

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 76

Civil Appeal No 15 of 2019

Between

Red Star Marine Consultants
Pte Ltd

... Appellant

And

- (1) The Personal Representatives
of Satwant Kaur d/o Sardara
Singh (deceased)
- (2) Manjit Kaur d/o Sardara Singh

... Respondents

In the matter of Suit No 601 of 2016

Between

Red Star Marine Consultants
Pte Ltd

... Plaintiff

And

- (1) The Personal Representatives
of Satwant Kaur d/o Sardara
Singh (deceased)
- (2) Manjit Kaur d/o Sardara Singh

... Defendants

JUDGMENT

[Companies] — [Directors] — [Attribution]

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Red Star Marine Consultants Pte Ltd
v
Personal Representatives of Satwant Kaur d/o Sardara Singh,
deceased and another

[2019] SGCA 76

Court of Appeal — Civil Appeal No 15 of 2019
Judith Prakash JA, Tay Yong Kwang JA and Steven Chong JA
15 October; 29 October 2019

25 November 2019

Judgment reserved.

Judith Prakash JA (delivering the judgment of the court):

1 It is trite that a company possesses a legal personality which is distinct from that of its directors or shareholders. It is also clear that a company, not being a natural person, is not capable of acting or having thoughts independent of its human agents. However, a company may sue or be sued in its own name, and may even be prosecuted for criminal offences. In these circumstances, the question may arise as to whether the knowledge or acts of a company's agents should be attributed to the company. This appeal is one such case. It raises the interesting question as to whether the fraudulent acts and knowledge of a man who is more or less the sole shareholder and director of a company should be attributed to that company, where the company seeks to recover from a third party the proceeds of the fraudulent acts which the sole director and shareholder was party to.

Background facts

2 The appellant, Red Star Marine Consultants Pte Ltd, is a company engaged in the business of marine consultancy. Dhanvinder Singh s/o Karam Singh (“Mr Singh”) and his wife, Ms Kathelene Wilhemina Rappa (“Ms Rappa”), are the only directors and shareholders of the appellant. Mr Singh is the managing director of the appellant. The first respondent (“the Estate”) represents the estate of Satwant Kaur d/o Sardara Singh (“Ms Kaur”). Ms Kaur was employed by the appellant from 2001 to 2012 as the personal secretary of Mr Singh. The second respondent was a sister of the late Ms Kaur.

3 Between 2006 and 2012, Ms Kaur obtained sums totalling S\$1,633,875.20 from the appellant. She took the funds by cashing cash cheques drawn on the appellant’s bank account which had been signed by Mr Singh. These cash cheques were accompanied by payment vouchers stating that the cash cheques were to pay invoices for services rendered by the appellant’s service providers (whom we shall refer to as “vendors”). Ms Kaur utilised these moneys to purchase and/or pay the premiums for a number of insurance policies on her own life. She also purchased properties with these funds. Three of these properties were registered in her sole name. The funds were also used to purchase two other properties (“the Rivervale and Bayshore properties”). One of these was put in the joint names of herself and the second respondent. The other was registered in the second respondent’s sole name.

4 On 29 August 2012, the appellant shifted its office from North Bridge Road to Kallang Pudding Road (“the New Office”). On or about 5 September 2012, Ms Rappa was unpacking at the New Office when she discovered incriminating documents belonging to Ms Kaur. Ms Rappa informed Mr Singh,

who was not in Singapore then, of this discovery. Mr Singh told his wife not to allow Ms Kaur to enter the New Office. On 13 September 2012, Ms Kaur and the second respondent broke into the New Office, after which they changed the locks.

5 On 15 September 2012, Mr Singh lodged a police report alleging that Ms Kaur had misappropriated the appellant's moneys. In the course of investigations, Ms Kaur gave a total of eight statements to the police, in which she admitted that she had taken various sums of money from the appellant. However, she alleged that this was with the consent and knowledge of Mr Singh.

