LIABILITY FOR THE DISHONESTY OF OTHERS

PRINCIPLES AND DEVELOPMENTS IN THE LAW OF VICARIOUS LIABILITY IN THE CONTEXT OF FRAUD ACTIONS

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Introduction to general principles

1. Vicarious liability is the doctrine whereby a defendant is made liable for the acts/omissions of a tortfeasor. The effect is that the defendant is liable as though he or she were the tortfeasor, notwithstanding that the defendant may be personally innocent of any wrongdoing.

2. This simple statement of the law is in contrast to the difficulties and complexities in its application. This is particularly the case in fraud cases.

3. The reason for these difficulties is that the Court's approach is driven by general policy concerns rather than strict legal reasoning. Thus, in the appellate authorities in this area, Judges have expressly recognised the underlying socio-economic concerns which vicarious liability is intended to address. These include:

   3.1. The need for the victims of torts to have defendants of substance to claim against. Very often, the actual tortfeasor is not worth suing.

3.2. The view that those who benefit from enterprise should also take the associated liabilities in order to encourage those in business to take steps to minimise and avoid risks to third parties.

3.3. The need to distribute risks and liabilities amongst society, rather than have the losses fall solely upon an injured claimant with no effective remedy.

3.4. The availability of insurance to provide protection against various risks.

4. This was summarised by Lord Millett in *Lister v Hesley Hall* [2001] 1 AC 215 at [65]:

> "*Vicarious liability is a species of strict liability. It is not premised on any culpable act or omission on the part of the employer; an employer who is not personally at fault is made legally answerable for the fault of his employee. It is best understood as a loss-distribution device […] The theoretical underpinning of the doctrine is unclear. […]"*

5. The issue in *Lister* was whether the owner of a school boarding house was vicariously liable for the abuse of children by its employee, the warden of the house. That is obviously a very different context from fraud cases, but it demonstrates the potential width of the principle even in cases concerned with *deliberate* wrongdoing by employees and other agents.

6. In the more recent case law, the trend, with one notable exception,[1] has been for increasing the scope of vicarious liability. This can be seen in the two related questions that a Court asks when deciding whether it is appropriate to find the defendant vicariously liable.

7. **Stage 1 of the analysis** requires the court to consider the nature of the relationship between the defendant and the tortfeasor to see whether it is one which is capable of giving rise to vicarious liability. The classic example is of course the relationship of employer/employee.

8. However, an employment relationship is not necessary. In *Cox v Ministry of Justice* [2016] AC 660 the Supreme Court held that the Ministry of Justice was vicariously liable for prisoners working in prison canteens – one prisoner had negligently injured another in the course of work. There was no relationship of employment, but the Supreme Court held this was not necessary. It sufficed that the tort had been committed as a result of

[1] *Various Claimants v Morrisons*, see below.

activity undertaken by the tortfeasor which was integral to the defendant's business activities. This was taken even further in the *Institute of the Brothers of the Christian Schools*, discussed below.

9. **The second stage** of the analysis is that there must be a "*close connection"* between the acts/omissions of the tortfeasor and what he has been entrusted to do by the defendant. This test was laid down in *Lister v Hall* and followed by the House of Lords in *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, a case of commercial fraud committed with the assistance of one of the partners in a firm.

10. The test is easy to articulate but not so easy to apply. This is exemplified by the important decision of *Mohamud v Morrisons* [2016] AC 677. In this case, the Supreme Court held that a supermarket was vicariously liable for the acts and omissions of a petrol pump attendant who had racially abused and assaulted a customer who had come into the petrol station kiosk in order to ask whether he could print some documents from a USB stick he was carrying.

11. At first blush, it is odd to talk about a "*close connection*" between the acts of the tortfeasor and his role as an employee in cases of deliberate misconduct. In the *Mohamud* case, abusing and assaulting a customer is, in one sense, nothing whatever to do with the role which the supermarket employed him for. But this misses the point, which is that vicarious liability is driven by the policy factors mentioned earlier and an assessment as to whether it is right to hold the employer liable.

