CHEWTON GLEN TALK

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RECENT DEVELOPMENTS IN CIVIL FRAUD

1. Thank you for inviting me to speak at this event about recent developments in civil fraud. Judges and retired judges in particular like to talk about their own cases so I thought I would not disappoint but srart with one of my own cases in the Court of Appeal but one where we were ignominiously overturned by the Supreme Court. *Philipp v Barclays Bank* [2023] UKSC 25 concerned a case of APP (advanced push payment) fraud of which as Lord Leggatt said giving the judgment, it was a particularly egregious example. The claimant's husband was contacted in February 2018 by an individual who claimed to be working for the Financial Conduct Authority in conjunction with the National Crime Agency and to be investigating a fraud within HSBC and an investment firm Tilney where Dr Philipp held substantial savings. In a series of telephone calls Dr and Mrs Philipp were led to believe that their money needed to be moved to "safe accounts".

2. Dr Philipp, at the instigation of the fraudster, caused £700,000 to be transferred from his investment account with Tilney to his wife's current account with the Bank. On two occasions, Mrs Philipp attended a branch of the Bank in person with her husband and gave instructions for an international payment to be made from her account to a bank account in the UAE. On the first occasion her instruction was to transfer

£400,000 to an account in the name of Lambi Petroleum Ltd (a company with which Dr Philipp told the cashier, falsely, that he had had previous dealings). On the second occasion the instruction given was to transfer £300,000 to an account in the name of Bonito Systems Ltd. On each occasion Dr and Mrs Philipp were following directions given by the fraudster. Before making the transferrin each case, the Bank telephoned Mrs Philipp to seek her confirmation that she had made the transfer request and wished to proceed with it. She gave the confirmation, so the bank made the payments in accordance with her instructions.

3. The Philipps had in fact already been contacted by the police who told them that it was suspected that a fraud was taking place, but they ignored the warning as the fraudster had instructed them not to cooperate with the police. After the second transfer they had another visit from the police who informed them that others had been victims of the fraud, but they said they did not want any involvement with the police. However, the police informed the bank that they had credible information that Mrs Philipp's current account had been compromised by fraudsters, so the bank froze the account. Mrs Philipp instructed the bank to make a third payment of £250,000 to Bonito Systems but was informed that her account was frozen. At the request of the fraudster, she sought to persuade the bank to lift the block on the account, but they refused. It was only after a third visit from the police that the Philipps realised that they had been the victims of a fraud which had deprived them of the bulk of their life savings.

4. In the subsequent proceedings, the claimant's case was that the Bank was under a duty at common law implied into the contract between them "to refrain from executing an order from Mrs Philipp if and for as long

as it was put on inquiry, by having reasonable grounds for believing that the order was an attempt to misappropriate funds from Mrs Philipp". This was said to be an application or an extension of the so-called Quincecare duty (after the decision of Steyn J in *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363) requiring a bank not to execute a payment instruction given by an agent of the customer without making inquiries if the bank has reasonable grounds for believing that the instruction is an attempt by the agent to misappropriate the customer's funds.

5. In *Quincecare* and the subsequent cases which followed it, the common factor was that the instruction came from an agent who was an authorised signatory on the customer's account but was acting in fraud of the customer. In the Court of Appeal in *Philipp* Birss LJ giving the lead judgment recognised that common factor but we accepted the claimant's submission that the reasoning in the *Quincecare* line of cases does not depend on whether the instruction is given by an agent, but is capable of being applied with equal force to the situation where an instruction is given by a customer who is an unwitting victim of APP fraud, where the bank is on inquiry as to the fraud. We accepted that the order to transfer money was "an attempt to misappropriate" the customer's funds within the scope of the duty as formulated by Steyn J as arising where the bank "has reasonable grounds … for believing that the order is an attempt to misappropriate the funds of the customer."