6 Ms Kaur was eventually charged by the police in October 2014 with seven charges of criminal breach of trust by a clerk or servant under s 408 of the Penal Code (Cap 224, 2008 Rev Ed) and one charge under s 47(1)(c) punishable under s 47(6)(a) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed). In January 2016 she was granted a discharge not amounting to an acquittal. Not long after, on 8 May 2016, Ms Kaur passed away from cancer. On 8 June 2016, the appellant filed the present action against the Estate, claiming for losses resulting from Ms Kaur's alleged fraud, breach of trust, fiduciary duties and/or duty of loyalty and fidelity. The appellant joined the second respondent in the action on 29 May 2017, claiming that she had used money from Ms Kaur to acquire the Rivervale and Bayshore properties.

The decision below

7 The Judge, in *Red Star Marine Consultants Pte Ltd v Personal Representatives of the Estate of Satwant Kaur d/o Sardara Singh, deceased and*

another [2019] SGHC 144 (“the GD”), dismissed the appellant’s claims against the Estate and the second respondent on the principal ground that the appellant had not proven on a balance of probabilities that Ms Kaur had committed fraud in the manner suggested by Mr Singh. In particular, the Judge found that Mr Singh was aware of and consented to Ms Kaur’s taking of moneys belonging to the appellant: GD at [62] and [63]. In making that finding, the Judge took into account the following facts:

- (a) Ms Kaur was able to perpetrate the alleged fraud over a period of six years and her acts would have been patently obvious from the appellant’s accounts: GD at [64]–[72].
- (b) Mr Singh’s explanation of how the alleged fraud was perpetrated did not make sense: GD at [74].
- (c) Mr Singh failed to call several witnesses who would have been able to give evidence crucial to the appellant’s case. The vendors should have been called because these vendors would have been in a position to confirm Mr Singh’s explanation as to why he did not know about the fraud and/or Mr Singh’s account as to the arrangements which Ms Kaur undertook to facilitate her fraudulent conduct. The appellant’s accountant (“the accountant”) should have been called since Ms Kaur had allegedly hidden her fraud from Mr Singh by manipulating the appellant’s accounts: GD at [75].
- (d) There was no good explanation as to why the appellant had delayed so long before commencing proceedings. Mr Singh’s own evidence was that he had completed his investigations within five or six

months of starting them in September 2012, but the proceedings were commenced only in 2016: GD at [76].

(e) The Estate’s witnesses testified that Mr Singh had paid significant sums of money to Ms Kaur. At least two of those witnesses gave reliable testimony: GD at [79]–[87]

8 The Judge also held that the appellant’s claim against the Estate was largely time-barred in any event: [93]–[108]. The Judge also dismissed the appellant’s claim against the second respondent for knowing receipt on the ground that such a claim must be premised on the existence of a breach of trust or fiduciary duty (GD at [116]) and this had not been established as against Ms Kaur.

The parties’ submissions

The appellant

9 The appellant’s submissions on appeal focus primarily on the conduct of Ms Kaur. It emphasises that Ms Kaur was a fiduciary of the appellant, and that she had breached her fiduciary duties by misappropriating the appellant’s moneys. The appellant submits that the evidential burden was on the Estate to explain why Ms Kaur had taken those moneys.

10 The appellant also submits that the Judge was wrong to criticise Mr Singh’s explanation as to how the alleged fraud was perpetrated; Ms Kaur’s *modus operandi* was of no significance because she had already admitted to taking the money. Further, even if the appellant knew or ought to have known of Ms Kaur’s fraud, this would absolve Ms Kaur from all wrongdoing only if

the appellant had consented to Ms Kaur taking the money at the time in which she had done so. In addition, Mr Singh’s credibility should be measured against the reasons provided by Ms Kaur as to why she took the appellant’s money. The Judge was also wrong to draw an adverse inference from the appellant’s failure to call several witnesses. The appellant submits, in the alternative, that its claim should be allowed even if Mr Singh were party to the fraud, because the appellant is a separate legal entity.

11 The appellant further submits that its claim was not time barred because exceptions set out in ss 22(1) and 29(1) of the Limitation Act (Cap 163, 1996 Rev Ed) (“Limitation Act”) apply. As for its claim against the second respondent, the appellant submits that the second respondent was aware of Ms Kaur’s fraud and that she utilised the appellant’s money for her own benefit.

