] UKSC 50 addresses the attribution of knowledge in a corporate context.

The status of a company as a separate legal personality with an identity entirely distinct from that of its directors and shareholders has long been a cornerstone of our commercial lives. As a conceptual entity however, a company acts through the medium of human beings; often its directors and frequently, a sole director.

Companies are frequently held responsible for the acts of their employees and directors, through the principles of vicarious liability for example. When though, are the acts, knowledge and intentions of those individuals able to be treated as the acts, knowledge and intentions of the company itself?

### The Facts

The Appellant, Singularis Holdings, was a company registered in the Cayman Islands and set up to manage the personal assets of a Saudi Arabian businessman, Maan Al Senea. Mr Al Senea was the sole shareholder, the only director with influence over the management of the company and also its chairman, president and treasurer. He also exercised the signing powers over the company's accounts.

The Respondent, Daiwa, is the London subsidiary of a Japanese investment and brokerage firm. Following various dealings between the two in June 2009 Daiwa held a cash surplus of some US$204m for Singularis.

On Mr Al Sanea's instructions Daiwa made payments of the entire surplus to other companies in Mr Al Sanea's business group, leaving Singularis unable to meet the demands of its creditors. Mr Al Sanea then placed Singularis into liquidation.

Singularis' liquidators subsequently brought a claim against Daiwa for the full amount of the payments on the basis that Daiwa was in breach of its *Quincecare* duty to the company when it gave effect to the payments.

**Issues**

The *Quincecare* duty of care is owed by banks to their customers. It balances the banks obligation to execute its customers' orders in a timely manner with a duty not to execute such orders if it knows or suspects that the order has been given dishonestly. A bank can be liable for damages if it executed an order knowing it to have been dishonestly given, or shut its eyes to the obvious fact of the dishonesty, or acted recklessly in failing to make such enquiries as an honest and reasonable man would make.

In the context of this case, Mr Al Sanea and the other companies within his group were in dire financial straits at the time of the Daiwa payments in 2009. The judge at first instance found that any reasonable banker would have realised that there were "many obvious, even glaring, sign that Mr Al Sanea was perpetrating a fraud on the company" (see paragraph 192 of Rose J's judgment).

The issues for the Supreme Court were whether:

1) That fraud could be attributed to the company, Singularis, and if so
2) Could its claim against Daiwa be defeated by illegality, a lack of causation as the company caused its own loss or by a countervailing claim in deceit.

**Decision**

The Supreme Court held that Mr Al Sanea's fraud was just that, his and not that of Singularis.

Daiwa attempted to rely the controversial decision in *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 1 AC 1391 in which the controlling mind of the company's knowledge of fraudulent activities was attributed to the company. That resulted in the company being unable to claim against its auditors for negligently failing to detect the fraud and the defence of illegality was made out.

*Stone & Rolls* was distinguished in the later case of *Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23 in which liquidators of a company originally owned and controlled by an individual and his associates were, in contrast to *Stone & Rolls*, not prevented by the illegality principle from suing those persons in fraud. The Supreme Court explained that the key to any question of attribution was always to be found in considerations of the context and the purpose for which the attribution was relevant. Where the purpose was to apportion responsibility between the company and its agents so as to determine their rights and liabilities to one another, the answer might not be the same as where the purpose was to apportion responsibility between the company and a third party.

Giving the lead judgment, Baroness Hale, held that:

> 34... In [the trial judge's] view, what emerged from Bilta was that "the answer to any question whether to attribute the knowledge of the fraudulent director to the company is always to be found in consideration of the context and the purpose for which the attribution is relevant" (para. 182). I agree and, if that is the guiding principle, then Stone & Rolls can finally be laid to rest.
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> 35. The context of this case is the breach by the company's investment bank and broker of its Quincecare duty of care towards the company. The

purpose of that duty is to protect the company against just the sort of misappropriation of its funds as took place here. By definition, this is done by a trusted agent of the company who is authorized to withdraw its money from its account. To attribute the fraud of that person to the company would be, as the judge put it, to "denude the duty of any value in cases where it is most needed" (para. 184). If the appellant's argument were to be accepted in a case such as this, there would in reality be no *Quincecare* duty of care or its breach would cease to have consequences. This would be a retrograde step".

**Commentary**

The Court rejected Daiwa's attempt to rely on the unlawfulness that it had a duty to protect against, as a reason for avoiding its liability for failing to detect that same unlawfulness. Misappropriations of company funds such as that carried out by Mr Al Sanea were exactly the kind that the *Quincecare* duty of care is to protect against.

A key aspect of the decision was a reminder that funds which belong to a company do not also belong to its 'controlling mind', as Mr Al Sanea was. Even the sole director of a company can steal from it, but that does not mean that the company should necessarily be prevented from bringing claims against a third party (in this case Daiwa) who had negligently facilitated the theft.

The case highlights that the *Quincecare* duty does not just arise in the context of retail banks; Daiwa are an investment bank and brokerage business. Mrs Justice Rose at first instance also hinted that the duty of care may be more burdensome on an institution which operates fewer accounts and transaction, as in those circumstances anomalies may be easier to spot.

The decision provides helpful guidance in the often-difficult area of attribution of fraudulent knowledge or conduct to a company. The answer will now lie in a consideration of the context and purpose for which the attribution is relevant. This is the case even for a so called 'one-man company'.

It will be of particular relevance in the insolvency context and confirms that insolvency practitioners are able to bring proceedings against directors of a company without the possibility of such claims being immediately stifled on the basis of an argument that their own wrongdoing should be attributed to the company. Further, it may encourage claims by liquidators against financial institutions which have facilitated the misappropriation of company funds.

By Christopher Pask

**About the authors:**

Richard Cherry successfully represented the tenant in *Caridon Properties Ltd v Shooltz* and is instructed by Oliver Fisher solicitors to represent the tenant in the Court of Appeal *Trecarrell House Ltd v Rouncefield*.

Christopher Pask has a broad practice which covers the range of Chambers' core areas, with an emphasis on commercial litigation, property and insolvency matters, especially cases where fraud and dishonesty are alleged.

Richard Collier joined Chambers in October 2018 following the successful completion of his pupillage and has appeared in the County Court litigation concerning gas safety records.