6. However, as Lord Leggatt said in his judgment this was not fundamental to our analysis. Rather the crux of our reasoning, taken from that of Steyn J, was that a bank's primary duty to execute a valid payment order potentially conflicts with its duty to exercise reasonable skill and care

in and about executing such an order and that this conflict or tension may be resolved by requiring the bank in certain circumstances not to execute an order without making inquiries. The Supreme Court held that this analysis in both Quincecare and our judgment was flawed. Having engaged in a detailed analysis of the doctrine of apparent authority of an agent, the Supreme Court at [97] of Lord Leggatt's judgment concluded that the Quincecare duty was not "some special or idiosyncratic rule of law but properly understood, it is simply an application of the general duty of care owed by a bank to interpret, ascertain and act in accordance with its customer's instructions. Where a bank is "put on inquiry" in the sense of having reasonable grounds for believing that a payment instruction given by an agent purportedly on behalf of the customer is an attempt to defraud the customer, this duty requires the bank to refrain from executing the instruction without first making inquiries to verify that the instruction has actually been authorised by the customer." The Supreme Court held that the duty simply did not arise in that case where, even though the customer was the victim of APP fraud, the instructions to the bank were clear and unequivocal coming from the customer not a purported agent. In those circumstances, no enquiries were necessary to clarify what the bank had to do and the bank would have been in breach of duty in failing to comply with the customer's instructions. Accordingly, the appeal was allowed.

7. In *Arena Television v Bank of Scotland* [2025] EWHC 3036 (Comm) decided last November, Butcher J considered so called ABL or asset backed lending fraud, The claimants were an outside television broadcast company and its parent both now in liquidation who claimed to have been the victim of an ABL fraud perpetrated by their directors.

The fraud involved the sale of equipment to an intermediary, often Sentinel, which in turn would sell it to a lender which would pay the intermediary the purchase price which was passed on to the claimants less a commission. At the same time, the claimants would sign a hire-purchase agreement with the lender providing for monthly payments and an option to purchase at the end of the term. The claimants' case was that the vast majority of the equipment did not exist or was subject to prior ABL and that sums in excess of £1 billion obtained by the ABL fraud were not used in the claimants' business but were either misappropriated for the benefit the directors and related parties or used to conceal and perpetuate the misappropriations.

8. The claimants claimed against the banks, alleging that they were liable for breach of their mandates because they had processed payment instructions given without actual authority since they were given in furtherance of the ABL fraud; and that the banks could not rely on apparent authority because they had notice of matters which should have caused them to make inquiries. The banks denied the claims, alleging that the directors had had actual authority to give the instructions for the payments said to have been misappropriations, because they controlled the companies. The banks applied to strike out the claims. They contended that, whereas there could be no actual authority in relation to a payment instruction given by an agent acting dishonestly in fraud of the customer, his principal, there could be actual authority in cases in which the agent was acting, albeit dishonestly vis-à-vis third parties, in pursuance of the customer's business. The banks contended that this distinction between fraud on the company and fraud by the company was recognised by the Supreme Court in *Philipp*, properly understood.

9. The application to strike out was largely dismissed by Butcher J except as regards one aspect not relevant for present purposes. He held that it was arguable, with a reasonable prospect of success, that the relevant law was correctly stated in Article 23 of Bowstead & Reynolds on Agency: an agent only has actual authority to act honestly in pursuit of the interests of the principal. The judge noted that Lord Leggatt had said in *Philipp* that this clearly and correctly stated the law. The judge also held that it was arguable with a reasonable prospect of success that in a case such as that one, there was no workable distinction between a fraud on and a fraud by the principal. The ABL fraud involved not only misrepresentations to lenders but committed the companies to liabilities which would render them insolvent, which could readily be said to be a fraud on the companies. He thus rejected the argument that this distinction had somehow been implicit in the Supreme Court decision in *Philipp*.

10. The judge held that there was a significant argument that the authorities relied on by the defendants, *Barwick v English Joint Stock Bank* (1867) LR 2 Ex 259, *Lloyd v Grace Smith & Co* [1912] AC 716, *Briess v Woolley* [1954] AC 333 and *Armagas Ltd v Mundogas SA (The 'Ocean Frost')* [1986] 717 did not establish the propositions or the dividing line for which they contended. Those cases establish only that if an agent makes a fraudulent misrepresentation within the scope of his actual or apparent authority, the principal will be bound, but do not establish a general proposition capable of being applied in that case as to when an agent will have actual authority to make fraudulent misrepresentations.