The respondents

12 The Estate submits that it is irrelevant whether Ms Kaur was a fiduciary of the appellant. Even if she were, there would have been no breach of fiduciary duty because the appellant, through Mr Singh, was aware of and consented to Ms Kaur’s conduct. It further submits the Judge was right to find that Mr Singh was not a credible witness.

13 In addition, the Estate submits that the appellant should not be allowed to argue that its claim should succeed even if Mr Singh was privy to Ms Kaur’s fraud. The appellant had all along adopted the position that Mr Singh was not so privy. It cannot be allowed to depart from its pleadings because the Estate would otherwise be irreparably prejudiced: it was deprived of the opportunity

to plead and argue that the appellant was bound by the conduct and knowledge of Mr Singh.

14 The Estate submits that in any event, the Judge was right to find that the appellant's claim was largely time-barred, and that the exceptions in the Limitation Act did not apply.

15 The second respondent submits that the appellant has not discharged its burden of establishing that its money was used by her to purchase the Rivervale and Bayshore properties. She did not know that Ms Kaur's money was traceable to the fraud committed on the appellant. The factual circumstances were such that it was reasonable for her to believe that Ms Kaur was receiving money from the appellant on a legitimate basis. In particular, Ms Kaur did not act in a manner which betrayed that she had anything to hide.

Issues

16 Three issues arise from the parties' submissions, which we will address in turn:

- (a) whether Ms Kaur was privy to the fraud;
- (b) whether Mr Singh was privy to the fraud; and
- (c) whether, in the light of the answers to the first two issues, the appellant should be allowed to recover from the Estate.

Whether Ms Kaur was privy to the fraud

17 We will deal with this point shortly because counsel for the Estate, Mr Alfred Lim, candidly and, in our view, rightly, accepted at the hearing before us that Ms Kaur was privy to the fraud against the appellant. Ms Kaur's involvement is beyond argument because she could not explain why Mr Singh had transferred large sums of the appellant's money to her. In this regard, the fact that Ms Kaur was a salaried employee of the appellant subject at all times to the instructions and supervision of Mr Singh in her handling of the appellant's assets would tend to indicate that she was not in a fiduciary relationship with the appellant. Notwithstanding that, if she misappropriated the appellant's money, the law would regard her as a constructive trustee of the same and generally liable to account to the appellant for the money, in the absence of legal answer to the appellant's claim.

18 The purported explanations which we discuss below were explanations that Ms Kaur gave in her statements to the police when they were investigating the fraud allegations.

19 First, Ms Kaur claimed that the money was paid to her for the purpose of tax evasion on the part of the appellant. However, the amounts which were paid to Ms Kaur (more than \$1.6m) over six years were far in excess of the declared profits of the appellant over the same period: GD at [66]. Thus, the payments to Ms Kaur likely exceeded the sums that would have been paid in tax.

20 Second, Ms Kaur alleged that Mr Singh transferred the money to her because he and Ms Rappa were on the verge of divorce and he did not want his

wife to know that the appellant was making profits. We do not find this to be a credible explanation. One would expect such an arrangement to be temporary and that Ms Kaur would return the money to the appellant (or Mr Singh) after the divorce proceedings concluded. However, Mr Singh continued to transfer the sums to Ms Kaur for *six years*, and it appears that those sums (or the bulk of the total amount at least) have still not been returned to Mr Singh. In fact, it appears that Mr Singh and Ms Rappa are still married – Mr Singh refers to her as his wife in his affidavit of evidence-in-chief filed in June 2018.

21 Third, Ms Kaur claimed that Mr Singh would from time to time demand that she purchase, presumably with the appellant's money which had been transferred to her, meals as well as luxury items like pens, wallets and clothing for him. As we pointed out to Mr Lim at the hearing, these items are unlikely to have cost her \$1.6m. In any event, it is clear that Ms Kaur had used that money to purchase insurance policies and properties *for herself*: see [6] above. It was still incumbent on the Estate to explain why or how Ms Kaur was entitled to use the appellant's money on herself.

