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The construction & energy law specialists

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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Vicarious liability

Cox v Ministry of Justice & Mohamud v WM Morrison Supermarkets plc

[2016] UKSC 10 & 11

Vicarious liability is a means of establishing that a person or company may be liable for the acts of another, usually but not always employees. This can include agency staff and/or subcontractors. Whilst these are obviously "employed" by third parties, if a company exerts sufficient control over the activities of those staff, there could well be vicarious liability for those staff on the basis that the company in question is deemed to be their "employer" for a particular activity or period of time. This is a liability that cannot be contracted out of. Two recent cases which came before the Supreme Court have suggested that the courts may be prepared to look beyond the traditional employer/employee relationship. According to Lord Red, the scope of vicarious liability depends upon the answers to two questions:

"First, what sort of relationship has to exist between an individual and a defendant before the defendant can be made vicariously liable in tort for the conduct of that individual? Secondly, in what manner does the conduct of that individual have to be related to that relationship, in order for vicarious liability to be imposed on the defendant?"

The first question was considered in the claim brought by Mrs Cox who was employed by HM Prison Swansea as a catering manager. She was accidentally injured by a prisoner, not an employed member of staff, who dropped a sack of rice on her back. She sought compensation from the Ministry of Justice ("MOJ"). At first instance, the court held that the MOJ was not vicariously liable for the negligence of the prisoner. However, the CA disagreed, stating that the relationship between the prisoner and the prison service was similar to that of employer and employee. The Supreme Court agreed with Lord Red, noting that:

"a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party)..."

In other words, the Supreme Court recognised that today many workers may in reality be part of the workforce of an organisation without having a contract of employment with that organisation. Further, the word "business" did not necessarily require the carrying out of commercial activities nor the pursuit of profit. It was enough that the prison carried on activities in the furtherance of its own interests, here the rehabilitation of prisoners.

In the second case, the Supreme Court considered the connection between the relationship of the employee and employer and the conduct of the employee which caused harm to the potential claimant. Here, Mr Mohamud visited a petrol station owned by Morrisons, where he was racially abused and assaulted. The perpetrator of the attack, Mr Khan, was an employee of Morrisons. His job involved some interaction with customers and members of the public who attended the station kiosk, but nothing more than serving and helping them. The issue for the courts was whether or not there was a sufficiently close connection between the wrongdoing of Mr Khan and what he was employed to do. At first instance and in the CA, the courts held that the fact that Mr Khan's employment involved interaction with customers was not enough to make his employers liable for his use of violence towards the claimant. The Supreme Court disagreed.

In applying "the close connection test", Lord Toulson said that a court must consider two matters:

(i) What was the nature of the employee's job; and

(ii) Was there a sufficient connection between the position in which the employee was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice?

Mr Khan's job was to attend to customers and respond to their enquiries. His response to Mr Mohamud as a potential customer was within the "field of activities" entrusted to him by his employer. The court rejected the argument that in leaving the kiosk, the significant or close connection between Mr Khan and his employment at Morrisons was broken. Mr Khan leaving the kiosk, following Mr Mohamud and threatening and assaulting him was one "seamless episode". Further, in telling Mr Mohamud never to return to the premises, Mr Khan was purporting to act about his employer's business. Lord Toulson continued that:

"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 employee's abuse of it. Morrisons was therefore held responsible for the abuse of the position it entrusted to Mr Khan."

The assault was unprovoked and unexplained, but there was a sufficiently close connection between the position in which the employee was employed, which included face to face contact with customers, and his wrongful conduct to make it just that Morrisons should be held responsible for the consequences of Mr Khan's actions.

