Neutral Citation Number: [2025] EWHC 3036 (Comm)

Case Nos: CL-2024-000377 and CL-2024-000587

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/11/2025

Before :

MR JUSTICE BUTCHER

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Between :

CL-2024-000377

(1) ARENA TELEVISION LIMITED (IN LIQUIDATION)
(2) ARENA HOLDINGS LIMITED (IN LIQUIDATION) — **Claimants**

- and –

(1) BANK OF SCOTLAND PLC
(2) LLOYDS BANK PLC — **Defendants**

- and –

SENTINEL BROADCAST LTD (IN ADMINISTRATION) — **Part 20 Defendant**

And Between

CL-2024-000587

SENTINEL BROADCAST LTD (IN ADMINISTRATION)

Claimant

-and-

LLOYDS BANK PLC

Defendant

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- -

Lance Ashworth KC and William Day (instructed by **Stewarts Law LLP**) for the **Claimants in CL-2024-000377**
Joseph Curl KC and Jon Colclough (instructed by **Isadore Goldman**) for the **Claimant in CL-2024-000587**
Simon Salzedo KC, Joanne Box and Mohammud Jaamae Hafeez-Baig (instructed by **Eversheds Sutherland (International) LLP**) for the **Defendants**

Hearing dates: 6-9 October 2025

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Approved Judgment

This judgment was handed down remotely at 10.00am on 19 November 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE BUTCHER

Mr Justice Butcher:

Introduction

1. There are before the court applications for summary judgment / strike out in two actions: CL-2024-000377 ('the Arena Proceedings') and CL-2024-000587 ('the Sentinel Proceedings'). The Arena Proceedings and the Sentinel Proceedings are being case managed and are to be tried together pursuant to an order of Robin Knowles J dated 28 March 2025.

2. In both sets of proceedings the Claimants bring what have been loosely (and, now, anachronistically) described as '*Quincecare* claims' against the relevant Defendant(s). In each set of proceedings, these claims arise out of what the Claimants contend to have been a large-scale fraud, which has been called the 'asset backed lending fraud' or 'ABL Fraud'.

The Arena Proceedings

3. In the Arena Proceedings, the Claimants are Arena Television Limited, which I will call 'Arena TV', and Arena Holdings Limited, which I will call 'Arena Holdings'. They are companies in the same group (the 'Arena Group'). Where I refer to both together I will call them 'the Arena Claimants'. From the pleadings served, it appears uncontroversial that Arena TV was the main trading company and carried on business as an outside television broadcaster, while Arena Holdings was the parent company. It is the Arena Claimants' pleaded case that at the material times, 99.8% of the issued share capital of Arena Holdings was held by Mr Richard Yeowart, and that he and Mr Robert Hopkinson were directors of both the Arena Claimants.

4. Arena TV held GBP and USD current accounts with Bank of Scotland PLC ('BoS') from February 2002 (the 'GBP BoS Account') and August 2011 ('the 'USD BoS Account') respectively. Arena Holdings held a GBP current account with Lloyds Bank PLC ('Lloyds') from July 2006 ('the Lloyds Acount'). I will refer to these accounts as 'the Arena Accounts'. From January 2009, BoS and Lloyds have been part of the same banking group.

5. The Claimants in the Arena Proceedings contend that the ABL Fraud involved purported ABL arrangements in respect of television and production equipment. In outline, they allege:

   (1) Mr Yeowart and Mr Hopkinson purported to source equipment and procure Arena TV or Arena Holdings to sell it to an 'intermediary', which was often but not always Sentinel Broadcast Ltd ('Sentinel'), who in turn would sell it to a lender (of which there were some 55 in total). The lender would pay the intermediary the purchase price, and the intermediary would pass those proceeds to Arena TV or Arena Holdings minus a commission of around 1%.

   (2) In parallel, Mr Yeowart and Mr Hopkinson would sign a hire-purchase agreement for Arena TV or Arena Holdings with the lender, permitting Arena TV or Arena Holdings to use the equipment in return for monthly payments, and with an option to acquire the equipment at the end of the term. The monthly payments would cover the cost of the equipment plus finance charges.

(3) In reality the vast majority of the equipment did not exist or was subject to prior ABL. Their investigations to date suggest that in excess of £1.2 billion of ABL was obtained for at least 8,196 purported pieces of equipment but only 66 pieces of equipment actually existed. Of the sums procured by the ABL Fraud the majority (over £1 billion) was paid into the Arena Accounts.

(4) The sums obtained by the ABL Fraud were not used in the Arena Group's businesses but were either (a) misappropriated for the benefit of Mr Yeowart, Mr Hopkinson and related parties or (b) used to conceal and perpetuate those misappropriations by (i) giving a false impression as to the Arena Group's turnover and/or (ii) being used in a Ponzi-like manner to fund new deposits and meet existing repayment obligations.

6. The Arena Claimants contend that there were a number of facts and matters which would have caused a reasonably skilful and careful banker in the position of BoS and/or Lloyds to make inquiries as to whether the transactions passing through the Arena Accounts were truly authorised. In particular, they contend, upon periodic reviews by the relationship management team, when fresh credit was requested or extended to the Arena Group, when the Arena Accounts went into excess/overdrawn positions and/or from internal reporting systems it would have been apparent that:

(1) Arena TV and Arena Holdings were using, and dependent on using, the proceeds of fresh ABL and/or payments from Sentinel or other intermediaries rather than trading revenue to discharge liabilities in respect of previous ABL;

(2) The manner and volume of ABL and the use of the Arena Accounts was inconsistent with the Arena Group's legitimate business activities and revenues or the legitimate acquisition or use of the equipment;

(3) Substantial payments were going out of the Arena Accounts to or for the personal benefit of Mr Yeowart and Mr Hopkinson.

7. In the event, the Arena Claimants say, certain lenders discovered the ABL Fraud in or around November 2021. That resulted in the appointment of joint administrators (now joint liquidators), and the subsequent commencement of civil and criminal proceedings against Mr Yeowart and Mr Hopkinson. They fled the jurisdiction and no recoveries have yet been made from either of them by the Arena Claimants.

The Sentinel Proceedings

8. In the Sentinel Proceedings, Sentinel is the sole Claimant. It is alleged that Sentinel was incorporated in April 2002, and that at all times until its administration it was controlled by its director, Paul Antony Froom. Sentinel operated a bank account with Lloyds ('the Sentinel Account'). Sentinel alleges:

(1) Mr Froom participated in the ABL Fraud, by causing Sentinel to 'sell' non-existent equipment to lenders. The lenders then leased the fictitious equipment to the Arena Claimants under hire purchase agreements, and 99% of the money received from the lenders was, on the instructions of Mr Froom, paid from the Sentinel Account to the Arena Claimants ('the Arena Payments').

(2) A total of (roughly) £1.085 billion was paid to Sentinel by various financial institutions, and (roughly) £1.078 billion was paid from the Sentinel Account to the Arena Claimants.

(3) When Sentinel 'sold' the equipment to the lenders it became indebted/liable to them pursuant to s. 51(1) Sale of Goods Act 1979. As a result, at all times after July 2002, Sentinel was insolvent.

(4) For various reasons, from 30 April 2012, Lloyds had reasonable grounds for believing that Mr Froom was not authorised to instruct Lloyds to make the Arena Payments.

9. On 7 July 2022, Sentinel entered into administration pursuant to an order of the High Court on the application of a creditor called Investec Asset Finance PLC. Its Administrators have received proofs of debt in the total sum of (roughly) £416.3 million and expect to receive further proofs of debt in due course.

The Statements of Case in the Proceedings

10. The Arena Proceedings were commenced on 28 June 2024. A Defence and Counterclaim was filed on 24 October 2024 and a Reply and Defence to Counterclaim was filed on 31 January 2025.

11. In the Particulars of Claim in the Arena Proceedings the Arena Claimants allege that:

(1) BoS and Lloyds breached their banking mandates with the Arena Claimants by processing payment instructions given by Mr Yeowart and Mr Hopkinson without the Arena Claimants' actual authority. It is said that Mr Yeowart and Mr Hopkinson lacked actual authority because the Arena Accounts were not used in the legitimate trading of the Arena Group and because the payment instructions, or most of them, were given in furtherance of the ABL Fraud.