11. The judge also considered that, in a case in which the actual authority of directors of a company is said to derive from the terms of articles of association which comprise Table A of the model articles, that actual authority does not extend to acts done in breach of their duty under section 172(1) of the Companies Act to act in a way they consider, in good faith, to be most likely to promote the success of the company for the benefit of its members as a whole.

12. The decision of the Supreme Court in *Bilta UK Ltd v Tradition Financial Services* [2025] UKSC 18 concerned a so-called MTIC ("missing trader intra community") VAT fraud in 2009 involving spot trading in carbon credits under the EU Emissions Trading Scheme, also known as EU Allowances ("EUAs"), which at the time attracted VAT. Such frauds were also known as "carousel frauds" because the goods ostensibly bought and sold went round and round (sometimes more than once), ending up with the original supplier elsewhere in the European Community, one company in the chain (a so-called "missing trader") not paying the output VAT to His Majesty's Revenue and Customs. As Lewison LJ explained in his judgment in the Court of Appeal at [10]:

> "Those involved in MTIC Fraud will usually seek to transact in high-value, easily transportable products. Mobile phones, SIM cards and computer chips were popular product vehicles for MTIC Fraud in the early- to mid-2000s. The fraudsters involved tend to transact in high volume and at high speed and frequency, using back-to-back transactions between linked companies set up or acquired for the purpose. The transaction chains may also include companies that are

not controlled by the fraudsters. The use of a chain of companies obscures the fraud and complicates the task of investigation."

13. By way of a short diversion, when I was Presiding Judge of the Midland Circuit in 2010, I heard confiscation proceedings arising out of the conviction of two leading MTIC fraudsters in relation to large numbers of carousel transactions involving computer chips. They were both serving prison sentences and at the confiscation hearing under the Proceeds of Crime Act which lasted for some ten weeks at the Crown Court at Leicester they represented themselves, being brought from prison each morning. I found that the amount of the benefit which they were each liable to pay was some £92 million on the basis of there having been a carousel, although that was reduced on appeal, from recollection to about £24 million.

14. Anyway, back to *Bilta*. The claimant companies were in liquidation. The liquidators alleged that the defendant had knowingly been party to the carrying on of the companies' businesses for a fraudulent purpose within section 213 of the Insolvency Act 1986. The principal issue on appeal was whether section 213 only applies to persons exercising management or control of the business as the defendants contended. That contention was rejected by all the Courts. It was held that the phrase "any persons who were knowingly parties to the carrying on of the business" for a fraudulent purpose within section 213(2) encompassed not only directors and other "insiders" but any third party who participated in, facilitated or assisted a fraudulent transaction by the company in the knowledge that the business was being carried on for a fraudulent purpose. This conclusion was supported by the legislative context, in particular the surrounding sections to section 213

which defined more narrowly the categories of persons to whom they were directed. It was also supported by the legislative history of the precursors to section 213, which pointed to a parliamentary purpose of expanding the range of persons targeted by the fraudulent trading provisions and by earlier authorities on such provisions including the decision of Neuberger J in *Re BCCI* which was approved.

15. In *Stevens v Hotel Portfolio (UK)* [2025] UKSC 28, the liquidators of the company brought proceedings against the defendants Mr Ruhan ("R") and Mr Stevens ("S"), who had been directors of the company. Cambulo Madeira a company beneficially owned by S but in fact as R's nominee bought three London hotels for £125 million which were subsequently sold to an unconnected party for £320 million. R benefited from the profit on the resale by some £102 million which he then dissipated so it could not be traced. The trial judge Foxton J found that R had breached his fiduciary duty as a director by making unauthorised profits and then breached the constructive trust on which he held those profits by dissipating them; and that S had dishonestly assisted both breaches.

16. However, the Court of Appeal allowed S's appeal and held that the making of the unauthorised profit and its subsequent dissipation were part of a single and uninterrupted course of conduct which, taken as a whole, caused the claimant company no overall loss. That decision was reversed by the Supreme Court. It rejected first S's submission that a constructive trust of unauthorised profits was merely the remedy of equity for the breach of trust constituted by the making of the unauthorised profit, holding that it was a free-standing trust which gave rise to an immediate proprietary interest of the beneficiary, the

company, in the fund representing those profits from the moment of their receipt by the trustee, R; that, therefore, the dissipation by R of a fund of unauthorised profits held on a constructive trust was itself a breach of trust which rendered him liable to compensate the company for the loss caused by such dissipation; that, further, S having dishonestly assisted R in the dissipation of the fund was jointly liable with R to compensate the company for the loss.

