The Supreme Court has handed down two new judgments addressing the legal limits of vicarious liability in employment and non-employment cases.

In ***WM Morrison Supermarkets plc (Appellant) v Various Claimants [*2020] UKSC 12** the Supreme Court has been called upon to once again review the boundary of vicarious liability for acts of employees. Its corrective to the decisions below, which had pinned Morrisons with a multi-million liability for the malicious acts of one of its employees, will be a source of significant relief for employers, large and small.

Those underlying events involved a senior auditor, disgruntled following internal disciplinary proceedings, going rogue. The auditor had, for legitimate reasons , access to the payroll data for the entirety of Morrison's workforce. In an apparent (and elaborate) attempt to frame another employee, and to harm his employer, the rogue auditor uploaded the personal data of 98,998 of these employees to a publicly accessible file sharing website (under an account set up in the name of the colleague). Posing as a 'concerned member of the public' he then anonymously sent CDs containing the data to national newspapers, purporting to have obtained the data from said website.

9,263 of the affected employees brought a group action for breach of the statutory duty created by section 4(4) of the Data Protection Act 1998, misuse of private information, and breach of confidence. During the course of proceedings Morrisons was alleged to be both primarily liable and vicariously liable for the auditor's actions as his employer.

At first instance Langstaff J (as he then was) held that whilst the employer had no primary liability, it was vicariously liable. In the latter regard he held that the unlawful disclosure was sufficiently closely related to the task that the auditor had been authorised to do (namely provide authorised task of disclosing the data to Morrison's external auditors) that liability was attracted. In a chilling finding for employers he found that Morrisons had trusted the auditor to deal with confidential information and it therefore took the risk that it might be wrong in placing that trust in him.

The Court of Appeal rejected Morrison's appeal against this conclusion. In reliance on judicial dicta, a comment by Lord Toulson in ***Mohamud* [2016] AC 677**, it found that there had been a "seamless and continuous sequence of events" linking the auditor's authorised task with the wrongful data breach. Further it found, in reliance upon ***Mohamud,*** that the improper motive of the auditor was irrelevant to the twin questions of whether or not the disclosure was within the field of activities assigned to him and to whether there was a sufficient connection between the conduct and the employment. In reliance on the presence of the factors identified by Lord Phillips in ***Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 *(known as the Christian Brothers case)*** the Court held that vicarious liability arose.

On Morrison's further appeal the Supreme Court has, however, confirmed that this approach was fallacious and that were it correct it suggested an interpretation of ***Mohamud*** which would have constituted *'a major change in the law'*.

In respect of the ***Mohamud*** points the Supreme Court went back to first principles and surveyed the judicial origins of vicarious liability for acts of employees. In concluding this analysis (which is worth reading in full) the Supreme Court endorsed Lord Nicholls' neat summary of the issue in ***Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48** as being a question of whether *'the wrongful conduct was so closely connected with acts the employee was authorised to do that, for the purposes of the liability of his employer to third parties it might*

fairly and properly be regarded as done by the employee whilst acting in the ordinary course of his employment '.

The Supreme Court set out that Lord Toulson's comments in ***Mohamud*** that there had been "an unbroken sequence of events", and that it was "a seamless episode", militating against a finding of vicarious liability in that case, had in effect been misapplied by courts below. Those comments were not, the Supreme Court explained, directed towards the temporal or causal connection between the various events, but towards the capacity in which the wrongdoer, Mr Khan, had been acting when those events took place.

The Supreme Court considered that Lord Toulson's reference to motive being 'irrelevant' in ***Mohamud*** had been taken out of context and in isolation could be dubbed as *'misleading.'* The Supreme Court has confirmed that the question of whether an employee is acting, albeit wrongly, on his employer's business, or whether they are acting for personal reasons, is *'plainly important'* to the analysis of "closeness of connection".

In respect of the application of the factors in the ***Christian Brothers*** case, the Supreme Court has clarified that these factors have no application to the question of "closeness of connection" for the purposes of assessing whether an employee's specific actions attract vicarious liability. These factors are relevant to the distinct and separate question of whether, in the case of wrongdoing committed by someone who *was not* an employee, the relationship between the wrongdoer and the defendant was sufficiently akin to employment. Employment status was not at issue in *Morrisons*.

Approaching the consideration of Morrison's potential liability afresh the Supreme Court has held that *'the mere fact that [the auditor's] employment gave him the opportunity to commit the wrongful act would not be sufficient to warrant the imposition of vicarious liability'.* Assessing the facts against those in various previous higher level decisions (the proper approach to be adopted to the 'close connection' issue) it has been concluded that in the present case it is *'abundantly clear'* that the auditor was not engaged in furthering his employer's business when he was pursuing a personal vendetta. The 'closeness of connection' test was therefore not satisfied.

In ***Barclays Bank Plc v Various Claimants [2020] UKSC 13*** the Supreme Court considered the correct approach to determining whether a relationship giving rise to vicarious liability exists between two persons who are not in an employment relationship. It confirmed that the correct approach continues to be to ask whether the tortfeasor was carrying on business on his/her own account or whether s/he was in a relationship akin to employment. The Court also decided that, only in what it described as 'doubtful cases' would the five policy reasons identified in the ***Christian Brothers*** case, be relevant to deciding whether workers who were technically self-employed or agency workers, were part and parcel of an organisation's business so as to make it fair, just and reasonable to impose vicarious liability.