(2) BoS and Lloyds cannot rely on Mr Yeowart's and Mr Hopkinson's apparent authority as authorised signatories because BoS and Lloyds (i) had notice of facts and matters which would cause a reasonably skilful and careful banker in their position to make inquiries and (ii) failed to make such inquiries. Alternatively it is said that BoS and Lloyds breached their respective duties to the Arena Claimants by failing to make inquiries as to whether Mr Yeowart and/or Mr Hopkinson were in fact authorised and by failing to refrain from processing payment instructions pending satisfactory resolution of those inquiries.

(3) BoS and Lloyds are liable to reconstitute the relevant accounts in the sums of (roughly) £214.1 million (for the GBP BoS Account), $8.4 million (for the USD BoS Account) and £66.8 million (for the Lloyds Account). The Arena Claimants say that they have given credit for payments made to the lenders that purported to discharge liabilities owed to the lenders, on the basis that otherwise the Arena Claimants would be unjustly enriched. This claim is pleaded in paragraphs 51-56 of the Particulars of Claim. An alternative claim in damages for breach of duty in the same amounts is pleaded in paragraph 61 of the Particulars of Claim.

(4) Further or alternatively, BoS and Lloyds are liable for damages of (roughly) £259.2 and £6.98 million, representing in each case the difference between (1) the Arena Claimants' liability to lenders as at 28 November 2008 (in the case of BoS) and as at 1 April 2009 (in the case of Lloyds) and (2) the Arena Claimants' liability to lenders as at the date of their administration. This claim is pleaded in paragraphs 59-60 of the Particulars of Claim.

12. In their Defence and Counterclaim in the Arena Proceedings, BoS and Lloyds have denied the claims in their entirety. They have also filed a Part 20 claim against Sentinel.

13. Of note, because particularly relevant to one of the applications before the Court, are the following:

(1) At paragraph 4.1 of the Defence and Counterclaim, it is alleged that: 'Mr Yeowart and/or Mr Hopkinson had the Claimants' actual authority to give the payment instructions for those payments alleged to have been misappropriations … by reason of their control of the Claimants and/or pursuant to the mandates and terms and conditions applicable to the Accounts'. Paragraph 41 makes a similar plea, and particularises that the mandates applicable to the Accounts meant that BoS was entitled to act on the instructions of Mr Yeowart and/or Mr Hopkinson 'without making further enquiries into the purpose for which they were given or any circumstances relating to them', and that Lloyds was entitled to act on any instruction 'without enquiring about its purpose, or the circumstances in which it is given, or about the dissipation of any proceeds.' A further similar plea is made at paragraph 43.3(a) of the Defence and Counterclaim.

(2) In paragraph 81 it is pleaded that, if the Defendants are liable to pay any sums to the Arena Claimants, then the Arena Claimants are liable to the Defendants for the same sums in deceit, on the basis that payments will have been made out of the accounts by the Defendants in reliance on fraudulent misrepresentations made by Mr Yeowart and/or Mr Hopkinson which are attributable to the Arena Claimants or for which they are vicariously liable.

(3) In paragraphs 82-90 it is pleaded that, if the Defendants are liable to pay any sums to the Arena Claimants, then the Arena Claimants are liable to the Defendants in conspiracy, on the basis that the Arena Claimants, Sentinel, Mr Yeowart, Mr Hopkinson and Mr Froom (or any two together) wrongfully and with intent injured the Defendants by unlawful means.

14. In its Particulars of Claim in the Sentinel Proceedings, Sentinel alleges:

(1) Mr Froom's payment instructions to Lloyds in relation to the Arena Payments were given without Sentinel's actual authority.

(2) Lloyds cannot rely on Mr Froom's apparent authority because it ought to have been apparent to Lloyds that the payments to the Arena Claimants indicated or involved wrongdoing.

(3) As a result, Lloyds is liable to reconstitute Sentinel's bank account in the sum of the £1.078 billion which Sentinel paid to the Arena Claimants, alternatively £944.8 million (which Sentinel paid to them after 30 April 2012).

(4) Alternatively, Sentinel claims damages for breach of duty in the sum of £944.8 million (being the value of the payments to the Arena Claimants after 30 April 2012).

The Applications made

15. Three applications have been issued and are before the Court.

16. The first two applications were issued by Lloyds and BoS (in the Arena Proceedings) ('the Arena Application') and by Lloyds in the Sentinel Proceedings ('the Sentinel Application'). Each was issued on 18 December 2024.

17. In the Arena Application, what is sought is:

(1) An order that the Arena Claimants' claims (1) for reconstitution of the relevant accounts as pleaded in paragraphs 51-56 of the Particulars of Claim and (2) breach of duty as pleaded at paragraph 61 of the Particulars of Claim should be struck out pursuant to CPR r. 3.4(2)(a), 'save insofar as the claims relate to payment instructions by which Mr Yeowart and/or Mr Hopkinson extracted monies for their direct personal benefit'; alternatively that there should be summary judgment under CPR r. 24.3 in favour of the Defendants in respect of those claims. This has been called 'Ground 1' of the Arena Application.

(2) An order that the Arena Claimants' claims for breach of duty as pleaded at paragraphs 59 and 60 of the Particulars of Claim be struck out, alternatively summary judgment be entered in favour of the Defendants in respect of those claims. This has been called 'Ground 2' of the Arena Application.

18. By the Sentinel Application, Lloyds seeks the striking out or summary dismissal of the entire claim.

19. The third application is one issued by the Arena Claimants in the Arena Proceedings ('the Arena Cross-Application'). By this application the Arena Claimants seek an order for the striking out or for summary judgment in respect of: (1) paragraphs 4.1, 41 and 43.3 of the Defence and Counterclaim ('Ground 1 of the Arena Cross-Application'), and (2) the Defendants' counterclaims in deceit and unlawful means conspiracy pleaded at paragraphs 81 to 90 of the Defence and Counterclaim ('Ground 2 of the Arena Cross-Application').

The Parties' Submissions

Arena Application Ground 1 and Sentinel Application

20. The parties' submissions relating to Ground 1 of the Arena Application and as to the Sentinel Application may be summarised as follows.

21. The Defendants' case was that it was clear that all instructions for the Arena Payments from the Sentinel Account to the Arena Claimants were made with Sentinel's actual authority. As to the Arena Claimants, all payments from the Arena Accounts, other than payments by which Mr Yeowart or Mr Hopkinson dishonestly extracted money for their personal benefit, were either pursuant to legitimate business or were part of the fraudulent scheme conducted jointly by the Arena Claimants and Sentinel against the

lenders, and all instructions to make such payments were given with the actual authority of the Arena Claimants.

22. The Defendants accepted, for the purposes of this application, the factual allegations made in the Particulars of Claim in each of the actions. But they submitted that it could, on the basis of those (alleged) facts, be seen that there was actual authority (from Sentinel and the Arena Claimants as the case may be) for the payment instructions identified in the previous paragraph. This, they argued, was because it is well established that an agent's authority includes authority to make fraudulent misrepresentations to third parties about matters within the scope of their authority.

23. In the present case, where the relevant Claimants were companies, they could only act through human agents. The authority of those agents came from the companies' constitutions, in particular from the articles. Those articles were in standard form, incorporating Table A (of the Companies (Tables A to F) Regulations 1985), and placed the conduct of the companies' businesses in the hands of the directors. If the company's business included making profit by defrauding third parties, then that business was authorised, and the company became a wrongdoer which could be sued by the innocent third parties.

24. This, the Defendants argued, is because those transactions were actually authorised by the companies. It is not merely a question of the directors having had (or potentially having had) ostensible or apparent authority from the relevant company, it being agreed on all sides that insofar as questions of ostensible or apparent authority arose, they could not be resolved at this hearing and would have to be resolved at trial. It is rather that the articles must be construed or interpreted as including the conferral of authority on the directors to conduct dishonest business on behalf of the company. However, they were not to be construed as including the conferral of authority on the directors to divert the company's resources to the agent's (i.e. the director's) own use, because that was not conducting the company's business. The distinction was between transactions which are a fraud **by** the company, as against a fraud **on** the company; and transactions which the agent enters into for his or her own interest and against the interests of the company are in the latter category, and will not have been actually authorised.