17. Second, the Supreme Court held, following *Target Holdings Ltd v Redferns* [1996] AC 421 that the loss caused by the breach of trust consisting of the dissipation of the profit was to be assessed by reference to a "but-for" counterfactual: i.e. what would have been the beneficiary's position but for the breach of trust. It follows that the appropriate counterfactual here was the position that the company would have been in if, once the unauthorised profits had been made, R had performed his duty under the trust and preserved rather than dissipated the fund constituted by those profits, not the position that the company would have been in if the unauthorised profits had never been made.

18. Finally the majority of the Supreme Court then applied the no equitable set-off principle under which, although there may be exceptions, where gains and losses are made and incurred for the trust estate by a series of breaches of trust one breach cannot be set off against the other, with the consequence that the beneficiary is entitled to the gains but the trustee had to bear the losses.

19. In *Mitchell v Al Jaber* [2025] UKSC 43, the claimants were the liquidators of MBI International & Partners, a BVI company of which

the defendant was a director and which was one of the companies in a group owned by him. The company went into liquidation in 2011 whereupon his powers as a director ceased under BVI law. However, in 2016 the defendant caused some 891,000 shares which the Company owned in JJW Inc, another company in the same corporate group to be transferred to an associated company by signing two share transfer forms as "director" and backdating the forms to 2010 prior to the liquidation. Those shares were rendered worthless in 2017 as a result of the transfer of all of JJW Inc's assets and liabilities to another company within the corporate group. The liquidators brought proceedings against the defendant for breach of fiduciary duty in effecting the 2016 share transfers. The trial judge, Joanna Smith J found that he was in breach of fiduciary duty and awarded some €67 million equitable compensation. The defendant appealed to the Court of Appeal on the grounds that (i) he had not owed a fiduciary duty to the company; (ii) the shares were subject to unpaid vendors' liens in favour of the entities which had sold them to the company; and (iii) the shares were worthless at the date of the trial which was when equitable compensation was to be calculated. The Court of Appeal dismissed his appeal on the first two grounds but allowed it on the third. The defendant appealed to the Supreme Court on the first two grounds and the liquidators on the third.

20. The Supreme Court found that the existence of fiduciary duties was not confined to established categories such as a trustee or a company director but could arise on an ad hoc basis where, looking at the matter objectively, someone undertook not to pursue his own interests and to act in the interests of another. It followed that fiduciary duties could arise where a person arrogated to himself, or purported to exercise, a fiduciary power, such as a company director's powers of administration

over the property of the company. By pretending to be a director of the company with power to transfer the shares, the defendant had both assumed fiduciary duties and broken them.

21. The Supreme Court held that an unpaid vendor's lien would be excluded where the joint intention of the parties, viewed objectively, was that there should be no lien. The Court found that the judge had been entitled to find, in the light of the evidence about the nature of the relevant transactions, that the unpaid vendor's liens contended for by the defendant had been excluded.

22. It then held that the general objective of a court of equity in awarding compensation for misappropriation of property where the property could not be returned in specie was to return to the claimant the value of the property misappropriated. There was no general or fixed rule that such compensation was to be assessed at the date of the trial, but this was an open question which required consideration of what was just and equitable as between the company and the fiduciary. If the property had value at the time it was misappropriated, the claimant suffered an immediate loss of that value at the time of the misappropriation. The Court said at [101] that:

> "In such a circumstance, if the defaulting fiduciary wishes to rely upon a supervening actual or counterfactual event breaking the chain of causation between the breach and the beneficiary's loss, on an assessment looking at all the information available to the court at trial, the burden lies squarely upon the fiduciary to prove that supervening event and to show that it should be treated as having

that impact on the analysis of the causative link between the breach of duty and the loss suffered by the beneficiary."

23. Supervening events were unlikely to qualify if the fiduciary had a hand in them in the absence of a convincing innocent explanation. As the Court said at [110]: "In line with the principle referred to by Lord Toulson in AIB, a wrongdoing fiduciary could not rely on any later wrongdoing by himself to reduce the loss regarded as flowing from his initial wrongdoing; and, if the fiduciary has not discharged the burden of proof on him, one cannot be sure that his later actions are not affected by wrongdoing." The Supreme Court concluded that the defendant could not discharge that burden and allowed the appeal by the liquidators restoring the judge's order for payment of equitable compensation.