22 Finally, Ms Kaur claimed that sums paid to her represented commissions for her role in the appellant. We find this explanation unconvincing. She was paid about \$100,000 to \$300,000 a year from 2006 to 2012, many times the profits earned by the appellant before tax (below \$50,000 each year): see GD at [66]. Even if Ms Kaur had played an instrumental role in the appellant, it would make absolutely no business sense for the appellant to pay her so much by way of commission. We also note Mr Lim's clarification at the hearing that Mr Singh was paid \$72,000 a year in director's fees. We find it incredible for a secretary to the managing director to be paid so much more than the managing director

himself. In addition, as we pointed out at the hearing, it is clear from Ms Kaur's statements to the police that the commission payments were separate from the money obtained from the cash cheques. The Estate has not provided any satisfactory explanation as to why Ms Kaur was entitled to the latter.

23 In the light of Ms Kaur's unconvincing explanations, we must, with respect, disagree with the Judge's conclusion that the appellant had not proven that Ms Kaur had committed fraud on the appellant. This is not the end of the inquiry, however.

Whether Mr Singh was privy to the fraud

24 The Estate's main point in the appeal was that whatever Ms Kaur may have done, she did with the knowledge and consent of Mr Singh. The Estate avers that because Mr Singh was privy to Ms Kaur's conduct, the appellant has no basis on which to recover the misappropriated moneys from the Estate.

25 Mr Singh maintained throughout the proceedings below that he was not involved in Ms Kaur's wrongdoing. He claimed that Ms Kaur had induced him to sign cash cheques for the purpose of making payments to the appellant's vendors and he did not know that she was siphoning off the funds. Like the Judge, we find this inconceivable.

26 As we emphasised to counsel for the appellant, Mr Mahmood Gaznavi, at all material times, the appellant was effectively a two-person operation run by Mr Singh and Ms Kaur. The appellant accepts that Mr Singh was away from the office most of the time providing services to clients. This shows that business was brisk. Mr Singh must have known the rates which the appellant

charged for its services, and thus he would have had in mind reasonable estimates as to the profits that the appellant should have been earning. In the light of the foregoing, we find it difficult to believe that he remained blissfully unaware of the fraud perpetrated against the appellant, especially when the appellant's accounts indicate that the appellant was earning only \$10,000 to \$20,000 a year in profits from 2006 to 2010. We highlight that the appellant is not a sprawling multi-million dollar company, and the amount drained out from the appellant's coffers were many times its profits. It was on the basis of those objective facts that the Judge made the finding that Mr Singh must have been privy to the fraud. In our judgment, he was perfectly entitled to make that finding. Indeed, we do not see how he could have found otherwise.

27 There is nothing in the appellant's submissions which persuades us that the Judge's findings were against the weight of the evidence. The appellant's submissions focus mainly on Ms Kaur's conduct. Indeed, at the outset of the oral hearing, Mr Gaznavi indicated that he was seeking to persuade the Court that Ms Kaur was guilty of misconduct. But the fact that Ms Kaur was privy to the fraud does not mean that Mr Singh was innocent. Their involvement need not be mutually exclusive. It is also possible that *both* Mr Singh and Mr Kaur were privy to the fraud. Indeed, having regard to the evidence led below, we find this to be the irresistible conclusion.

28 We add that contrary to the appellant's submissions, the Judge was entitled to draw an adverse inference against the appellant's failure to call the appellant's vendors and the accountant as witnesses: see [7(c)] above. In relation to the vendors, the appellant merely reiterates the point that Ms Kaur had admitted to taking the moneys. For the reasons set out in the preceding

paragraph, this submission does not take the appellant very far. Further, as the Judge noted (see [7(c)] above), the vendors’ evidence would have been relevant to the question of whether Mr Singh could have been unaware of Ms Kaur’s fraud.

29 As for the accountant, the appellant says that the Estate was supposed to have called the accountant, but failed to do so. Again, this does not assist the appellant. Since the accountant was a crucial witness who could shed light on how the accounts were prepared (and indeed, whether Mr Singh was aware of the suspicious figures which made it apparent that money was being siphoned from the appellant), the appellant ought to have called him as a witness, regardless of whether any other party wished to do the same. The appellant also highlights that the accountant “was not a friendly witness” to the appellant because the appellant had threatened to report him to the police. While this may be true, the appellant could have subpoenaed the accountant to compel him to testify. There is no evidence that any such attempt was made.