12. In so doing, the Supreme Court in *Mohamud* sought to simplify the close connection test by identifying a two-stage process for the Court to follow:

    12.1. **First** the Court identifies what functions or "*field of activities"* have been entrusted by the employer to the employee. In other words, what was the nature of his job? This question must be assessed broadly, not by reference to fine distinctions based on the interpretation of the contract of employment.

    12.2. **Secondly**, the Court must then decide whether there was a sufficient connection between the employee's role and his conduct to make it right for the employer to be held liable as a matter of social justice.

13. See Lord Toulson in *Mohamud* at [43]-[45].

14. Lord Toulson went on to say this about the assault and the threat that the Claimant should never return to the premises. "*This was not something personal between them; it was an order to keep away from his employer's premises which he reinforced by violence. In giving such an order he was purporting to act about his employer's business. It was a gross abuse of his position, but it was in connection with the business in which he was employed to serve customers. His employers entrusted him with that position and it is just that as between them and the claimant, they should be held responsible for their employees abuse of it."*

15. Whilst *Mohamud* is an assault case, it is obviously important for our purposes because it concerns deliberate misconduct, which is what dishonesty cases are concerned with.

The approach in fraud cases

16. The general law of vicarious liability applies to actions involving fraud and dishonesty, with one exception. We consider first the exception and then come to look at the general law.

Deceit

17. The exception is in relation to the cause of action of deceit. For deceit cases, the "close connection test" set out in *Mohamud v Morrisons* does not apply. Instead, it is necessary for the claimant to show that the fraudulent misrepresentation by the employee which the claimant relied upon was within the actual or ostensible authority of the employee. In other words:

    17.1. Either the employee must be acting within the course of his actual authority.

    17.2. Or the claimant relied upon a representation by the defendant employer that indicated that the authority of the employee was wider than the employee's actual authority.

18. This principle was laid down by the House of Lords in *The Ocean Frost* [1986] AC 717. It provides an important limitation on vicarious liability in cases of deceit because the requirements of ostensible authority are much more rigorous than the close connection test which is generally applied in vicarious liability.

19. This can be seen on the facts of *The Ocean Frost*: the claimants had been deceived into concluding a charterparty with the defendant company as a result of fraudulent

misrepresentations by the defendant's chartering manager. However, the manager did not have any general authority to conclude this type of charterparty. Neither was there any evidence that it would be generally assumed that a manager of his position and seniority would be authorised so to act. Moreover, although the claimants *thought* that the manager was authorised so to act, this was solely because of their misguided reliance upon the dishonest representations of the manager himself about his own authority. The claimants had *not* relied upon any representation about the manager's authority from the defendant itself.

20. As a result, the defendant employer was held to be not liable for the deceit of the manager. This follows from the general principle of law relating to ostensible authority that the representation as to authority which is relied upon by the claimant must be made by someone who is actually authorised: see *Freeman & Lockyer v Buckhurst Park* [1964] 2 QB 480.

21. The reason this is such an important limiting principle is that in cases of dishonest employees, the dishonest employee will frequently be acting alone and claiming to be duly authorised. This will not necessarily prevent ostensible authority arising because the claimant may be able to rely upon general representations as to authority by the employer – this will most frequently arise in circumstances where the employer has put the employee in a position which is usually assumed to have a particular ambit of authority. Despite that possibility, the fact remains that this principle makes the task of a claimant considerably harder.

22. The Court of Appeal recently re-affirmed that the ostensible authority test applies to deceit in *Winter v Hockley Mint* [2018] EWCA Civ 2480, a case where the victim was persuaded to enter into leases of postal and office equipment in reliance on dishonest representations of an agent. The case was remitted for a rehearing because the Judge had applied the wrong test.

23. However, the ostensible authority test is very clearly confined to the cause of action of deceit:

    23.1. The Court of Appeal has confirmed that it does *not* apply to cases concerning non-fraudulent misrepresentation: see *HSBC v Fifth Avenue Partners* [2009] EWCA 296.

23.2. The House of Lords and the Court of Appeal has confirmed that it does *not* apply to other dishonesty causes of action, including dishonest assistance, even if the assistance alleged constitutes a fraudulent statement: see *Dubai Aluminium v Salaam* and *Group Seven v Notable Services* (discussed below).