24. Finally I will refer to the recent Privy Council decision in *Credit Suisse Life (Bermuda) Ltd v Ivanishvili* [2025] UKPC 53. The plaintiff was the former Prime Minister of Georgia. On the advice of L, the relationship manager at his bank, he transferred $750,000 to the defendant Bermudian insurance company, a subsidiary of the bank, as premiums under two life assurance policies. Less than three years after discovering that L had dealt with the policy assets fraudulently, he brought a claim against L in Bermuda for breach of contract and of fiduciary duty. More than three years later the plaintiff applied to amend his claim to include a claim for damages for fraudulent misrepresentation, relying on implied representations made by L on behalf of the defendant.

25. The Chief Justice heard the trial, allowed the amendment application and gave judgment for the plaintiff on the breach of contract and of fiduciary duty claim and the misrepresentation claim. The defendant appealed to the Court of Appeal of Bermuda which dismissed the appeal in respect of breach of contract and of fiduciary duty but allowed the appeal in respect of misrepresentation. The Court of Appeal held that, in order to establish liability for fraudulent misrepresentation, it was necessary to show that the plaintiff had been consciously aware of the misrepresentation and understood it to have the meaning alleged, which the plaintiff had failed to do. It also held that the misrepresentation claim was time-barred pursuant to section 34A of the Limitation Act 1984 (which was equivalent to section 1 of the Foreign Limitation Periods Act 1984 in England and Wales) because it had been brought after the expiry of the three-year limitation period under Georgia law.

26. The defendant appealed to the Privy Council in respect of the breach of contract and of fiduciary duty and the plaintiff cross-appealed the dismissal of the misrepresentation claim. The Privy Council dismissed the appeal except on one ground on which it decided that the start date for damages for breach of contract should be later than found by the Chief Justice. However, it is one particular aspect of the Privy Council decision to dismiss the cross-appeal on which I want to focus.

27. At [115] of its judgment, the Privy Council noted that the Chief Justice found that, by recommending investment in the LPI policies, L impliedly represented that the Bank (including L himself) was not managing the plaintiffs' accounts fraudulently and did not intend to manage the policy assets fraudulently. Those representations were false and known to be so by L. They were intended to, and did, induce the

plaintiffs to enter into the LPI policies. Those findings were affirmed by the Court of Appeal and not challenged before the Privy Council. The issue on the cross-appeal on which I want to focus is whether the Court of Appeal was right to hold that the misrepresentation claim failed because the plaintiff had not pleaded and proved that he had any conscious awareness or understanding of the representations made to him.

28. The Privy Council considered first whether the misrepresentation claim was actionable as a matter of Bermudian law (which was taken to be the same as English law). The question of law it addressed in that context was whether it is an essential legal requirement of a claim in deceit that the plaintiff had contemporaneous awareness and understanding of the representation on which the claim is based. This was a question on which there were conflicting authorities. There is not time to go through the entire analysis but for those of you who are interested, the whole section of Lord Leggatt's judgment from [130] to [180] merits reading. The Privy Council concluded without hesitation that it was not an essential requirement of the tort of deceit that the plaintiff had contemporaneous awareness and understanding of the representation and that the modern cases which had imposed such a requirement were wrongly decided.

29. Those cases were said to have been decided on the basis of three misconceptions. The first was that unless the claimant can show that it was consciously aware of the representation and understood what representation was being made, it cannot show reliance on the representation. At [161] Lord Leggatt said that reliance or inducement had two aspects, that the representation must have deceived the claimant by

causing it to hold a false belief and that, because of holding that false belief, the claimant must have acted so as to suffer loss. Whilst both aspects of reliance require the representation to operate on the mind of the claimant, neither logically requires the claimant to be consciously aware of the representation at the time when the claimant acts on it. Lord Leggatt reiterates the example which he refers to in various places in his judgment of the taxi driver who is hailed by a passenger who intends to run off without paying the fare at the end of the ride. The driver naturally assumes without giving the matter any thought at all that the passenger intends to pay, as he put it: “the claimant is aware of the conduct which gives rise to the representation but acts on it without conscious thought”. In that example there has been reliance on an implied representation.