Whether the appellant should be allowed to recover from the Estate

30 We now turn to the legal consequences of our conclusion that Ms Kaur and Mr Singh perpetrated a joint fraud against the appellant. The overarching issue is whether, notwithstanding that it has been defrauded, the appellant is precluded, by the doctrine of illegality, from claiming against the Estate. As we held in *Ho Kang Peng v Scintronix Corp* [2014] 3 SLR 329 (“*Scintronix*”), illegality operates as a defence to a claim only because the court as a matter of public policy will not involve itself in a dispute between parties where both sides are equally tainted by the same wrong, with the defendant benefitting as a result: at [64]. We also held that for this defence to operate, the claimant must

personally be responsible for the wrong; its responsibility must be primary rather than vicarious: at [66]. This means that the appellant must *itself* be involved in wrongdoing. Of course, the appellant, being a company, has no mind and body of its own, and can only act through natural persons: at [47]. This does not however mean that a corporate entity can never be held to have acted wrongly. It is possible, in law, for the acts and intentions of human agents to be *attributed* to a company. The question is thus whether Mr Singh's acts and knowledge should be attributed to the appellant.

31 As the question of attribution was not argued in the proceedings below or in the parties' written submissions filed before the hearing, we invited the parties to address us on the issue of whether attribution of Mr Singh's knowledge and intentions to the appellant would preclude the appellant from recovering from the respondents. We also directed the parties to take into account the fact that Mr Singh is more or less the sole shareholder and director of the appellant (he holds more than 99% of the appellant's issued share capital).

32 In its further submissions, the appellant raises the following arguments:

- (a) The appellant was not tainted by fraud. Rather, it was the *victim* of fraud. Since Mr Singh and Ms Kaur conspired to wrongfully deprive it of its money, the appellant should not be precluded from recovering the money from them.
- (b) There is no reason why Ms Kaur should be afforded immunity just because she is not a director but a party who had defrauded the appellant. Returning the money to the appellant would deprive Ms Kaur of the fruits of her illegal conduct.

(c) It is true that if the appellant were allowed to claim from the Estate, “the court would effectively have assisted [Mr Singh] because he would have almost all the money given his large shareholding”. However, had the fraud not been committed, the moneys would have been Mr Singh’s anyway.

(d) The monies in the appellant can be said to be matrimonial assets. It would be unfair to Mr Singh’s wife (Ms Rappa) if the appellant were worth nothing – there would be nothing to divide.

(e) The appellant’s creditors would be worse off if the appellant’s claim were not allowed.

33 The Estate submits, essentially, that Mr Singh’s acts and knowledge should be attributed to the appellant because the appellant was a one-man company run by Mr Singh. The attribution of Mr Singh’s knowledge to the appellant would then preclude the appellant from claiming against the Estate even if Ms Kaur was involved in the fraud. This is because where the defence of illegality applies, the loss must lie where it falls.

34 The Estate’s submission that Mr Singh’s acts and knowledge should be attributed to the appellant because Mr Singh was its directing mind and will is misconceived. As this Court observed in *Scintronix*, the term “directing mind and will” of the company is a description of the person identified as the one whose knowledge and acts were to be attributed to the company under the rules of attribution; it is not a rule of attribution in itself: at [49] and [50]. The older authorities where the contrary position was adopted (some of which were cited by the parties) must be seen in the light of *Scintronix*.

35 In that case, we clarified, citing Lord Hoffmann’s judgment in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 506, that there are three distinct rules of attribution (at [48]):

- (a) First, the primary rules of attribution found in the company’s constitution or in general company law, which vest certain powers in bodies such as the board of directors or the shareholders acting as a whole.
- (b) Secondly, general rules of attribution comprising the principles of agency which allow for liability in contract for the acts done by other persons within their actual or ostensible scope of authority, and vicarious liability in tort.
- (c) Thirdly, special rules of attribution fashioned by the court in situations where a rule of law, either expressly or by implication, excludes the attribution on the basis of the general principles of agency or vicarious liability.