24. In light of the confinement of the use of ostensible authority principles to the cause of action of deceit, it is questionable whether it is justifiable in principle (as opposed to authority) to maintain a different test for vicarious liability in deceit. The approach taken by the court in *The Ocean Frost* appears to be more apposite to the law of attribution rather than vicarious liability.

Other dishonesty causes of action

25. So, for all other dishonesty causes of action, the close connection test will be applied. It is impossible to lay down hard rules about the applicability of the close connection in every case as the Court is carrying out "*an evaluative judgment in relation to a question of law, based on the facts as found."* (*Group Seven* at [137] of the judgment of the Court.)

26. However, there are three basic propositions to guide the assessment in any particular case.

27. **First**, vicarious liability is not excluded solely because the employee is acting solely for his own personal benefit (i.e. he is not bestowing any benefit on his employer); neither is vicarious liability excluded solely because the employee is also defrauding his employer as well as the claimant.

27.1. See *Lloyd v Grace Smith* [1912] AC 716 (HL). In this case, a managing clerk of a law firm conducted a conveyance for a client of the firm, but instead of conveying the property pursuant to the client's instructions, the clerk conveyed the property into his own name and disposed of the property for his benefit. Obviously, the law firm which employed the clerk didn't benefit from this and indeed the clerk was acting dishonestly towards his employers as much as towards the claimant. Despite this, the firm was still held vicariously liable.

28. **Secondly**, it is important to focus upon what was entrusted to the particular employee rather than the employee's seniority within the firm.

28.1. See *Morris v Martin* [1966] 1 QB 716 (CA). In this case, the claimant sent a mink stole to a cleaning company. The fur was given to a junior employee of the company to clean. But rather than clean it, he stole it. The company was held liable for damages for this theft. See Diplock LJ at 733A: "*The [defendant] could not perform their duties to the plaintiffs to take reasonable care of the fur and not to convert it otherwise than vicariously by natural persons acting as their servants or agents. It was one of their servants to whom they had entrusted the care and custody of the fur for the purposes of doing work upon it who converted it by stealing.*"

29. **Thirdly**, it is important to remember that just because particular conduct has been expressly prohibited by an employer, this alone will not prevent a finding of vicarious liability. Indeed, it may be an indicator that it is appropriate for vicarious liability to arise because the risk of the misconduct occurring during the employment was clear and apparent and therefore the employer should take the burden of such risk eventuating.

29.1. See *Rose v Plenty* [1976] 1 WLR 141 (CA). A milkman paid a boy to help him collect and deliver milk contrary to his employer's express prohibition that young persons should not be so employed. The boy fell off the milk float and was injured as a result of the milkman's negligence. The Court of Appeal held that the employer was liable for the milkman's negligence notwithstanding the express prohibition on his conduct. Lord Denning MR held that the prohibition "*affects only the conduct within the sphere of the employment and did not take the conduct outside the sphere altogether.*"

A limitation? The "frolic of his own" authorities

30. We now turn to a limiting principle in the law of vicarious liability which has recently come back into focus as a result of a decision of the Supreme Court. This is the concept of an employee being "*on a frolic of his own*".

31. This is a category of case where the employee is carrying out acts which appear to be of a type which he was authorised to carry out, but in so acting he so clearly departs from the scope of his employment that the employer is no longer vicariously liable.

32. This is potentially an important limitation on vicarious liability for employees who have engaged in fraudulent schemes. However, despite recent consideration at appellate level, the boundaries of the "*frolic of his own*" limitation remain unclear.

33. Two recent cases have discussed this concept.

34. **First**, *Group Seven v Notable Services LLP* [2020] Ch. 129 (CA). This case concerned attempts to launder stolen monies in the sum of EUR 100 million through a solicitor's client account in London. One of the dishonest professionals who assisted the primary fraudster in this scheme was Mr Othman Louanjli who was employed as a relationship manager by a Swiss bank, LLB. Mr Louanjli assisted the money laundering by providing statements to the solicitors who operated the client account which purported to vouch for the source of funds of the monies and the *bona fides* of the primary fraudster (Mr Louis Nobre). The statements were designed to assist the KYC checks of the solicitors so that the money could be released for onward payment and dissipation. The first statement was made on the telephone, the second was made in an email from Mr Louanjli's bank email account.