25. These principles, and the distinction referred to in the previous paragraph, were said to be established by long standing and binding authority. Reliance was placed, in particular, on 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. Reference was also made to various other authorities, including Senex Holdings Ltd v National Westminster Bank plc [2012] EWHC 131 (Comm) and Ivy Technology Ltd v Martin [2022] EWHC 1218 (Comm).

26. According to the Defendants, the Claimants' case in these two sets of proceedings appears to have been based on a misunderstanding of the decision of the Supreme Court in Philipp v Barclays Bank UK Plc [2024] AC 346 ('Philipp'). That case, the Defendants submitted, recognised and adopted the distinction which they drew, and which has been outlined above, namely that, unless expressly agreed, there can be no actual authority in relation to a payment instruction given by an agent acting dishonestly 'in fraud of' the customer, or where the payment instruction was 'an attempt to defraud the customer'; but it did not suggest that there would not 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.

27. The principles, and the distinction between fraud by and fraud on the company, for which they contended were, the Defendants argued, necessary to provide proper protection to third parties. On the Claimants' case, third parties would have to seek to establish ostensible or apparent authority in every case of dishonest directors of a company. That is not how the law has been understood, and would be highly inconvenient, especially in a case in which there are many third parties who may have been caught up in a fraud by a company.

28. Furthermore, the logic of the Claimants' case, here, was that it would mean that the Defendants were liable to Sentinel for amounts far greater than the amounts claimed by Sentinel's creditors in its administration to date. If the claim in the Sentinel Proceedings were a valid claim it would, in the ordinary course, benefit Mr Froom as the sole shareholder of Sentinel to the extent of more than £500 million, even though the premise of the claim is that it arises from a substantial fraud committed by Mr Froom and Sentinel themselves. The absurdity of this is not adequately met by the position adopted by Sentinel's administrators in July 2025 to the effect that Sentinel would not seek to claim more from the Defendants than is necessary to make the insolvent estate whole, and that nothing will go to Mr Froom.

29. For the Arena Claimants, it was submitted that the present application had to proceed on the basis that the factual matters pleaded both in the Particulars of Claim and in the Reply and Defence to Counterclaim were assumed to be true. The Reply and Defence to Counterclaim included averments that the 'overarching purpose' of the ABL Fraud was 'the dishonest extraction of funds from the Claimants' for the benefit of Mr Yeowart and Mr Hopkinson; that all the three categories of payment identified in paragraph 27(5) of the Particulars of Claim were 'necessary for or ancillary to the dishonest extraction of funds' or 'for the concealment of the same', and so were all 'pursuant to the ABL Fraud'; and that none of the three categories was for lawful commercial purposes. Payment instructions in relation to all those payments were in breach of Mr Yeowart's and Mr Hopkinson's fiduciary duties.

30. The Arena Claimants submitted that the legal position as to actual authority is accurately stated in Article 23 of *Bowstead & Reynolds on Agency* (23rd ed) ('*Bowstead*'), as follows:

> 'Authority to act as agent includes only authority to act honestly in pursuit of the interests of the principal'.

That formulation is supported by the Australian decision in Lysaght Bros & Co Ltd v Falk (1905) 2 CLR 421 (HCA) and was approved by Lord Leggatt in Philipp (at [72]).

31. If a director acts in breach of the duties he owes to a company, in particular the duties under s. 172(1) Companies Act 2006, which provides that '[a] director must act in the way he considers, in good faith, would be most likely to promote the success of the company', then he will not be acting 'honestly in pursuit of the interests of' his principal, the company, and will not have actual authority to do so. The link between the implied limitation on an agent's actual authority and the agent's fiduciary duties is established by numerous authorities, including Criterion Properties plc v Stratford UK

Properties LLC [2004] UKHL 28, as well as Hopkins v TL Dallas Ltd [2004] EWHC 1379 (Ch), and LNOC Ltd v Watford Association Football Club Ltd [2013] EWHC 3615.

32. The Barwick line of authorities, relied on by the Defendants, simply holds that a principal may only be liable for the deceit of an agent if the agent has acted within the scope of his or her actual or apparent authority. None of these cases decides that an agent is authorised to act dishonestly save where the agent is acting to divert the principal's monies for their own use.

33. The Defendants' case on the dividing line between actually authorised transactions which are frauds by the company, and unauthorised transactions which are frauds on the company has not been drawn consistently by the Defendants, and lacks coherence. As to inconsistency: in their application, the Defendants formulated the payment instructions which fell on the unauthorised side of the dividing line as being those by which Mr Yeowart and/or Mr Hopkinson 'dishonestly extracted monies for their direct personal benefit'. In Mr Salzedo KC's oral submissions and in a document whereby the Defendants proposed a legal issue for Ground 1 of their application, however, it was put that there would be no actual authority in relation to payment instructions given in fraud of the company '*including in particular* instructions to transfer monies to, or for the direct benefit of, the directors…'. The italicised words indicated a wider, but indefinite, category of supposedly unauthorised transactions.

34. As to incoherence, a number of points were made. One was that there was no convincing reason given as to why Article 23 of *Bowstead* should be limited to some types of breach of fiduciary duty. There is no basis in the authorities or in logic for saying that a director is not authorised to breach s. 172(1) Companies Act 2006 by dishonestly extracting funds from the company for his own benefit, but is authorised to breach s. 172(1) in other ways. Another was that the distinction between a fraud 'by' and a fraud 'on' the company is untenable. The ABL Fraud was both a fraud by the Arena Claimants and on the Arena Claimants. It left the Arena Claimants hopelessly insolvent.

35. Sentinel's submissions overlapped those of the Arena Claimants. It submitted that the basis of Lloyds' application was the proposition that Sentinel's director had actual authority to act in breach of the duties he owed to Sentinel (including at a time when those duties fell to be discharged taking into account the interests of Sentinel's creditors) and had actual authority to give payment instructions that involved the misapplication or misappropriation of money from Sentinel on a large scale. That was a surprising proposition which was plainly wrong.

36. Specifically: (1) a director does not have actual authority to breach his or her fiduciary duties, let alone to act in a way that s/he considered would actively damage the interests of the company or, where the creditor duty is engaged, its creditors; and (2) the supposed distinction between frauds by and on the principal is not based on or supported by authority, and in any event, the pleaded ABL Fraud was a fraud on Sentinel. (The 'creditor duty' is a reference to the fact that, when a company is insolvent or bordering on insolvency, the interests of the company include the interests of its creditors. As a result, a director has to have regard to their interests. Reference was made to the decision of the Supreme Court in BTI 2014 LLC v Sequana SA [2022] UKSC 25, esp at [51] per Lord Reed.)

37. In relation to (1), Lloyds had had to accept, for the purposes of this application, that, as pleaded in the Particulars of Claim in the Sentinel Proceedings, in causing and/or procuring and/or allowing instructions to be given to Lloyds to make the Arena Payments, Mr Froom acted in breach of the duties he owed as a director of Sentinel. The premise of Lloyds' application was that Mr Froom had actual authority to give those instructions. Thus Lloyds' case was that he had actual authority to act in breach of duty and dishonestly, in a way that was positively adverse to the interests of Sentinel and its creditors. That is an impossible contention. There was nowhere from which this authority could have come. Mr Froom could not have self-authorised; and the shareholders of Sentinel could not grant him such authority in light of the insolvency of the company and the dishonesty of the transactions in question.

38. In relation to (2), there is no binary distinction established by case law between frauds by a principal and frauds on the principal. However, even if there were such a distinction, the ABL Fraud was a fraud on Sentinel. The Arena Payments caused Sentinel large losses. That Sentinel should be regarded as a victim of the fraud is supported by the authority of Brink's Mat Limited v Noye [1991] 1 Bank LR 68.