36 The primary rules of attribution are not engaged here. As we held in *Scintronix*, there is a need for collective action of the board of directors in managing the business of the company; such action may be manifested by way of resolutions of the board of directors at meetings convened and conducted in accordance with the company’s constitution or informal assent of all directors of a company: at [52]. In the present case, there is no evidence that the payments to Ms Kaur were authorised by any resolution. And while informal assent of all directors may suffice there is no evidence that Ms Rappa, who was then the only other director on the board of the appellant, knew about and agreed to those

payments. Indeed, it is inconceivable that she would have agreed to a course of conduct that was so clearly against her own interests. That conclusion is also indicated by the fact that she was the one who alerted Mr Singh to the incriminating documents: see [4] above. Similarly, the general rules of attribution are not relevant for the purposes of establishing an illegality defence. This is because, as stated above, the appellant must itself be responsible for the wrong: *Scintronix* at [66].

37 We are therefore concerned with the special rules of attribution. These rules are “context-specific” and their content “should be determined based on the language and purpose of the substantive law upon which potential liability is to be established”: *Scintronix* at [67]. The importance of context was amply demonstrated in *Scintronix*. In that case, Mr Ho Kang Peng (“Mr Ho”), the former CEO and director of TTL Holdings Limited (“TTL”), authorised payment of bribes by TTL to secure business for TTL. TTL sued Mr Ho for breach of fiduciary duties for authorising those payments. It was argued that TTL’s claim must fail because Mr Ho’s illegal acts could be attributed to TTL, the result being that TTL was itself involved in those acts. We did not hesitate to reject that argument. We agreed with the distinction drawn in the English authorities that while a company should be bound by the improper acts of the directors at the suit of an innocent third party, that rule should not apply where the suit is at the instance of the company itself against the directors for their breach of duties: at [70]. Accordingly, we affirmed the High Court’s decision to allow TTL’s claim against Mr Ho.

38 The need to consider the context of the case when determining how the rules of attribution should be applied was echoed by members of the

UK Supreme Court in *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1 (“*Bilta*”). That case involved tax fraud perpetrated by two directors and their associates which ultimately left the company liable to pay more than £38m in tax. The liquidators of the company contended, *inter alia*, that a conspiracy existed to injure and defraud the company. It was argued that the claim was precluded by the defence of illegality because the company was party to the fraud. This argument was, not surprisingly, rejected. As in *Scintronix*, the Supreme Court endorsed the distinction drawn between a case where the purpose of attribution is to apportion responsibility between a company and its agents, or where the purpose was to apportion responsibility between the company and a third party. The importance of context was emphasised by various members of the court. Lord Neuberger of Abbotsbury (with whom Lord Clarke of Stone-Cum-Ebony and Lord Carnwath agreed) held that whether or not it is appropriate to attribute an action by, or 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”: at [9]. Lord Mance wrote of “the need for attention to the context and purpose in and for which attribution is invoked or disclaimed”: at [41]. Lord Toulson and Lord Hodge held that “the legal context, ie the nature and subject matter of the relevant rule and duty, is always relevant” to the question of attribution: at [191].

39 A day after the parties filed their further submissions, the UK Supreme Court delivered its judgment in *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50 (“*Singularis Holdings*”). Lady Hale, delivering the unanimous judgment of the court, wrote:

34 ... in my view, the judge was correct also to say that “there is no principle of law that in any proceedings where the company is suing a third party for breach of a duty owed to it

by that third party, the fraudulent conduct of a director is to be attributed to the company if it is a one-man company”. In her 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 ...

While the parties did not have the opportunity to submit on *Singularis Holdings*, the principles enunciated in that case are entirely consistent with those set out in *Bilta* and *Scintronix*.

40 We also observe that the approach in Hong Kong is the same. In *Moulin Global Eyecare Trading Ltd v The Commissioner of Inland Revenue* (2014) 17 HKCFAR 218, Lord Walker of Gestingthorpe NPJ, sitting in the Court of Final Appeal of Hong Kong, stressed the “importance of context ... in any problem of attribution” (at [41]) and elaborated that the “the crucial matter of context includes not only the factual and statutory background, but also the nature of the proceedings in which the question arises” (at [113]). Chief Justice Ma, Mr Justice Ribeiro PJ and Mr Justice Bokhary NPJ agreed with Lord Walker. And while Mr Justice Tang PJ disagreed with the outcome of the appeal, he agreed with Lord Walker that “questions of attribution are always sensitive to the factual situation in which they arise” (at [12]).