30. Lord Leggatt noted that the suggestion that the representation must be "actively present to [the claimant's] mind" had its source in a dictum of Bowen LJ in *Edgington v Fitzmaurice* (1885) 29 Ch D 459. In that case the Court of Appeal famously held that it was sufficient to establish inducement that the claimant was induced by the misrepresentation, there a misstatement in the prospectus, even though the claimant was also induced to invest by his own mistake that the debentures were secured by a charge over the company’s property. Bowen LJ said:

> "But such misstatement was material if it was actively present to his mind when he decided to advance his money. The real question is, what was the state of the plaintiff's mind, and if his mind was disturbed by the misstatement of the defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference. It resolves itself into a mere question of fact."

31. Lord Leggatt said that it was wrong to treat this much-cited dictum as authority for a requirement that, to prove causation, a plaintiff must always show that he gave conscious thought to the representation made. The only relevant question was whether the misrepresentation had in fact caused the plaintiff to act as he did and the case is not authority for the proposition that conscious awareness is logically or legally necessary for liability in deceit.

32. At [170] Lord Leggatt recognised that sometimes it may be necessary to show that the claimant understood the defendant's words to convey a particular meaning, when they were unclear or ambiguous and the representation is only false if it bears one particular meaning. The other nineteenth century cases of *Smith v Chadwick* (1884) 9 App Cas 187 and *Arkwright v Newbold* (1881) 17 Ch D 301 were examples of this. These were cited by Christopher Clarke J in *Raiffeisen Zentralbank Österreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm) as establishing that a requirement of awareness or understanding was said to be an essential element of the cause of action. At [173] Lord Leggatt said that: "The mistake made in *Raiffeisen* and cases which have followed it has been to treat what in practice needs to be shown to establish deceit in particular factual circumstances as if it were a necessary element of the cause of action."

33. The second misconception in the modern cases was said at [174] to be "that a distinction needs to be drawn between cases where the claimant has relied on a representation and cases where the claimant has acted on an assumption. The idea is that, if the claimant has acted on an

assumption, it cannot be said that the defendant's representation caused the claimant to hold a false belief. The source of the error must lie with the claimant." Lord Leggatt described this as a false dichotomy as the categories of representation and assumption are not mutually exclusive. Rather, as he said at [176]:

> "What matters is whether, in a case where the claimant has acted on an assumption, the assumption was one which the claimant would naturally be expected to make in response to the defendant's words or actions or whether it was one made independently by the claimant. If the claimant has acted as a result of an erroneous belief not caused by the defendant, the defendant will not be liable."

34. The third misconception in the modern cases was that requiring awareness of representation is necessary to preserve the distinction between misrepresentation and non-disclosure. Lord Leggatt explained the distinction at [178]:

> "The distinction turns on whether the defendant (1) has done something to cause the claimant to hold a false belief on which the claimant has acted to its detriment or (2) has merely failed to inform the claimant of a material fact or to correct a false belief which the claimant independently holds. A case may fall in the first category without the claimant being aware of what the defendant has done, as *Gordon v Selico* and other examples mentioned earlier show. Such ignorance does not turn the case into one of non-disclosure. The seller who takes active steps to conceal a defect in order that a buyer should not discover it stands in a different position from the seller who is aware of a defect not apparent to the buyer but does nothing actively to hide it. The line

is not always easy to draw. But it depends entirely on what the defendant has or has not done and not at all on the claimant's awareness or understanding of acts done by the defendant."

35. The Privy Council therefore concluded that it is not a legal requirement of a claim for deceit that the claimant was aware of the representation or understood it to have been made and the Court of Appeal of Bermuda had been wrong to so hold. However, the Privy Council went on to hold that the Court of Appeal had been right to conclude that the claim was not actionable under Georgia law because under that law it was time-barred so that ultimately the cross-appeal failed.

36. I hope this has not felt too much like the greatest hits of the Supreme Court on civil fraud of 2025, but I also hope that it has given you a useful summary of some of the recent developments in this area. Thank you once again for inviting me to talk. If there is time, I am happy to take questions.