Arena Application Ground 2

39. The parties' submissions in relation to Ground 2 of the Arena Application may be summarised as follows.

40. The Defendants seek the striking out of the Arena Claimants' pleaded claim for losses arising from the continuation of the ABL Fraud. That plea is that, but for the Defendants' alleged breaches of duty, inquiries would have been made by November 2008 (in the case of BoS) and by April 2009 (in the case of Lloyds) as to whether Mr Yeowart and/or Mr Hopkinson were acting without authority; the result of those inquiries would have revealed that Mr Yeowart and Mr Hopkinson were acting dishonestly to further their own interests; while those inquiries were being carried out, no payments would have been made out of the Arena Accounts and no payments would have been made out of the Arena Accounts once the inquiries had been concluded, Mr Yeowart and Mr Hopkinson would therefore not have been able to continue the ABL Fraud, and the Arena Claimants would not have incurred any further liabilities to third parties. On that basis, the Arena Claimants claim losses arising out of the continuation of the ABL Fraud, in the amount of the difference between (i) the Arena Claimants' liability to lenders as at 28 November 2008 (in the case of BoS) and as at 1 April 2009 (in the case of Lloyds) and (ii) the Arena Claimants' liability to lenders upon administration.

41. The Defendants contend that these (alleged) losses fall outside the scope of the duty of care which they owed to the Arena Claimants. The purpose of the Defendants' duty was to protect the customer from agents who were authorised to operate the customer's bank account misappropriating funds by issuing instructions to the bank without the customer's authority. The risk of harm against which the duty is imposed is no broader than that. The duty merely requires the bank to refrain from executing instructions until inquiries are made to verify that the instruction has been authorised by the customer. It does not require further steps to protect the customer against any other adverse consequences that might be caused by the agent's conduct.

42. It is no part of a bank's role to protect its customer from its own fraud. Banks have neither the statutory obligations nor the powers of an auditor; and do not take on the risk of advising a company whether its management is acting dishonestly. The consequential losses claimed by the Arena Claimants are therefore outside the scope of the Defendants' duty. Those alleged losses do not represent the fruition of the risk of an agent who is authorised to operate the customer's bank account misappropriating funds by issuing instructions to the bank without the customer's authority; instead, they represent the fruition of the more general risk that a fraud conducted in the name of a company may ultimately rebound to harm the company itself.

43. The Arena Claimants submitted that Ground 2 of the Arena Application should be dismissed. The point was a novel one, which ought to be determined on the facts as found at trial rather than on the basis of assumed facts. Specifically:

(1) It is controversial as to whether the scope of duty issue (which is established by what was called the SAAMCO line of authorities, after South Australia Asset Management Corp v York Montague Ltd [1997] AC 191) extends beyond the duties of care owed by professionals giving advice or information. No previous authority has considered the application of SAAMCO in what may be called the *Quincecare* context.

(2) It is in dispute as to whether the scope of a bank's private law duty to customers in relation to payment instructions is limited to making authorised payments and refraining from debiting sums without authority. That view of the scope of the duty is based on a pre-Philipp view of the law. Post-Philipp the correct analysis is that a bank's obligations in relation to payment instructions are an application of the bank's general duty of care in providing all its services implied (in a non-consumer context such as the present) by s. 13 of Supply of Goods and Services Act 1982.

(3) In order to resolve the scope of duty issue the Court will need to make findings as to all the banking services agreed over time to be provided by the Defendants to the Arena Claimants.

(4) The construction exercise required by the Defendants' scope of duty argument cannot be conducted on a summary basis. There is no common ground as to the full set of written terms that applied to the relationship of BoS with Arena TV or of Lloyds with Arena Holdings over the relevant time period. Furthermore, the effect of the relevant express terms for SAAMCO purposes is closely bound up with other issues on which the Defendants do not seek strike out or summary judgment, and in particular the Defendants' reliance on the express terms as including various exclusions of liability for consequential loss.

(5) A summary determination against the Arena Claimants on Ground 2 of the Arena Application will not lead to any material reduction in the scope of the issues to be determined at trial, nor the steps to be taken ahead of trial.

Arena Cross-Application Ground 1

44. By Ground 1 of the Arena Cross-Application, the Arena Claimants seek the striking out of or a summary determination against the Defendants in respect of the allegation that:

> 'Mr Yeowart and/or Mr Hopkinson had the Claimants' actual authority to give the payment instructions for those payments alleged to be misappropriations … by reason of their control of the Claimants and/or pursuant to the mandates and terms and conditions applicable to the Accounts.'

45. As will be apparent, there are two aspects to this plea: first, that Mr Yeowart and/or Mr Hopkinson had actual authority for the payment instructions by reason of *control of the Arena Claimants*; second that they had such authority by reason of the *mandates and terms and conditions* of the Arena Accounts.

46. In relation to the second aspect – mandates and terms and conditions of the Arena Claimants' agreements with the Defendants – the Arena Claimants submitted that they were the wrong agreement in which to look to see the terms of Mr Yeowart and Mr Hopkinson's actual authority. Actual authority of an agent is conferred by an agreement between principal and agent, not between the principal and a third party. It is not determined by the terms of a bank mandate: see Extrasure Travel Insurances Ltd v Scattergood [2003] 1 BCLC 598 (Ch).

47. In any event, and even if the Arena Accounts' terms and conditions were relevant to the conferral of actual authority on Mr Yeowart and/or Mr Hopkinson to give payment instructions on behalf of the Arena Claimants, those terms did not, properly construed, confer any actual authority on Mr Yeowart and/or Mr Hopkinson to act dishonestly against the interests of the Claimants, including to misapply and/or misappropriate funds from the Arena Accounts. They did not, in other words, exclude or oust the ordinary position as to actual authority stated in *Bowstead* Article 23. In any construction of these terms and conditions, insofar as regarded as relevant to the terms of Mr Yeowart's and/or Mr Hopkinson's actual authority, the 'Gilbert-Ash' principle (after Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd [1974] AC 689) is engaged.

48. The terms and conditions pleaded by the Defendants in the Defence and Counterclaim may be assumed for the purposes of the present applications to have been incorporated as part of the contractual relationship between the Defendants and the Arena Claimants. The terms which are relied on as being relevant to the Defendants' case as to Mr Yeowart's and/or Mr Hopkinson's actual authority cannot be construed as excluding the operation of Article 23 of *Bowstead*, let alone as authorising Mr Yeowart and/or Mr Hopkinson to misapply and/or misappropriate funds.

49. The first aspect is 'control of the [Arena] Claimants' by Mr Yeowart and/or Mr Hopkinson. Assuming that there was such control, it cannot make any difference to the analysis. Mr Yeowart and Mr Hopkinson would, from the outset, have lacked authority to use any such control to authorise themselves to misapply and/or misappropriate funds held in the relevant accounts. Agents cannot self-authorise. Moreover, none of the previous authorities has suggested that control is the answer to a *Quincecare* claim. On the contrary, such a contention was rejected in AL Underwood Ltd v Bank of Liverpool [1924] 1 KB 775 per Atkin LJ at 796; and in Singularis Holdings Ltd v Daiwa Capital Markets Ltd [2017] EWHC 257 (Ch) (first instance), [2020] AC 1189 (Supreme Court) a *Quincecare* claim had succeeded notwithstanding that the fraudulent agent was the sole shareholder and a director in circumstances where no other director exerted any influence.

50. The Defendants' submissions in relation to Ground 1 of the Arena Cross-Application may be summarised as follows.

51. In the first place, the Defendants put before the Court proposed amendments to paragraphs 4, 41 and 43 of the Defence and Counterclaim, to clarify: (1) that the 'control' referred to was control 'pursuant to the Claimants' Articles of Association'; and (2) that the plea as to actual authority in those paragraphs, by reason of control and/or pursuant to the mandates and terms and conditions applicable to the Accounts, was not intended to be a plea of actual authority in relation to payments which were a fraud on the Claimants, including in particular sums extracted by Mr Yeowart and/or Mr Hopkinson for their personal benefit.

52. In relation to what I have called above the 'second aspect', viz the mandates and terms and conditions, there are, the Defendants said, numerous provisions which make it clear that the authorised signatories or nominated users had the authority of the relevant customer to operate the accounts. The Arena Claimants' authorisation of these terms, acting by and with the knowledge of Mr Yeowart and/or Mr Hopkinson, was capable of conferring actual authority on Mr Yeowart and Mr Hopkinson in accordance with the terms. The making of a contract with a third party (here the Defendants) is a species of conduct which may evince the necessary manifestation of the will of the principal (here, each of the Arena Claimants) that it is willing for the agent to act.