41 It is clear from these authorities that contrary to the Estate’s submissions, there is no hard and fast rule or even presumption that the knowledge or conduct of a sole director or shareholder must be attributed to the company. Instead, the Court must consider both the *legal* and *factual* context of the case. As we shall see, the context of this case is crucial to our decision on the issue of attribution.

42 We begin by identifying the legal rule which is sought to be applied in relation to the company: *Scintronix* at [50]. The applicable legal rule is the defence of illegality, which, as stated above, operates on the premise that the court as a matter of public policy will not involve itself in a dispute between parties where both sides are equally tainted by the same wrong. Thus, the court must ask itself whether allowing the appellant's claim (which could only be done if Mr Singh's knowledge and acts were not attributed to the appellant) would be consistent with the purpose of the defence of illegality: *Scintronix* at [67].

43 In our judgment, it would not. Mr Singh owns 5,099 out of the 5,100 shares in the appellant. The remaining share is owned by his wife. In addition, Mr Singh was and still is the only director involved in the operation and management of the appellant: GD at [5]. The appellant is, therefore, essentially a one-man company run and owned by Mr Singh. If this Court were to allow the appellant's claim against the Estate, Mr Singh would be, effectively, the sole beneficiary of the claim whether by way of increased dividends or director's fees or even the lion's share of the assets upon the appellant's winding-up (if such should occur). In other words, if the appeal were allowed, the Court would effectively be assisting Mr Singh (who for all practical purposes owns all of the shares in the appellant) to recover the fruits of his illegal conspiracy with Ms Kaur to defraud the appellant of its moneys. We also emphasise that if Mr Singh had sued the Estate to recover the moneys due to him (pursuant to his arrangement with Ms Kaur), there would be no question but that his claim would be precluded by the defence of illegality. We see no reason why the result ought to be different merely because Mr Singh seeks to achieve the same result by

interposing the appellant to circumvent a potential illegality defence by the Estate.

44 We add that this case can be distinguished from *Bilta* which the appellant relies on in its further submissions. We have set out the facts in *Bilta* above at [38]. If we followed the result in *Bilta*, the appellant would succeed. The important factual difference between this case and *Bilta* is that there the company was in insolvent liquidation and the action was brought for the benefit of creditors by the liquidators. As we discuss in more detail below, that is not the situation here.

45 On the other hand there is the decision of the UK House of Lords in *Stone & Rolls Ltd v Moore Stephens* [2009] 1 AC 1391 (“*Stone & Rolls*”). We briefly summarise the facts of *Stone & Rolls* which would appear to be a decision in favour of the respondents. The claimant company, which was owned, controlled and managed by one Mr Stojevic, employed the defendant firm of chartered accountants as its auditors between 1996 and 1998. After the claimant went into liquidation, the liquidators brought proceedings in the name of the company in December 2006 for damages for almost US\$174m alleging that the auditors had been negligent in carrying out the audits in those years in failing to detect and prevent Mr Stojevic’s dishonest activities in procuring the company to engage in frauds on banks, in particular a Czech bank, to which it had to pay substantial damages. The action was struck out by a majority of 3-2 in the House of Lords. While there is no clear *ratio* (see *Bilta* at [21]–[24]), the majority, broadly speaking, held that since Mr Stojevic was the beneficial owner and directing mind and will of the company who, as its human embodiment, exercised exclusive control over it, the company was to be imputed with

awareness of the fraudulent activities against the banks and was primarily liable for them. The company was, therefore, not allowed to recover damages from the auditors. *Stone & Rolls* has, however, been the subject of much criticism (*Bilta* at [21]) and is no longer considered in the United Kingdom to have precedential value.