35. One of the questions for the Court of Appeal was whether Mr Louanjli's employer, the bank, was vicariously liable for Mr Louanjli's conduct in assisting the money laundering scheme. The bank argued that there was no vicarious liability because there was no real connection between what Mr Louanjli did and what he had been entrusted to do by the bank:

    35.1. Whilst Mr Louanjli purported to give a reference about Mr Nobre (the primary fraudster) and the EUR 100 million, the bank had in fact previously rejected Mr Nobre as a client and also the EUR 100 million on grounds that it could not be satisfied of the origin of the money.

    35.2. Moreover, the bank had expressly told Mr Louanjli to have nothing to do with Mr Nobre.

    35.3. Thereafter, Mr Louanjli was bribed by Mr Nobre and purported to make statements on behalf of the bank in order to assist Mr Nobre for his own reward. He was not acting in any way to assist the Bank.

36. All of these points were found as facts by the Judge. However, both the Judge and the Court of Appeal rejected the bank's submission that there was no close connection

between Mr Louanjli's acts and his employment, and that he was in fact on a frolic of his own.

37. The Court of Appeal held that the fact that Mr Louanjli was not seeking to benefit the Bank but was rather pursuing his own interests did not mean that there was no vicarious liability, relying the decision in *Lloyd v Grace Smith* (see above). In addition, the Court found that it was sufficient that Mr Louanjli was purporting to act as a representative of LLB and that his position as a relationship manager at LLB was important to the solicitors undertaking the money-laundering checks on the EUR 100 million.

38. The decision is thus very far-reaching. Despite the fact that Mr Louanjli was assisting someone who wasn't a client of the bank, that he had been bribed to do so and was seeking to further only his own interests, this was not sufficient for the bank to escape liability.

39. In contrast to the *Group Seven* case is the recent Supreme Court decision in *Various Claimants v Morrisons* [2020] 2 WLR 941. This case concerned misuse of personal data – so whilst not a fraud case it does concern deliberate wrongdoing.

40. Specifically, the wrongdoing was perpetrated by a Mr Skelton who was employed by Morrisons as an internal auditor. Mr Skelton harboured an irrational grudge against his employer due to a disciplinary incident some months before the material times. Subsequently, he was asked by his employer to collect a copy of Morrison's payroll data and provide it to external auditors. He did this, but he also unlawfully copied the data, uploaded it to a public website and also sent it to national newspapers. As a result of this data breach, the employees whose data had been unlawfully published sued Morrisons on the basis that it was vicariously liable for Mr Skelton's acts.

41. The Judge and the Court of Appeal held that Morrisons was vicariously liable, but the Supreme Court disagreed.

42. In so doing, the Supreme Court emphasised the general principle which was that "*the wrongful conduct must be so closely connected with the acts [that] the employee was authorised to do that, for the purposes of the liability of the employer to third parties, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment."* See [23]. In so doing, the Supreme Court stated that it was simply applying the "close connection" test as laid down in *Lister v Hall* and *Dubai*

Aluminium Co Ltd v Salaam. The Court emphasised that Lord Toulson was not seeking to depart from this test in *Mohamed v Morrisons* (per Lord Reed at para. 26).

43. On the facts, the Supreme Court held that the test was not satisfied. Its reasoning proceeded as follows:

    43.1. First, disclosure of employee data on the internet did not form part of Mr Skeleton's functions or field of activities.

    43.2. Secondly, the close temporal and causal connection between on the one hand Mr Skelton being instructed to collate and transmit the data to external auditors, and on the other hand his unlawful disclosure on the internet, did *not* suffice to establish liability.

    43.3. Thirdly, Mr Skeleton's motivation *was* relevant: the fact that he was acting for purely personal reasons rather than on his employer's business was highly material.