53. The question of what, on a proper construction, was the width of authority conferred on Mr Yeowart and Mr Hopkinson by the mandates and terms and conditions is one best determined at trial alongside the other issues as to the proper construction of the relevant mandates and terms and conditions.

54. In relation to what I have called the first aspect – control – the Defendants contended that this provides an alternative basis for finding that all payment instructions, save in relation to the 'theft' payments, were given with actual authority. It is a scenario which did not arise and was not discussed in Philipp.

55. In the authority context, given their degree of control over the Arena Claimants, it makes no sense to suggest that Mr Yeowart and Mr Hopkinson had anything less than full actual authority to approve transactions on behalf of the company including transactions which were part of a fraud by the companies.

Arena Cross-Application Ground 2

56. Ground 2 of the Arena Cross-Application seeks the strike out or summary determination of the Defendants' counterclaims in deceit and unlawful means conspiracy, on the basis that the case on attribution and vicarious liability is unsustainable in law.

57. The Arena Claimants contended, in relation to this Ground, that the purpose of the counterclaims is to set up an equal and opposite liability in tort to 'cancel out' any liability on the part of the Defendants for breach of mandate and duty of care; and that they are legally misconceived for precisely that reason.

58. In the first place, both counterclaims are contingent on the Defendants being found liable in breach of mandate and duty of care. The putative claims only arise, therefore,

if it has been established that Mr Yeowart and/or Mr Hopkinson gave certain payment instructions without actual or apparent authority and in breach of their fiduciary duties. Yet, there could, whether as a matter of attribution or by way of vicarious liability, be no liability on the part of the Arena Claimants for any deceitful representations made by Mr Yeowart and/or Mr Hopkinson unless those representations were made within their actual or apparent authority.

59. Secondly, the Defendants' attribution case is indistinguishable from that rejected in Singularis at every level. The result in Singularis was itself unsurprising given the decision of the Supreme Court in Bilta (UK) v Nazir (No. 2) [2015] UKSC 23. The analysis in Singularis indicates that, where the relevant legal context is that there is a valid *Quincecare* claim, that claim cannot be defeated by attributing to a claimant the acts of the fraudulent agent to set up an equal and opposite deceit counterclaim. While the analysis in Singularis was expressed in respect of a claim in deceit, the same logic applies to a claim in unlawful means conspiracy.

60. Third, insofar as vicarious liability is relevant, it cannot assist the Defendants here because the cause of any loss would be the Defendants' own breach of duty. In any event, the test for vicarious liability cannot be satisfied, given that, *ex hypothesi*, Mr Yeowart and Mr Hopkinson lacked actual or apparent authority from the Arena Claimants to give the payment instructions, such that the Defendants also breached their duties under the mandate and to take care in following those payment instructions.

61. The Defendants submitted as follows. They pointed out that the relevant pleaded counterclaims rely on various representations made by Mr Yeowart and Mr Hopkinson which are not confined to the payment instructions themselves; and that the conspiracy counterclaim also relies in the alternative on deceit by Mr Froom and/or Sentinel in relation to representations made by them. Thus the first of the Arena Claimants' arguments (summarised above) is misconceived. Even if Mr Yeowart or Mr Hopkinson gave certain payment instructions without authority, it does not follow that the other payment instructions or the other representations relied upon were each given without apparent or actual authority. That is a matter for determination at trial. Similarly it cannot be assumed for the purposes of the Arena Cross-Application that the representations made by Mr Froom were made without authority.

62. Whether the representations and knowledge of Mr Yeowart and/or Mr Hopkinson are to be attributed to the Arena Claimants will depend on the application of the relevant rules of attribution. These emphasise that whether there is attribution in any given case depends on the context and the purpose for which the attribution is relevant. This is a matter best determined at trial after an examination of the entire legal and factual context. In any event, the Arena Claimants cannot demonstrate at this stage that the Defendants have no reasonable grounds or prospects of establishing that Mr Yeowart's and Mr Hopkinson's representations and/or knowledge are to be attributed to the Arena Claimants. On the contrary, insofar as there is a general rule capable of application without reference to the factual and legal context, it points towards attribution here.

63. The decision of the Supreme Court in Singularis does not dictate that there can be no attribution here. It establishes no principle of law applicable without regard to the context and purpose for which attribution is relevant; and in any event deals only with payments by which sums were stolen from the company by the individual giving the

payment instructions. Alternatively, Singularis does not apply to one-person companies such as the Arena Claimants appear to have been.

64. If the correct analysis is not whether Mr Yeowart's and/or Mr Hopkinson's representations and/or knowledge are to be attributed to the Arena Claimants, the Defendants' case is that those Arena Claimants are vicariously liable for their deceit. The application of the tests for vicarious liability are plainly sensitive to the facts and circumstances of the case, and should be resolved at trial. The Arena Claimants' causation argument is distinguishable in the case of non-theft payments and also in the case of a one-person company.

Analysis

Preliminary Matters

65. Before considering the merits of each of the applications, it is convenient to deal with two preliminary matters.

Principles applicable to the applications

66. The first is as to the applicable principles in relation to the applications made. Those applications are for summary judgment or strike out of various aspects of the case. There has been, it should be noted, no order for the trial of any preliminary issue(s).

67. The principles in relation to an application for summary judgment under CPR Part 24 are well-known. They were stated by Lewison J in Easyair Ltd v Opal Telecom [2009] EWHC 339 (Ch) at [15], in a passage which has been cited very frequently since, as follows:

> 'i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can

> reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.'

68. Under CPR r. 3.4(2)(a) the court may strike out a statement of case if it appears to the court that the statement of case discloses no reasonable grounds for bringing or defending the claim. Where, as here, strike out is sought on the basis of the pleaded case, the test is the same as that for summary judgment: see Begum v Maran (UK) Ltd [2021] EWCA Civ 326 at [20]-[21].

69. In an area of the law which is uncertain or developing it is not normally appropriate to strike out. In Barrett v Enfield London Borough Council [2001] 2 AC 550, Lord Browne-Wilkinson said, at 557:

> 'In my speech in the *Bedfordshire* case [1995] 2 AC 633 , 740-741 with which the other members of the House agreed, I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case

> was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out.'

The decision in Philipp

70. The second preliminary matter is to provide an overview of the decision of the Supreme Court in Philipp, which is of significant importance to the present applications and was the subject of detailed submissions at the hearing. It was described by the Defendants as 'the point of departure' in relation to their applications. The case concerned what is known as an 'authorised push payment' or 'APP' fraud. The claimant had been persuaded by a fraudster to instruct her bank to make two payments to accounts in the UAE. The instructions to the bank were given personally. At first instance the claim was dismissed on the basis that, while a bank was under a duty not to execute a payment instruction where it was on notice that its customer's agent was attempting to misappropriate funds, such a duty did not arise where the instruction had been given by the customer herself. The Court of Appeal, however, had held, by extrapolating from the reasoning in *Quincecare*, that it was at least possible in principle that a relevant duty of care could arise in the case of a customer herself instructing her bank to make a payment when that customer had been the victim of an APP fraud. The Supreme Court allowed the appeal, holding that it was a basic duty of a bank under its contract with a customer who has a current account in credit to make payments from the account in compliance with the customer's instructions; and that that duty was strict and that, therefore, when a customer had authorised and instructed a bank to make a payment, the bank had to carry out the instruction promptly and without concerning itself with the wisdom or risks of the payment decision. While a bank had a duty not to execute a payment instruction given by an agent of its customer without making inquiries if it had reasonable grounds to believe that the agent was attempting to defraud the customer, that duty did not apply where the customer had unequivocally authorised and instructed the bank to make a payment.

71. The Supreme Court considered that the error of the Court of Appeal's approach could be traced to an error in the reasoning in *Quincecare*. In that case, Steyn J had accepted the idea that a bank could comply with its mandate (and execute what he described as a 'valid and proper order') but yet be in breach of another duty (which came to be called a '*Quincecare* duty') not to implement a payment instruction if and for so long as the banker was 'on inquiry' that the order was an attempt to misappropriate funds of the customer. That error was corrected in Philipp.