Insurance: non-disclosure clauses

Mutual Energy Ltd v Starr Underwriting Agents Ltd

[2016] EWHC 590 (TCC)

A non-disclosure clause in an insurance policy provided as follows:

"Notwithstanding any other provisions of this policy:

(a) the Insurers agree not to terminate, repudiate, rescind or avoid this insurance as against any Insured, or any cover or valid claim under it, nor to claim damages or any other remedy against any Insured or any agent of any Insured, on the grounds that the risk or claim was not adequately disclosed, or that it was in any way misrepresented, or increased, or that any term, condition or warranty was breached, or on the ground of negligence, unless deliberate or fraudulent non-disclosure or misrepresentation or breach by that Insured is established in relation thereto;"

Mr Justice Coulson had to decide what the words "*deliberate or fraudulent non-disclosure*" meant. Did the reference to *"deliberate … non-disclosure"* mean that the contract could be avoided in circumstances where Mutual Energy had honestly but mistakenly decided not to disclose a particular document or fact (the Insurers' case); or did it mean that avoidance was only available if there had been a deliberate decision not to disclose a particular document or fact which Mutual Energy knew was material, such that its non-disclosure involved an element of dishonesty?

On Mutual Energy's interpretation, the meaning of the clause imported an element of dishonesty: that the relevant person knew that a particular document or fact should be disclosed to the Insurers and deliberately failed to disclose it. Insurers argued that deliberate must be given a separate and distinct meaning from "fraudulent", and that, because it is fraudulent non-disclosure, it would involve the element of dishonesty. On the Insurers' view, "*deliberate … non-disclosure*" must encompass an honest but mistaken decision not to disclose a document or fact.

The Judge noted that conduct can be deliberate and dishonest, but not fraudulent. A breach of contract could be deliberate and made in the knowledge that it is a breach, but it may not be fraudulent. The remedy may be different, depending on which it is. Further, a representation may be dishonest but, if there is no intention to deceive or no intention that the misrepresentation be acted upon, then it is not fraudulent.

The Judge also considered the clauses from a business common sense point of view. There was a strong risk here that Mutual Energy could be punished for undertaking a rigorous disclosure exercise because they had made an honest mistake in the non-disclosure of one material document; but they would not be penalised if they had failed to go about the disclosure exercise properly, failed to consider the document in question (or indeed any documents), and simply failed to disclose the file. It could not be right that Mutual Energy should be in a worse position because they had made an honest mistake, as opposed to an inadvertent error.

The Insurers' interpretation produced a wholly unbusinesslike result and so the Judge concluded that "*deliberate or fraudulent non-disclosure*" meant a deliberate decision not to disclose something which the Insured knows should be disclosed, and does not extend to an honest mistake.

Termination: giving notice for a repudiatory breach

Vinergy International (PVT) Ltd v Richmond Mercantile Ltd FZC

[2016] EWHC 525 (Comm)

As part of an appeal against an arbitration award, Mr Justice Teare had to consider whether Richmond was able to rely on an unhindered common law right to terminate an agreement by reason of a repudiatory breach so as to completely bypass the notice and remedy requirements in the termination clause. Vinergy said that where a contract provided for a notice to be given before a contract could be terminated that notice also applied with regard to the right to terminate at common law.

There was discussion of the 1995 case of *Lockland Builders v Rickwood* (1995) 46 Con LR, where a clause in a building contract gave the owner a right to terminate for delay or poor materials if he served a notice of breach and complied with the procedure set out in the contract. The owner did not follow this procedure but sought to terminate for repudiatory breach. The termination was held to be invalid. The CA noted that whilst the notice of breach was required in respect of breaches that fell within the scope of the clause in question (i.e. for delay or poor materials), notice of breach would not have been required if the breaches complained of had been outside the scope of the termination clause.

However, here, the Judge held that there was no general test; it was a matter of construction as to whether or not the notice clause applied to a party terminating because of a repudiatory breach. Under the agreement here, the express right to terminate arose on the failure of the other party to observe terms of the agreement and the failure of the other party to remedy the breach within the period specified in the notice of breach. There was no express mention of the right of a party to accept a repudiatory breach as terminating the agreement. Further, the Judge did not consider that you could imply an agreement that before a party terminated, whether pursuant to the contract or pursuant to the common law, the party must follow the procedure laid down of giving notice to remedy. The express right to terminate provided by the contract was said to be dependent upon the "failure ... to observe any of the terms herein". Further, the requirement to give notice to remedy was not in itself all-embracing as it did not apply to all of the contractual rights to terminate.

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