46 In particular, some academics have criticised the majority for failing to be sensitive to the context of the claim in that case: see Hans Tjio, Pearlie Koh and Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at paras 07.039–07.046. A majority of the judges of the UK Supreme Court who heard *Bilta* also took the view that *Stone & Rolls* should not be followed: *Bilta* at [30] (per Lord Neuberger Abbotsbury, with whom Lord Clarke of Stone-cum-Ebony and Lord Carnwarth agreed), [47] (per Lord Mance) and [154] (per Lord Toulson and Lord Hodge). In *Singularis Holdings*, the UK Supreme Court unanimously stated that “*Stone & Rolls* can finally be laid to rest”: at [34]. However, the fact that *Stone & Rolls* is no longer considered good law in the United Kingdom does not stand in the way of the decision we have reached. There is an important distinction between *Stone & Rolls* and the present situation. As in *Bilta*, the company there had been compulsorily wound up and the liquidators were suing the auditors on behalf of the unsecured creditors; there was no likelihood of the fraudulent Mr Stojevic benefitting in any way from a successful claim against the auditors and this factor may have lain behind the criticism of the result of the case which was to allow the auditors to escape the consequences of their negligence.

47 The factual context of the present case is different from both *Bilta* and *Stone & Rolls* because the appellant is still a going concern and Mr Singh is still

very much in control of the appellant. He is therefore in a position to benefit from his fraudulent conduct should the appeal be allowed. This crucial fact is highly relevant to the question of whether the appellant should be allowed to succeed in its claim against the Estate. We repeat the holding in *Singularis* that the answer to the question whether the court should 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 (see [34] of *Singularis*).

48 We now turn to the appellant's further submissions, which we have summarised at [32] above. We address those arguments in the same order:

- (a) The appellant is wrong to start from the premise that it was not tainted by fraud. It assumes what it needs to show – that Mr Singh's acts should not be attributed to it.
- (b) The fact that Ms Kaur (in this case, her estate) would benefit if the appeal were dismissed is merely the result of applying the defence of illegality, which is that the loss must lie where it falls.
- (c) It is plainly illogical for the appellant to justify Mr Singh reaping the rewards of his fraudulent conduct (which would be the indirect effect of allowing the appellant to claim from the Estate) by emphasising that Mr Singh would have been entitled to benefit from the company's business if fraud had not been committed. The appellant is essentially submitting that Mr Singh should face no consequences whatsoever for his wrongdoing, which cannot be right. It also ignores the undeniable fact that the fraud was perpetrated with Mr Singh's complicity.

(d) The effect of our decision on the purported divorce proceedings between Mr Singh and Ms Rappa is a matter for the matrimonial court hearing the ancillary matters. It would be open to Ms Rappa to argue in the matrimonial proceedings, should such ever arise, that Mr Singh had dissipated the asset pool by conspiring with Ms Kaur to defraud the appellant.

(e) The appellant's creditors are not without remedy even if we disallow the appellant from recovering from the Estate. They may, if necessary, apply for the appellant to be wound up. The liquidator could then pursue the appropriate claim against the relevant party or parties for the benefit of the appellant's creditors. We should state however that this appears to be a hypothetical concern only as there is no evidence that the appellant is insolvent and thus in danger of being the subject of compulsory creditor-initiated winding-up proceedings.

49 Accordingly, we attribute Mr Singh's knowledge and acts relating to the fraud to the appellant. The result is that the appellant is precluded from claiming against the Estate. In our judgment, this outcome is consistent with the policy grounds which undergird the defence of illegality.

Other issues

50 For the same reasons, the appellant is precluded from claiming against the second respondent for knowing receipt. And in the light of our conclusion that the appellant is precluded from recovering against the Estate, it is not necessary for us to address the parties' submissions on the defence of limitation.

Conclusion

51 For the above reasons, we dismiss the appeal. We also lift the injunction which the appellant obtained against the Estate. The appellant shall pay the respondents' costs which we fix at \$50,000 inclusive of disbursements. There shall be the usual consequential orders in relation to the undertaking for security for costs furnished by the appellant's solicitors.

Judith Prakash
Judge of Appeal

Tay Yong Kwang
Judge of Appeal

Steven Chong
Judge of Appeal

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