72. The judgment of Lord Leggatt JSC (who gave a judgment with which all the other members of the Court agreed) establishes a conceptual framework which may be summarised as follows:

(1) First, that a bank in processing payments to and from a customer's bank account acts as the agent of the customer. The bank is always limited by its mandate, i.e.

the terms of authority conferred on it by the customer, and the duty to comply with that mandate is strict unless otherwise agreed (at [28]-[30]);

(2) A bank must carry out its services with reasonable skill and care, which is a contractual term implied in law (under s. 13 Supply of Goods and Services Act 1982 or under s. 49 Consumer Rights Act 2015), and owed co-extensively in tort; but that requirement to act with reasonable skill and care 'only applies, and is only capable of applying, insofar as the contract gives the supplier any latitude in how the relevant services are carried out' (at [34]-[35]). The duty of care does not act as an implied limitation of, or operate in tension with, the duty to comply with the mandate (at [63]-[65]).

(3) A bank's mandate may be subject to other implied limitations. A bank is not required to make a payment that would expose it to criminal or civil liability (at [31]) and must act honestly towards its customer (at [106]). In addition, Lord Leggatt referred to Article 23 of *Bowstead* saying that this clearly, 'and in my opinion, correctly', stated the principle as to an agent's having authority to act only honestly in pursuit of the interests of the principal (at [72]). Lord Leggatt made it clear that pre-2001 editions of that text, which had stated that an agent did not lose his authority when acting 'fraudulently and in furtherance of his own interests', whilst unexceptionable in relation to apparent authority, could not be supported as regards actual authority (at [71]). At [72]-[74] Lord Leggatt said:

> '[72] … The basis for this proposition [viz that in Article 23 of the current edition of Bowstead] is elucidated both in the comment that follows it and in a valuable article by the current main editor, Peter Watts, "Actual authority: the requirement for an agent honestly to believe that an exercise of power is in the principal's interests" [2017] JBL 269. I would express it as follows.
>
> [73] In principle, the scope of an agent's authority is a matter of agreement between the agent and the principal. Where that agreement is recorded in writing, the question is one of interpretation of the document. No doubt it would be possible in theory for a principal in appointing an agent to agree that the agent may bind the principal even if and when the agent is acting dishonestly with the aim of defrauding the principal. But it seems inconceivable that any sane person would ever agree, or could reasonably be presumed to have agreed, to confer such authority on an agent. As is generally the case in commerce, parties to an agency relationship naturally deal with each other on an unspoken common assumption that each will act honestly in relation to the other. It goes without saying that authority conferred on an agent does not encompass acting dishonestly to further the agent's own interests in opposition to the interests of the principal.

> [74] A clear statement of the legal principle can be found in *Lysaght Bros & Co Ltd v Falk* (1905) 2 CLR 421, a decision of the High Court of Australia, where O'Connor J said, at p 439:
>
> "Every authority conferred upon an agent, whether express or implied, must be taken to be subject to a condition that the authority is to be exercised honestly and on behalf of the principal. That is a condition precedent to the right of exercising it, and, if that condition is not fulfilled, then there is no authority, and any act purporting to have been done under it, unless in a dealing with innocent parties, is void."
>
> I agree with the comment in *Bowstead & Reynolds on Agency*, para 3-012, that the reference in this passage to dealing with innocent parties is to be understood as a reference to the possibility of apparent authority.'

(4) An agent who does not have actual authority in accordance with the principle stated in Article 23 of *Bowstead* may nevertheless have apparent authority to give a payment instruction so far as the bank is concerned, unless the bank is 'put on inquiry', i.e. 'has reason to believe that the agent is acting without authority and fails to make inquiries that a reasonable person would have made in the circumstances to verify that the agent had authority' (at [86], and [89]).

(5) There is therefore no conflict or tension between the mandate and the bank's duty of care, since the duty of care is only engaged in circumstances where the bank is 'put on inquiry' (at [91], [97]). Liability for breach of mandate and for breach of the bank's duty of care 'align' and are coextensive, albeit that the remedies differ.

The Merits of the Applications

73. I turn to consider the merits of the various applications. Because of the relationship of their subject matter, the most convenient order in which to consider the applications is: first, Ground 1 of the Arena Application and the Sentinel Application, and second, Ground 1 of the Arena Cross-Application. Thereafter I will consider Ground 2 of the Arena Application; and then Ground 2 of the Arena Cross-Application.

Arena Application Ground 1 and Sentinel Application

74. The issue in relation to Ground 1 of the Arena Application and the Sentinel Application is whether the relevant claims of the respective Claimants stand no realistic prospect of success because it can be said at this stage, with confidence, that the relevant agents had actual authority to give the instructions in question. In my judgment that cannot be said, and the applications should be refused. My principal reasons for that conclusion follow.

75. First, and most simply, it appears to me arguable, with a realistic prospect of success, that the relevant law is accurately stated in *Bowstead* Article 23, and thus that, at least in the absence of express agreement of the principal otherwise, an agent only has actual authority to act honestly in pursuit of the interests of the principal.

76. Lord Leggatt at [72] of Philipp said that he considered that Article 23 of *Bowstead* correctly stated the position. He also referred to the commentary which follows that Article, which states, in part:

> 'It is implicit in a conferral of authority that the principal intends the agent to exercise the relevant powers in the interests of the principal. An agent who deliberately or recklessly exercises powers against the interests of the principal must know that the agent acts without the principal's consent, and therefore acts without authority.'

77. If the question of whether Mr Yeowart and/or Mr Hopkinson, and Mr Froom, had actual authority is to be answered by reference to whether they were acting honestly in pursuit of the interests of their principal(s), or as to whether they deliberately or recklessly exercised powers against the interests of their principal(s), then the issue of whether there was actual authority has to go to trial. On the basis of the facts pleaded and assumed to be true, there is clearly a triable issue as to whether Mr Yeowart and/or Mr Hopkinson and Mr Froom were acting honestly in pursuit of the interests of their principal(s), or were exercising powers against the interests of their principal(s).

78. The Defendants' answer to this is to say that, despite the apparent width of the formulation in *Bowstead*, Lord Leggatt clarified: that what he meant by an agent not 'acting honestly in pursuit of the interests of the principal' was confined to cases where the agent was 'defrauding the principal' (at [73]), or 'acting dishonestly to further the agent's own interests in opposition to the interests of the principal' (ibid); that he regarded that as the equivalent of acting 'dishonestly and in fraud of [the] principal', which is the phrase he used at [70]; and that that does not embrace frauds directed against third parties. In my view it is clearly arguable, with more than a fanciful prospect of success, that Lord Leggatt was not seeking to circumscribe what is stated in *Bowstead* Article 23, or in the commentary on that Article, in the way in which the Defendants contend.

79. Secondly, it is arguable, with a real prospect of success, that there is no realistic or workable distinction which can be drawn, in a case such as the present, between frauds on and by the principal. As the Claimants submit, the nature of the ABL Fraud as it is alleged to have been involved not only misrepresentations to lenders, but committed the companies which were Mr Yeowart's, Mr Hopkinson's and Mr Froom's principals to liabilities which those companies would ultimately be unable to pay and which would render them insolvent. That can readily be said to be a fraud on those companies.

80. Furthermore, and more specifically, in the present case, it is the Arena Claimants' case that the 'overarching purpose' of the ABL Fraud was the dishonest extraction of funds for the benefit of Mr Yeowart and Mr Hopkinson, and that all categories of payment identified in paragraph 27(5) of the Particulars of Claim were necessary for or ancillary to that extraction. This provides an additional arguable point as to why a distinction such as that sought to be drawn by the Defendants is inapplicable.

81. Thirdly, there is an argument with a realistic prospect of success that the line of authorities relied upon by the Defendants does not establish the propositions, and dividing line, for which they contend and on which Ground 1 of the Arena Application and the Sentinel Application depend. Specifically there is a significant argument to the

effect that the cases relied on by Mr Salzedo KC as binding authorities - 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 – 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 this case as to when an agent will have actual authority to make fraudulent misrepresentations.