    43.4. Fourthly, the fact that Mr Skelton's employer had entrusted him with the relevant data had only given him the opportunity to commit the tort. This was insufficient to establish liability.

44. In so doing, the Supreme Court held that Mr Skelton was acting on a frolic of his own. He was not engaged in furthering his employer's business but was rather pursuing a personal vendetta, seeking vengeance against his employer for the previous disciplinary issue. The Court endorsed the dictum of Lord Wilberforce in *Kooragang Investments v Wrench* [1982] AC 462: "*the underlying principle remains that a servant, even while performing acts of the class which he was authorised, or employed, to do, may so clearly depart from the scope of his employment that his master will not be liable for his wrongful acts.*"

45. Whilst the decision in *Morrisons* is no doubt encouraging for those acting for defendant employers, it is difficult to square the actual finding with some of the previous cases involving fraud or intentional wrongdoing.

46. In particular, there is an obvious tension between this decision and that of the Court of Appeal in *Group Seven*, which was neither discussed by the Supreme Court nor cited to the Court.

47. Several points of tension can be identified.

48. **First**, the Supreme Court appears to have placed a lot of weight on the fact that Mr Skelton was not seeking to further his employer's interests. But in the fraud context, it will frequently be the case that the employee is seeking solely to benefit himself and other members of the fraudulent conspiracy.

    48.1. For example, in *Lloyd v Grace Smith*, the fraudulent clerk was in no way seeking to benefit his employer or further his employer's business. He defrauded the client solely for his own benefit. As the Court of Appeal said in *Group Seven*: "*The argument that in order to establish vicarious liability it was necessary to show that the employee's misdeed was committed for the employer's benefit was rejected by the House of Lords long ago in* Lloyd v Grace Smith*.*"

49. The **second** point of tension arises from the fact that Mr Skeleton had been specifically entrusted with the task of collating the payroll data and transmitting it to the external auditor. However, the Supreme Court placed emphasis on the fact that he was not authorised to post this data on the internet. This approach distinctly jars with the emphasis in cases such as *Mohamed* and *Dubai Aluminium* that the Court should not assess vicarious liability solely by reference to the employee's actual authority, but rather take a broad view of the activities which had been entrusted to the employee.

    49.1. For example, we can contrast the decision in *Morrisons* with that in *Morris v Martin* (see above). In *Morris*, the employee had been entrusted with the care of the fur stole – he was supposed to clean it and return it to the owner. However, instead of doing that he stole it and sold it for his own benefit. Obviously, he was not authorised by his employer to act in this way, but this was no answer to vicarious liability in the case.

    49.2. In *Morrisons*, Mr Skeleton was similarly entrusted with something – namely the data – and rather than doing what he should have done with it, he abused his position for personal gain. The Supreme Court's approach places a lot of emphasis on actual authority, apparently with a view to cutting down vicarious liability, contrary to the thrust of many of the dishonesty cases.

50. The **third** point of tension is that the Supreme Court in *Morrisons* placed weight upon Mr Skelton's motivation for acting – he had a personal vendetta against his employer and wanted to harm it. This was held to be highly relevant. However, whilst the facts of *Morrisons* may be extreme in this respect, this is unlikely to be an unusual state of affairs

in dishonesty cases. Whilst fraudulent employees will usually be acting primarily for their own benefit, it is in most cases obvious that their dishonest conduct will harm their employer (whether reputationally or financially) and it is difficult to see how they do not intend such obvious consequences of their actions. But in fraud cases this has not been held to be a reason for not imposing vicarious liability.

51. **Fourthly**, the Supreme Court's invocation of the "frolic of his own" limitation raises big questions about how this limitation is to be applied in fraud cases. It is difficult to see why Mr Skelton in *Morrisons* was on a frolic of his own whilst Mr Louanjli in *Group Seven* was not. Indeed, the case for Mr Louanjli being on a frolic of his own was stronger, in some senses, given the fact that Mr Louanjli had been bribed and the fact that the Bank had rejected Nobre (the primary fraudster) as a client. Similarly, it is difficult to see why the fraudulent clerk in *Lloyd v Grace Smith* and the dishonest cleaner in *Morris v Martin* were similarly not on their own frolic.

