

June 28, 2024

**Diamonds aren't forever:  
who is vicariously responsible when they have been stolen?**

By [Robert Blackett](#)

*Take care of the pence and the pounds will take care of themselves*

Attributed to William Lowndes

Lowndes Square is a garden square in Belgravia, named for former resident William Lowndes. He served as secretary to the Treasury during the reign of Queen Anne. On Lowndes' death in 1724, Walpole called him "as able and honest a servant as ever the Crown had". Three hundred years later, *Shamsan v 44-49 Lowndes Square Management Company Ltd* [2024] EWCA Civ 436 tells the tale of some less able servants, their unwitting role in a seven-million-pound jewellery theft and, in its aftermath, an unsuccessful search by the victim's lawyers for deeper pockets on which to pin responsibility for the servants' errors. The hearing is available to view online at [https://www.youtube.com/watch?v=SGxtGK1\\_94g](https://www.youtube.com/watch?v=SGxtGK1_94g).

### Lowndes Square

Lowndes Square is just south of Knightsbridge underground station and firmly on the dark blue part of the London Monopoly board. It has been the setting for dramas real and fictional, beside which the *Shamsan* case is an unexciting footnote. EF Benson's light-hearted short story *The Countess of Lowndes Square* concerns a fictional resident, the Countess of Hampshire, who becomes a professional blackmailer. Benson paints the square as a hotbed of intrigues, infidelities and hypocrisies among the inter war aristocracy.

There might be some truth in Benson's picture. Oswald Mosley, aristocratic leader of the British Union of Fascists, lived at 5 Lowndes Court with his first wife, Cynthia. In 1932 Mosley met and began an affair with 'bright young thing' Diana Mitford after they were introduced at a party by society hostess Emerald Cunard (at another of whose parties Mosley first met the future George VIII). Mitford immediately left her first husband Bryan Guinness (heir to the Guinness brewing fortune) and moved, with a skeleton staff of four servants, to a flat on Eaton Square, round the corner from the Mosleys, to pursue their affair. When Cynthia Mosley died suddenly a year later, Mosley and Mitford promptly married in a secret ceremony at Joseph Goebbels' house in Germany with Adolf Hitler as guest of honour. The Mosleys would continue to live at Lowndes Court until at least the mid-1960s, save for a three year spell spent interned together during the war at a house in the grounds of Holloway Prison under Defence Regulation 18B.

The following decade, a less glamorous visitor to the square was Patrick Mackay - one of the UK's most prolific serial killers (also much enamoured of Nazism) - who, in 1975 strangled elderly Lowndes Square resident Adele Price, having gained access to her flat by asking for a glass of water. In the 1980s, Alan Hollinghurst's Man Booker Prize-winning novel *The Line of Beauty* (2004) depicts fictional resident Wani Ouradi, son of a wealthy Lebanese businessman, pursuing his ill-fated magazine and screenplay in the shadow of the AIDS epidemic. The 2020s have seen real-world resident Abdullah Alfasasi arrested in a raid of his Lowndes Square flat for his role in smuggling £104 million in criminal funds from the UK to Dubai using couriers including a Kim Kardashian lookalike and a former partner of world super-middleweight boxing champion Joe Calzaghe.

## Flat 9, 48 Lowndes Square

48 Lowndes Square (the “**Building**”) is a block on the West side of Lowndes Square, adjacent to Harvey Nichols department store. While most of Lowndes Square comprises large neoclassical apartment blocks dating from the 1830s designed by George Basevi (who also designed nearby Belgrave Square), 48 Lowndes Square dates from the mid-1930s. It is more art deco in style, designed by Ernest Joseph, who also designed Shell Mex House at 80 Strand.

From 14 September 2018 the Claimant, Ms Shamsan took an assured shorthold tenancy of Flat 9, 48 Lowndes Square for a two-year term for a rent of £2,700 per week.

## The burglary

Porters worked at the Building. It was the practice of the porters to require that each person permanently resident in a flat provide to the porters a copy set of keys to permit the porters to have access to the flat. Ms Shamsan duly did so.