The ***Barclays*** case concerned a doctor who ran a private practice and performed a range of work. Part of that work was to conduct pre-employment medical assessments for prospective employees of Barclays Bank. The doctor conducted those assessments at consulting rooms in his home and was paid a fee for each completed assessment report. Barclays arranged the appointments with the doctor, notified job applicants of the details of their appointments and provided the doctor with a pro forma report template to complete for each assessment. The doctor was alleged to have sexually assaulted some 126 Claimants employees during the course of examinations he conducted between 1968 and 1984.

The question of vicarious liability was considered at a preliminary hearing where the Judge decided that the doctor's wrongdoing was sufficiently closely connected with activities he undertook on behalf of Barclays, acting under its control and for its benefit as an integral part of its business activity. For these reasons the Judge held that it would be fair and just to find Barclays vicariously liable for any assaults proved against the doctor.
The Court of Appeal dismissed the bank's appeal.

Lady Hale gave the judgment of the Court with which Lords Reed, Kerr, Hodge and Lloyd-Jones agreed. In its judgment the Supreme Court surveys recent developments in the law of vicarious liability which were thought to call into question the classic distinction between employment relationships and relationships analogous to employment on the one hand; and relationships with an independent contractor on the other. Having considered the recent cases, the Supreme Court approved the judgment in ***Kafagi v JBW Group Ltd [2018] EWCA Civ 1157*** and emphatically asserted that the previously understood distinction has not been eroded. It said that the question was, and always had been, whether the tortfeasor was carrying on business on his/her own account or whether s/he was in a relationship akin to employment with the Defendant.

The Supreme Court noted an apparent tendency to elide the policy reasons for the doctrine of the employer's liability for the acts of its employees with the principles which should guide the development of that liability in relationships which are not employment but which are sufficiently akin to employment to make it fair and just to impose such liability.
It accepted that in 'doubtful cases' the five policy reasons identified in the ***Christian Brothers*** case *might* be relevant in deciding whether workers who were technically self-employed or agency workers were integrated into the Defendant's business so that there were "effectively part and parcel of that business" and therefore it was just, fair and reasonable to impose vicarious liability.

However, the Court also made it clear that unless there *was* doubt about whether the tortfeasor was carrying on his/her own independent business there would be no need to consider the five policy reasons in ***Christian Brothers***.

In this case the Supreme Court was satisfied that the doctor had clearly been in business on his own account with a portfolio of patients and clients. Accordingly, Barclays were not vicariously liable for his wrongdoing.

In reaching a decision which, on the facts of the case, is not particularly surprising, the Supreme Court discussed the temptation to align the law of vicarious liability with employment law and to assert that limb (b) of s.230(3) Employment Rights Act 1996 encapsulates the distinction between people whose relationship is akin to employment and true independent contractors. The Supreme Court resisted that temptation with this striking observation. *"..it would be going too far down the road to tidiness for this court to align the common law concept of vicarious liability developed for one set of reasons with the statutory concept of 'worker' developed for a quite different set of reasons."*

Commentary

The Supreme Court has used the cases of *Morrisons* and *Barclays* to attempt to place some clearer limits on the scope of vicarious liability, with mixed results. Ever since the ***Christian Brothers*** case in 2012, the scope

of vicarious liability had been gradually expanded, both in terms of the analysis of the work relationships to which it applied, and the type of act or omission to which it applied.

Barclays has provided some much-welcomed clarity as to how to analyse whether a work relationship which is not employment is capable of giving rise to vicarious liability. The first question to ask is whether the tortfeasor was carrying on business on his/her own account as opposed to being in a relationship akin to employment with the Defendant. If someone is in business on their own account, the analysis stops there – vicarious liability will not attach. Only in borderline cases does the analysis need to go further, including a consideration of the *Christian Brothers* five factors.

The *Morrisons* case, which concerned an employment relationship, is perhaps less clear cut. It has clarified that the question as to whether specific acts or omissions of an employee attract vicarious liability is whether "*the wrongful conduct was so closely connected with acts the employee was authorised to do that, for the purposes of the liability of his employer to third parties it might fairly and properly be regarded as done by the employee whilst acting in the ordinary course of his employment".* However, the answer to that question must be answered on a case by case basis. Thus for employers, and those who advise them, it will remain fraught with uncertainty. What is helpful is the Supreme Court's focus on the need to analyse whether the employee at the time was furthering his employer's business or instead on a "frolic of his/her own". Where the acts in question were deliberate and personally motivated, it appears in general terms that a court will be less likely to find vicarious liability, in the light of *Morrisons*.

The Supreme Court in *Morrisons* is careful to say that other types of deliberate torts which frequently form the subject matter of vicarious liability claims, those involving sexual abuse or sexual assault, are treated differently. There is unlikely to be any real debate as to whether those torts were committed either in furtherance of the employer's business, or whether they were personally motivated. The Supreme Court explains the "close connection" test is applied differently, focusing on other criteria, such as the employer's conferral of authority on the employee over the victims, which authority has then been abused. These asides show again the role of policy in delineating the scope of vicarious liability.

It seems therefore that drawing clear lines as to the legal limits of vicarious liability remains challenging. Policy considerations underpin much of the case-law, with the courts considering on whose shoulders it is "just" for the loss to fall. Further, decisions are fact-specific and the legal principles that are to be applied to each set of facts are broadly worded. However, Morrisons and Barclays may indicate that the trend of expansion of vicarious liability may have come to a halt.

The information and commentary contained in this article does not, and is not intended to, amount to legal advice to any person on any specific case or matter, and should not be relied upon as such.