52. All of this means that it is difficult to predict how the Supreme Court's decision in *Morrisons* will affect vicarious liability in the dishonesty sphere. But is probably worth noting some more general points:

    52.1. First, the previous decision of the Supreme Court in *Mohamed* was clearly a liberal application of the close connection test. Lord Reed in delivering the judgment of the Supreme Court in *Morrisons* started by saying that the decision in *Mohamed* had given rise to "*misunderstandings*". This may therefore signal a return to a more constrained approach to vicarious liability, particularly in novel situations.

    52.2. Secondly, it is important to note the subject matter of the *Morrisons* case: it concerned misuse of data. Data claims are a hugely expansive area of liability. The liabilities imposed by statutory regimes and the sheer amount of data which large numbers of employees have access to gives rise to the prospect of massive liabilities for employers. Moreover, it is currently impossible to insure effectively against such liabilities – insurers are not willing to underwrite such uncertain risks with potentially huge exposure. Therefore, although the Supreme Court did not expressly discuss this issue, the specific subject matter of the case may have contributed to the decision to limit vicarious liability in this instance.

53. In general, the *Morrisons* decision is important in re-stating the need to focus on what has actually been entrusted to the employee and the connection to that and the tort the

employee has committed. Going forward, in assessing the prospects of an employer being held vicariously liable, it is advisable carefully to examine the scope of the employee's authority. The highlighting of the "frolic of his own" limitation may also provide assistance to those defending employers from the consequences of employee's frauds. But, at the same time, one should not lose sight of the fact that the Supreme Court considered that it was merely applying the close connection test and was not seeking to criticise the outcome in *Lister v Hall*, *Dubai Aluminium* or *Mohamed.* In addition, the specific context of the case, namely data, may mean that it is unwise to take too much from the case when seeking to apply it in the fraud context.

Credit Lyonnais v Export Credits Guarantee Department

54. It is well-established that before the principal can be vicariously liable, all the acts or omissions which are necessary to make the servant or agent personally liable must have taken place within the scope of his employment or agency.

55. This is clear from the House of Lords decision in *Credit Lyonnais v Export Credits Guarantee Department* [2000] 1 AC 486. The employee in question there had assisted a third party in a fraudulent scheme involving the issue of worthless bills of exchange. These were backed by guarantees that the employee issued. Whilst the issuing of the guarantees was not itself unlawful, he was aware of the dishonest scheme and was facilitating it. On this basis, the employee was personally liable on the basis that he was party to a common design to commission a tort together with the third-party fraudster.

56. However, the House of Lords held that in those circumstances there was no *vicarious* liability on the part of his employer, the Export Credit Guarantee Department. This was because for the purposes of vicarious liability all the features of the wrong which were necessary to make the employee liable had to have occurred in the course of his employment. An employer was not vicariously liable for acts of an employee committed in the course of his employment which were not in themselves tortious (i.e. the issuing of guarantees) and only became so when linked to other acts outside the course of his employment (i.e. the fraudulent common design with the third party).

57. This test was slightly revised in *Dubai Aluminium* where Lord Nicholls said at para. 39 that all the acts or omissions which are necessary to make the servant personally liable

must have taken place within the course of his employment. The emphasis being on "*necessary*".

58. This principle was recently applied by the Court of Appeal in *Frederick v Positive Solutions* [2018] EWCA Civ 431. An agent who ran a property development scheme used the defendant's online portal to arrange re-mortgages which he obtained by putting forward false information. He ran off with the balance after paying off the existing mortgages. The Court of Appeal held that the defendant company which provided financial advice and gave him access to the online portal was not vicariously liable for the fraud because his wrongdoing had been part of a recognisably independent business and not an integral part of the company's business.

Liability of two employers

59. Until the Court of Appeal decision in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd and others* [2006] QB 510, it was thought that only one employer could be vicariously liable. However, *Viasystems* changed all that.