On Wednesday 11 December 2019, it is alleged, the porters gave the keys to Flat 9 to a person who claimed to be a cleaner. She gained entry to Flat 9 but disturbed Ms Shamsan’s son and left. The next day, Thursday 12 December 2019 Ms Shamsan caused the locks of Flat 9 to be changed and spares of the new key were once again left with the porters. Later the same day, however, while Ms Shamsan and her son were out, one or more unknown persons gained access to Flat 9 using a key. They stole jewellery claimed to have been worth around £7 million, none of which was insured. Ms Shamsan alleged that the porters had, again, carelessly allowed the criminals access to her new key.

## The case law on duties to prevent harm by others

Per Lord Goff in *Smith v Littlewoods* [1987] 1 A.C.241 at 27 B-C “... *the law [does] not recognise a general duty of care to prevent others from suffering loss or damage caused by the deliberate wrong doing of third parties ... The fundamental reason is that the common law does not impose liability for what are called pure omissions*”. That case had concerned an empty cinema the owners of which did nothing to secure. A fire was deliberately started by trespassers. The House of Lords concluded that the owners did not owe a duty of care to the owners of an adjacent property damaged by the fire.

Lord Goff said there were two exceptions to this principle. Those were where the relationship between the parties gave rise to an imposition or assumption of responsibility, or where the defendant negligently caused or permitted to be created a source of danger, and it was reasonably foreseeable that third parties might interfere with it and spark off the danger, causing damage to the defendant’s neighbours.

In their judgments, their Lordships discussed *Stansbie v Troman* [1948] 2 K.B. 48. There, a decorator had been left alone in a house, with the permission of the householder’s wife, carrying out his work. When he left the house to obtain wallpaper, he did not lock the door (the case report does not specify whether Mrs Troman had left him a key but, presumably, she had). During the decorator’s absence a thief entered the house. The householder claimed the value of the stolen property from the decorator. The claim was upheld at first instance and on appeal, on the basis that there had been a contract between the householder and the decorator, which had implicitly imposed a duty on the plaintiff decorator to take reasonable care with regard to the state of the premises if he left them during the work. In *Smith v Littlewoods* their Lordships suggested that a contract was unnecessary, and there would have been a sufficient assumption of responsibility on the part of the decorator as to make him liable

# HAYNES BOONE

to others with whom he had no contract. Lord Mackay said: “*I should have thought that on the same facts, a guest of the plaintiffs who had left property in the house, if it had been stolen, might also have succeeded in recovering damages in respect of that theft from the decorator*”. Lord Goff said: “*That there are special circumstances in which a defender may be held responsible in law for injuries suffered by the pursuer through a third party’s deliberate wrong doing is not in doubt. For example, a duty of care may arise from a relationship between the parties, which gives rise to an imposition or assumption of responsibility upon or by the defender, as in Stansbie v Troman where such responsibility was held to arise from a contract. ... Such responsibility might well be held to exist in other cases where there is no contract, as for example where a person left alone in a house has entered as a licensee of the occupier.*”

In *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] AC 736 and in *N & Anr v Poole Borough Council* [2019] UKSC 25; [2020] AC 780 Lord Reed suggested the act/omission distinction was unhelpful, saying in the later case:

*“I am intentionally drawing a distinction between causing harm (making things worse) and failing to confer a benefit (not making things better), rather than the more traditional distinction between acts and omissions, partly because the former language better conveys the rationale of the distinction drawn in the authorities, and partly because the distinction between acts and omissions seems to be found difficult to apply. ... a duty to protect from harm, or to confer some other benefit, might arise in particular circumstances, as for example where the [defendant] had created the source of danger or had assumed responsibility to protect the claimant from harm.”*

## **The position of the porters**

The immediate cause of Ms Shamsan’s loss was the burglary of her flat by the unknown criminals. Ms Shamsan would obviously have had a claim against them in the tort of conversion. They, however, were long gone with the jewellery.

The porter’s provision of the keys to the burglars was an act, not a mere omission. By providing the keys, they made things worse rather than merely failing to make things better. And, even if their breach had been different, and had consisted of a mere omission / failure to make things better, one can see how there might be said to have been an ‘assumption of responsibility’ on their part towards Ms Shamsan. They were like the decorator who was retained by the homeowner in *Stansbie*. Ms Shamsan was like the homeowner’s guest / licensee to whom the decorator would be taken to have assumed responsibility.

