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CIVIL FRAUD ROUNDUP: 2023

Zachary Kell & Alexander Kingston-Splatt

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INTRODUCTION

- *Philipp* v *Barclays Bank* [2023] UKSC 25
- *Tradition Financial Services Ltd v Bilta (UK) Ltd* [2023] EWCA Civ 112
- *Piroozzadeh* v *Persons Unknown* [2023] EWHC 1024 (Ch)
- *Enigma Diagnostics Limited (in Liquidation) and Ors* v *Boulter and Ors* [2023] EWHC 1999 (Ch)

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Philipp v *Barclays Bank* [2023] UKSC 25

"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? […] 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. […] 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…"

***Barclays Bank plc* v *Quincecare Ltd* [1992] 4 All ER 363, 376 (Steyn J.)**

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Philipp v *Barclays Bank* [2023] UKSC 25

- Authorised Push Payment fraud (APP), to be contrasted with a "pull" payment fraud
- Individual pretending to represent the FCA/NCA
- £700,000 transferred to two accounts in UAE, never recovered
- Mrs P sues Barclays for breach of its *Quincecare* duties

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Philipp v *Barclays Bank* [2023] UKSC 25

- Three questions for the Supreme Court:

- (1) Does the *Quincecare* duty have any application in a case where the relevant payment instruction was not issued to the bank by an agent of the bank's customer?

- (2) If not, should either (i) the *Quincecare* duty be extended so as to include the obligations contended for by Mrs Philipp in relation to authorised push payment fraud, or (ii) the law recognise or impose such obligations on a paying bank as incidents of its duty to exercise reasonable skill and care in and about executing an instruction?

- (3) Should the Court determine issues 1 and/or 2 above on a summary judgment and/or strike-out application?

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Tradition Financial Services Ltd v *Bilta (UK) Ltd* [2023] EWCA Civ 112

- First instance: [2022] EWHC 723 (Ch) per Marcus Smith J.
- Missing trader intra-community fraud (or "**MTIC Fraud**")
- EU Emissions Trading Scheme ("**EUA's**")
- *Re Gerald Cooper Chemicals Ltd* [1978] Ch 262 (Templeman J.)
- *Bilta (UK) Ltd (In Liquidation) v Natwest Markets Plc* [2020] EWHC 546 (Ch) (Snowden J.)
- *Banque Arab Internationale d'Investissement v. Morris* [2002] B.C.C. 407 (Neuberger J.)
- *Morris v Bank of India* [2005] EWCA Civ 693

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Tradition Financial Services Ltd v *Bilta (UK) Ltd* [2023] EWCA Civ 112

"A person cannot be made amenable under the section unless he has actively participated in the management of the company. To impose liability on a shareholder it must be shown that he took part in making management decisions which were intended to defraud creditors. A third party who knowingly participates in an act of fraudulent trading committed by a company's directors (for example, a creditor of the company who accepts payment of his debt out of money which he knows its directors have obtained by fraud) may be compelled personally to restore the money so applied by means of an order under the section: In re Cooper Chemicals Ltd [1978] Ch 262."

Lewison L.J at [112]

Quoting O'Flaherty J. in *O'Keeffe* v *Ferris* [1997] 3 IR 463

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Tradition Financial Services Ltd v *Bilta (UK) Ltd* [2023] EWCA Civ 112

"I should make it clear, however, that nothing I say must be taken as setting the outer limits of the scope of section 213 . All that we are asked to decide is whether a person cannot fall within the scope of section 213 unless he has a controlling or managerial function within the company. Whether an "outsider" can be said to be party to the carrying on by a company of a fraudulent business may well be a question of fact and degree which requires careful analysis. That question does not arise in this case, because of the settlement agreement."

Lewison L.J at [118]

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Piroozzadeh v *Persons Unknown* [2023] EWHC 1024 (Ch)

- Mr Piroozzadeh alleged that he was induced by fraudsters, via WhatsApp, to transfer CAD 1,990,051 to two accounts.
- Purpose was to enable foreign exchange trading on an account he was induced to open with one respondent, OA Capital Holdings Limited.
- Later – transfer of eight tranches of cryptocurrency stablecoin Tether into four wallets, comprising 870,818 Tether.
- Fraud discovered. LBAs sent. Investigation agents traced Tether to five wallets held by Binance Holdings Limited.

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Piroozzadeh v *Persons Unknown* [2023] EWHC 1024 (Ch)

- Without notice application heard by Sir Anthony Mann.
- Orders granted included interim proprietary injunction and *Bankers Trust* orders.
- Binance applied to discharge on two main grounds:
  - Application should not have been without notice.
  - Failure to discharge duty of fair presentation.

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Piroozzadeh v Persons Unknown [2023] EWHC 1024 (Ch)

- The fair presentation argument included:
  - First, failure to explain defences, in particular constructive trustee argument.
    - *D'Aloia* v *Persons Unknown* [2022] EWHC 1723 (Ch).
    - *De Agnola* v *Dos Santos* [2018] EWHC 2199 (Comm).
  - Second, inadequate explanation as to why alleged trust may be breached in order to justify the injunction.
  - Third, failure to explain why damages were an inadequate remedy.
  - Fourth, failure to explain how Binance could actually comply with the order sought.

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Piroozzadeh v *Persons Unknown* [2023] EWHC 1024 (Ch)

- Key points:
  - Consider differing positions of different defendants.
  - In particular, compare substantive (alleged) wrongdoers and institutions which may hold proceeds of wrongdoing (or details about it).
  - Consider giving short notice of application.
  - Vital importance of duties of fair presentation and full and frank disclosure.

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Enigma Diagnostics and Ors v *Boulter and Ors* [2023] EWHC 1999 (Ch)

- Mr Nicholas Thompsell, sitting as a DHctJ.
- Rare example of the iniquity exception to legal professional privilege.
- Case concerned alleged "Enigma Investment Scheme" and other related "schemes".
- *R (Morgan, Grenfell & Co Limited)* v *Special Commissioner of Income Tax* [2003] 1 AC 563.
- *R v Cox & Railton* [1884] 14 QBD 153.
- *JSC BTA Bank* v *Ablyazov* [2014] EWHC 2788 (Comm).
- Usually need to show strong *prima facie* case for iniquity exception to apply.

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Enigma Diagnostics and Ors v *Boulter and Ors* [2023] EWHC 1999 (Ch)

- Conclusion:

"39. Taken individually holes can be picked in various of the items put forward by the Claimants as evidence for the proposition that Investors were misled. Indeed the Second and Third Defendants have itemised in their letter dated 30 May 2023 various points that could reasonably be made by way of criticism in relation to various witness statements and other documentation referred to. There is the evidence only of seven investors out of hundreds of investors.

40. Nevertheless, taken as a whole I consider that the evidence put together is impressive and compelling that PCL was systemically telling Investors that the monies aid to DLA Piper would go to Enigma or the other Porton portfolio companies whose shares were being purchased, whilst the truth was that it was in fact trading for its own purposes and kept a substantial proportion of the money, over 60 per cent overall, in the case of Enigma. Mr Furber-Smith's compelling direct evidence is backed up by the other evidence provided to the court. No clear evidence is before the court that suggests that Investors knew that PCL was selling on its own account at a profit."

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Thank you!

zkell@radcliffechambers.com

akingston-splatt@radcliffechambers.com

Radcliffe Chambers
11 New Square
Lincoln's Inn
London WC2A 3QB

T: 020 7831 0081
F: 020 7405 2560
DX: 319 London
clerks@radcliffechambers.com

www.radcliffechambers.com