60. The case involved a flood at a factory caused by the negligence of a fitter's mate supplied by D3 on a labour only basis to D2. The mate was working under the supervision of a fitter supplied by D3 and both of them were under the supervision of a fitter contracted to D2.

61. The Court of Appeal held that both D2 and D3 were vicariously liable. The rationale being that the mate was under the control of both D2 and D3 in that both D2's fitter and D3's fitter had been entitled, and if the opportunity arose obliged, to prevent the mate's negligence.

62. In reaching this conclusion, the Court made it clear that to look for a transfer of a contract of employment of the negligent employee was distracting and misleading. The inquiry should concentrate on the relevant negligent act and then ask whose responsibility it was to prevent it.

63. *Viasystems* was applied by the Supreme Court in the case of *Various Claimants v The Institute of the Brothers of the Christian Schools* [2013] 2 AC 1. This was another sexual

abuse case where the abuse was carried out by brother teachers at a residential school for boys in need of care between 1958 and 1992. The board of managers was held to be vicariously liable for the wrongs and the question for the Court was whether the Institute (an unincorporated association) was vicariously liable as well.

64. The Court held that it was vicariously liable even though the brothers supplied by the Institute entered into contracts of employment with those managing the school. The rationale for this conclusion was that the teaching activity undertaken by the brothers was in furtherance of the objective, or mission, of the Institute and the manner in which the brother teachers were obliged to conduct themselves as teachers was dictated by the Institute's rules.

65. More pertinently for present purposes, *Viasystems* was applied in the recent decision of *Bilta (UK) Ltd (In Liquidation) v Natwest Markets Plc* [2020] EWHC 546. This was a dishonest assistance case where two traders who were dealing in carbon credits were held to have been guilty of blind eye knowledge in dishonestly assisting a carousel fraud.

66. The traders were employed by a joint venture company, called RBS Sempra, but were carrying out the trades in the name of Natwest pursuant to a Commodities Trading Activities Master Agreement between Natwest and RBS Sempra.

67. Natwest accepted that the trades had to be attributed to it with the result that, if the traders were dishonest, it would be liable. The issue was whether RBS Sempra remained liable for the acts of its employees, despite the fact that their trading was being carried out in the name of Natwest. RBS Sempra denied that it was vicariously liable on the basis that under the terms of the Master Agreement the traders and their supervisors were deemed to be acting for Natwest. Natwest countered by saying that the reality on the ground was that these were RBS Sempra employees supervised by other RBS Sempra employees and since they were operating in an RBS Sempra world, it followed that RBS Sempra was vicariously liable either alone or jointly.

68. The Judge agreed that RBS Sempra remained, in law and in fact, the employer of the traders, and retained an obligation to exercise some supervision and control over the way in which the traders were to perform their trading activities. As a result, he concluded that it was a paradigm case for the imposition of dual vicarious liability. In his view, to use the words of Rix LJ in paragraph [80] of Viasystems, the traders plainly were still recognisable as the employees of RBS Sempra by whom they were legally employed,

paid and supervised. But they were not simply operating within the RBS Sempra sphere of operations. On the contrary, the traders had the power and authority to commit Natwest to trading contracts as agents for Natwest, the trading activity that they were conducting was that of Natwest, and in that regard they were operating in the Natwest sphere of operations too. So on the facts, there was dual vicarious liability with both Natwest and RBS Sempra liable for the acts of the traders.

Conclusion

69. The application of the doctrine of vicarious liability is not easy. This is because, with the exception of the deceit limitation, it is not based on hard and fast legal rules, but on policy considerations and the requirements of "social justice". This makes it particularly difficult to assess whether an employer is vicariously liable in cases of deliberate wrongdoing such as dishonesty on the part of an employee.

70. This task has been made much more uncertain by the recent decision in *Morrisons*. It may be that the true distinguishing feature of that case was that the misconduct was aimed at the employer and that the Courts will continue down the more expansionist approach of recent years. However, we may well see renewed efforts on the part of employers to escape liability in fraud cases based on the "*Frolic of his own"* limitation.

71. Finally, it seems to us that the authority exception in cases of deceit is something of an anomaly. It may be time for the Supreme Court to have another look at this.

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