82. Specifically, it is realistically arguable that the case of Briess v Woolley, which was particularly relied upon by the Defendants, does not provide the support which they sought to gain from it, and that it decides no more of relevance than that the shareholders in that case had, by their resolution, authorised the agent to make representations which included fraudulent misrepresentations.

83. Fourth, there is a realistic argument 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, and in particular paragraph 70 thereof, that authority does not extend to acts done in breach of the directors' duty under s. 172(1) of the Companies Act 2006 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, including by reference to the consequences of any decision in the long term. There is a serious argument that the articles cannot be construed to give authority for acts in breach of the s. 172(1) duty because paragraph 70 commences with the words 'Subject to the provisions of the Act...'. Further and in any event, there is a cogent argument that, in the absence of express words authorising acts in breach of the directors' fiduciary duties, general words such as those of paragraph 70 should not be read as doing so. There is, moreover, some support for the implicit limitation on an agent's actual authority by reference to the agent's fiduciary duties in case law, in particular in LNOC Ltd v Watford AFC Ltd at [63]-[64].

84. I have considered whether, as I understood Sentinel, at least, to have submitted, I can and should not just dismiss the summary judgment and strike out applications which are Ground 1 of the Arena Application and the Sentinel Application, but also hold to be wrong in law the Defendants' case in relation to the actual authority of directors charged with managing the business of a company to enter into fraudulent transactions, provided that they are frauds by, not on, the company. I decline to make any final determinations in relation to this issue. In my view, it is appropriate that the entire issue of the extent of the directors' actual authority should be resolved, on the basis of established facts, at trial. While there are the cogent arguments which I have referred to above against the position advanced by the Defendants, there are also serious arguments tending in its favour. In particular:

(1) That there should be a wide construction of a document or instrument conferring authority has support from case law: see Ivy Technology Ltd v Martin [2022] EWHC 1218 (Comm) at [373].

(2) It may be difficult, unless such a wide construction is adopted, to account for certain results which may be treated as axiomatic or in any event principled. Thus, there can be little doubt, and it was not in issue before me, that a principal may be liable for acts of an agent which are performed carelessly and negligently. But it is unlikely to be straightforward – whether as a matter of construction of or

implication into any ordinary authority-conferring words, including those in paragraph 70 of Table A – to say that they extend to the giving of actual authority to be careless or negligent. If it is recognised that there may be actual authority for negligent acts this may tend to suggest that the concept of 'actual authority' is somewhat removed from what the principal can be taken to have agreed to. Further, if negligent acts are regarded as within the ambit of actual authority, it can be questioned whether there is any principled basis for saying that no act in breach of fiduciary duty / the duty under s. 172(1) Companies Act 2006 can be regarded as actually authorised.

(3) There are issues as to whether an approach to the ambit of actual authority, such as that advanced by the Claimants, provides sufficient and practical protection for third parties. Application of the doctrine of ostensible authority would be likely to require individual proof of the elements of representation and reasonable reliance (see *Bowstead*, 8-009 – 8-023), which may be burdensome, costly and inconvenient, especially in cases where there are many third parties involved.

(4) The case of Senex Holdings Ltd v National Westminster Bank plc [2012] EWHC 131 (Comm), [2012] 1 All ER (Comm) 1130 is one in which a director of a company was summarily held to have actual authority from the company notwithstanding that there was a triable issue that he had been acting, given the potential relevance of what I have termed above the creditor duty, in breach of his fiduciary duties.

85. Thus, in my judgment, this is an aspect of the case where the court should not seek to make determinations of issues of law on the basis of assumed facts. It is appropriate that the ambit of actual authority – and where any dividing line between authorised and unauthorised transactions is drawn – should be resolved when there has been an investigation both as to the circumstances in which authority was conferred, which may be of relevance to construction, and of the transactions themselves, so that if a line needs to be drawn it can be drawn distinctly and on the basis of established facts.

Arena Cross-Application Ground 1

86. I turn to Ground 1 of the Arena Cross-Application. As I have said, this has two aspects, and what I have called the first aspect relates to the alleged relevance of Mr Yeowart's and/or Mr Hopkinson's 'control' over the Arena Claimants.

87. The argument which the Defendants wish to advance by reference to this plea is that the fact that there were no innocent directors is relevant to establishing that the transactions in question, including the transactions which involved fraudulent misrepresentations to lenders, were part of the business of the companies, which the board of directors was authorised to conduct, and did conduct.

88. In my judgment, this argument is very closely bound up with the wider issues as to actual authority which are the subject of Ground 1 of the Arena and the Sentinel Applications, which I have already considered. I do not consider that there is a clear-cut and discrete point of law in relation to it which it is appropriate to seek to determine at this stage by way of strike out or summary judgment. The significance or otherwise of the alleged 'control' should be part of the investigation of actual authority at the trial.

89. The second aspect is as to the terms of the mandates and the other terms and conditions agreed between the Arena Claimants and the Defendants. This appears to me to fall into a different category.

90. I am prepared to accept, contrary to Mr Ashworth KC's submission, that it is at least arguable that the terms of the mandates / terms and conditions agreed with the Defendants were of possible relevance to the ambit of Mr Yeowart's and/or Mr Hopkinson's actual – and not merely apparent – authority.

91. Nevertheless, it does not appear to me to be arguable that the terms which have been identified and relied on by the Defendants had the effect of conferring on Mr Yeowart or Mr Hopkinson actual authority to conduct transactions which were fraudulent provided that they did not involve frauds on the Arena Claimants themselves. As was apparent from Mr Salzedo KC's submissions, the case that they did can be tested by reference to the term quoted in paragraph 33(c) of the Defendants' Second Skeleton Argument (and the similar terms quoted in (e), (i) and (k)). That quoted in paragraph 33(c) was the clause which Mr Salzedo KC put forward as the clearest example in support of his case. It provides:

> 'Subject to any legal or regulatory requirements which may apply we are authorised to act upon any instruction, agreement or arrangement that is in accordance with this Authority (or any subsequent properly authorised addition or alteration to it) without enquiring about its purpose, or the circumstances in which it is given, or about the disposition of any proceeds.'

92. In my view, this term (and the other similar terms pleaded) does not seek to confer, and cannot be construed as conferring, any actual authority on the directors, and in particular does not confer on them or recognise them as having any authority to engage in fraudulent activities. It deals only, and unsurprisingly, with the authority of the bank to act on instructions without inquiry. If anything, it assumes that there may be features in the circumstances in which or purposes for which an instruction was given which might mean that it was unauthorised by or otherwise objectionable to the customer, but states that the bank has no obligation to inquire into such matters.

93. In reaching this conclusion it is not, in my view, necessary to have regard to the 'Gilbert-Ash' principle, the relevance of which in this context is open to debate.

94. Accordingly, I will accede to this aspect of Ground 1 of the Arena Cross-Application.

Arena Application Ground 2

95. Ground 2 of the Arena Application, as I have said, seeks the striking out or summary determination against the Arena Claimants of the claim for damages represented by the difference between the Arena Claimants' liability to lenders as at a date in 2008 or 2009 and their liability to lenders upon their administration.

96. I accept, as Mr Salzedo KC submitted, that the duty on the Defendants which is pleaded in the Particulars of Claim in paragraphs 40-41, and admitted by the Defendants, is what may be described as the basic or standard duty of a bank which provides and operates a bank account on behalf of a customer. This duty is alleged to have been to make

payments from the account only when instructed by a duly authorised agent of the customer and in carrying out that mandate and/or providing and operating the account to act with reasonable skill and care. It is that same duty which, in paragraph 41, is pleaded as being owed in tort. I accept further that, whether it might have been (or might in future be) open to the Arena Claimants to plead some other and more onerous duty, arising from special features, or terms, of the relationship between the Arena Claimants and the Defendants, that has not been done in these paragraphs.

97. I also agree with the Defendants that it is necessary to apply what is called in Meadows v Khan the 'scope of duty principle' (at [36]) and to ask the 'scope of duty question' (as it is called at [28(2)]) in relation to the pleaded duty. The scope of duty principle does not arise only in relation to cases involving a professional providing information or giving advice, but has application in other cases in which one party has a duty of care to another, as was made clear by the Supreme Court in Meadows v Khan at [33]-[37].

98. The way in which this question is to be addressed was explained by the majority of the Supreme Court in Manchester Building Society v Grant Thornton as follows:

> '[13] In our view, the scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the reason why the advice is being given (and, as is often the position, including in the present case, paid for). Lord Hoffmann was explicit about this in *SAAMCO* at p 212:
>
> > "How is the scope of the duty determined? In the case of a statutory duty, the question is answered by deducing the purpose of the duty from the language and context of the statute: *Gorris v Scott*(1874) LR 9 Ex 125. In the case of tort, it will similarly depend upon the purpose of the rule imposing the duty. Most of the judgments in the *Caparo* case are occupied in examining the Companies Act 1985 to ascertain the purpose of the auditor's duty to take care that the statutory accounts comply with the Act. In the case of an implied contractual duty, the nature and extent of the liability is defined by the term which the law implies. As in the case of any implied term, the process is one of construction of the agreement as a whole in its commercial setting. The contractual duty to provide a valuation and the known purpose of that valuation compel the conclusion that the contract includes a duty of care. The scope of the duty, in the sense of the consequences for which the valuer is responsible, is that which the law regards as best giving effect to the express obligations assumed by the valuer: neither cutting them down so that the lender obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the valuer a liability greater than he could reasonably have thought he was undertaking."'

99. In Philipp, Lord Leggatt, at [97], stated that the so-called *Quincecare* duty 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'; and that when a bank has 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.' If the bank executes the instruction without making such inquiries 'and the instruction proves to have been given without the customer's authority', then the bank will be in breach of duty.

100. In my judgment this passage makes it clear that the purpose of the duty is to avoid the making of unauthorised payments. In my view, it can be said with confidence that, unless the contract between them, or their relationship, takes the case out of the norm, the scope of the duty owed by a bank to a customer with a current account is limited to protecting the customer from unauthorised payments. That would entail potential liability on the part of the bank for the amount of such unauthorised payments. It might further extend to losses consequential on the making of those payments such as interest, overdraft fees or currency losses. The scope of the duty does not, in my judgment, extend to protecting the customer against payments out of the account which were authorised, even if those payments would not have been made had the bank ceased to permit the operation of the account pending the completion of inquiries as to a suspectedly unauthorised payment. Nor in my judgment does it extend to the consequences of transactions with others which the customer entered into, but would not have been able to enter into had the bank ceased to permit the operation of the account because there were grounds to suspect that there might be unauthorised payment instructions.

101. The pleas in paragraphs 57 to 60 of the Particulars of Claim are a claim for damages which are not confined, or certainly are not explicitly confined, to those falling within the scope of duty which I have described above. I am accordingly prepared to make an order striking out those pleas or giving summary judgment in relation to them insofar as they claim damages in respect of losses falling outside that scope of duty.

Arena Cross-Application Ground 2

102. I turn to Ground 2 of the Arena Cross-Application, which concerns the Defendants' contingent counterclaims in deceit and unlawful means conspiracy. I have concluded that these cannot be struck out or disposed of summarily, and should go to trial.

103. If it had been the case that the only representations which were relied upon for the purposes of the counterclaim were exactly the same representations/payment instructions which the Arena Claimants rely upon in relation to their claim that the Defendants breached their duty of care, then I consider that the counterclaims would be susceptible to being struck out. In those circumstances, the premise of the liability of the Defendants on the claim would be that the relevant representations were not attributable to the Arena Claimants, and it would be inconsistent with that for there to be attribution of those representations to the Arena Claimants for the purposes of the counterclaim. Furthermore, in such circumstances, there would be a very strong case that the Defendants could not point to those representations as the cause of their liability to the Arena Claimants because they were the 'very thing' which the Defendants had a duty to take care not to act upon (cf Barings Plc v Coopers & Lybrand [2003] EWHC 1319 (Ch), [2003] PNLR 34, at [727]-[749]; Singularis (Supreme Court) at [24] per Lady Hale).

104. The Defendants are, however, right to say that the pleaded counterclaim does not rely only on the payment instructions which it is said, in the Arena Claimants' claim, to have been acted upon by the Defendants in breach of mandate and/or duty. Instead, as Mr Salzedo KC submitted, the Defendants plead that the relevant payments out of the Arena Accounts were made following other representations 'from Mr Yeowart and/or Mr Hopkinson to the Defendants' employees by email and/or by telephone and/or during the Defendants' employees' site visits to Arena's premises and/or indirectly via brokers that: (a) the Equipment that was the subject of ABL from Lloyds existed; (b) the Equipment that was the subject of ABL from Lloyds was required for the purposes of Arena's legitimate business; (c) the Equipment was or would be the subject of the relevant hire purchase agreements; (d) the serial numbers for the Equipment specified in the invoices supplied to Lloyds were legitimate; (e) the invoices and other supporting documents were authentic; (f) the Management Information provided to the Defendants reflected Arena's activities; (g) Arena's relationship with the Defendants was in furtherance of its legitimate business; and/or (h) Arena, Mr Yeowart, Mr Hopkinson, Sentinel and/or Mr Froom were not engaged in a dishonest and fraudulent scheme' (Defence and Counterclaim, para. 81.4).

105. Equally, in the counterclaim based on unlawful means conspiracy, the Defendants plead reliance not only on the alleged deceit of Mr Yeowart and/or Mr Hopkinson, including those matters referred to in the previous paragraph, but also deceit by Mr Froom and Sentinel (see Defence and Counterclaim paras. 83-84).

106. Clearly, whether there were any such representations as referred to in the two previous paragraphs, whether they can be meaningfully distinguished from the payment instructions given to the Defendants, and whether they were relied upon are matters which, if they need to be decided, will have to be resolved at trial.

107. The Arena Claimants nevertheless contended, as I understood it, that it is no answer for the Defendants to point to representations arguably different from the payment instructions which were acted upon, because the Defendants will only have been liable on the claim if their acting on relevant payment instructions was a breach of duty, and there would be no breach of duty if there had been justifiable reliance on other representations made, or apparently made, on behalf of the Arena Claimants. I am not convinced that that must necessarily be the case in relation to any and all fact patterns which might fall within the ambit of the case pleaded in paras. 81.4 (or 83-84) of the Defence and Counterclaim. Instead, I consider that this argument should be addressed when the facts are found.

108. Similarly, I consider that the question of whether any such allegedly separate representations were still part of the 'very thing' which it was the Defendants' duty to take care not to act upon is a matter which should be resolved at trial. In my judgment, Singularis does not establish any rule of law to the effect that a defendant to a *Quincecare* type claim cannot rely, for the purposes of a counterclaim, on instructions or representations even if they can fairly be regarded as distinct from the payment instructions which it should not have acted upon in making the relevant payment(s).

109. At trial it will also be open to the Defendants to argue that the fact, if it is established as a fact, that the Arena Claimants were 'one-man companies', with no innocent shareholders or directors, may make the present case distinguishable from Singularis. In Singularis the company was held by the first instance judge not to be a 'one man

company', and that was upheld by the Supreme Court (at [33]-[34] per Lady Hale). Lady Hale nevertheless made it clear that in her view, it would not have made a difference had it been a 'one man company' (at [34]). In the present case, there was an issue as to whether that view was *obiter dicta* or part of the *ratio*.

110. Had they stood on their own, the issue of *obiter dicta*/*ratio*, and the wider issue of whether the companies' being 'one-man companies' was a relevant distinction from Singularis might have been appropriate for resolution on a summary basis; but as there are other issues in relation to the counterclaims which I consider should go to trial, these points should be resolved in conjunction with those other issues.

Conclusion

111. For the reasons I have given:

(1) Ground 1 of the Arena Application and the Sentinel Application are dismissed.

(2) Ground 1 of the Arena Cross-Application succeeds insofar as it relates to 'the mandates and terms and conditions applicable to the Accounts', but is dismissed insofar as it relates to 'the control' of the Arena Claimants by Mr Yeowart and/or Mr Hopkinson.

(3) Ground 2 of the Arena Application succeeds in that there will be an order striking out or giving (reverse) summary judgment in respect of the claim for damages for losses falling outside the scope of duty as I have identified it.

(4) Ground 2 of the Arena Cross-Application is dismissed.

112. I trust that the parties will be able to agree an order reflecting these conclusions.