It seems clear enough, then, that Ms Shamsan would have had a claim against the porters and, indeed, Ms Shamsan’s claim against Lowndes, was premised on an allegation that the porters had indeed been negligent in providing keys to the criminals. Edis LJ observed this claim against the porters: “41. ... *would be a perfectly conventional tort claim*” and “59. ... *For present purposes it is appropriate to assume that the porters were negligent. On this assumption, they would be liable to [Ms Shamsan] for such loss as she has sustained ...*”.

Ms Shamsan and her lawyers were, however, interested to find some deeper pockets, and so it was necessary to consider how the porters had come to be employed at the building and to be providing this key holding service.

## **Ownership of the Building**

Ms Shamsan’s shorthold tenancy was evidently the tail end of a long line of leases and sub-leases. Per Edis LJ at [17] “*It is not necessary to explain exhaustively the complex series of leases and sub-leases ...*”. Wikipedia,

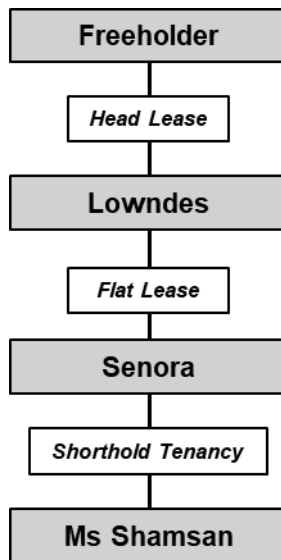
# HAYNES BOONE

incidentally, claims Lowndes Square to have “*the highest percentage of highly anonymous (shell company) ownership in the UK*”. Quite how one would determine that is unclear – the quoted source appears to be a 2018 BBC3 documentary by swiftly-forgotten satirist ‘BlindBoy Boatclub’ (whose signature look was wearing a plastic bag on his head).

From the no-doubt simplified account in the judgment, the freehold owner of the Building appears to have been the company formerly known as Sun Life Assurance (now Aviva Life and Pensions UK Limited). The freeholder had granted what were termed the “**Flat Leases**”, each a long lease of a flat with a term expiring in 2149.

The Defendant, 44-49 Lowndes Square Management Company Ltd (“**Lowndes**”) had subsequently acquired a long lease of the Building from the freeholder (termed the “**Head Lease**”), and had become the lessor under the Flat Leases, effectively being inserted into the chain between the freeholder and Flat Lease tenants. Lowndes was a limited company with two classes of shares. Each of the tenants under the Flat Leases held one ‘A’ share. The freeholder held some ‘A’ shares and all of the ‘B’ shares.

Lowndes’ tenant under the Flat Lease for Flat 9, 48 Lowndes Square was a company called Senora Holdings Limited (“**Senora**”). It was Senora which had granted the Claimant, Ms Shamsan, her two-year shorthold tenancy of Flat 9.



## The portage services

By the Head Lease, Lowndes had covenanted to the freeholder “*At all times to employ Messrs. Farebrother or some other firm of reputable surveyors [with the Freeholder’s approval] to act as managing agents for the Building and in relation to the provision of the services and the carrying out of the other matters referred to in the Third Schedule to the Flat Leases*”.

By the Flat Lease, Senora had covenanted to pay the Lessor (originally the Freeholder, now Lowndes) a service charge: “*... to the intent that [Lowndes] shall be fully indemnified paid and reimbursed in respect of all costs expenses payments and liabilities incurred by [Lowndes] in connection with the state and condition of the Building*”.

# HAYNES BOONE

*and the provision of services to the tenants thereof ...*". The Third Schedule to the Flat Lease listed the services whose cost could be included in the service charge as including *"the cost of employing a caretaker a porter or other staff"*.

Lowndes covenanted to Senora *"For the purpose of performing the covenants on the part of [Lowndes] herein contained at its absolute discretion to employ on such terms and conditions as [Lowndes] shall think fit one or more caretakers porters maintenance staff cleaners or such other persons as [Lowndes] may from time to time in its absolute discretion consider necessary"*.

Clause 8(c) of the Flat Lease was a complex provision which, in essence, allocated liability so that, as between Lowndes and Senora, Senora was to be liable for losses suffered by Senora or its *"licensees servants or others"* caused by the negligence of Lowndes *"its servants caretakers other employees or contractors"*.

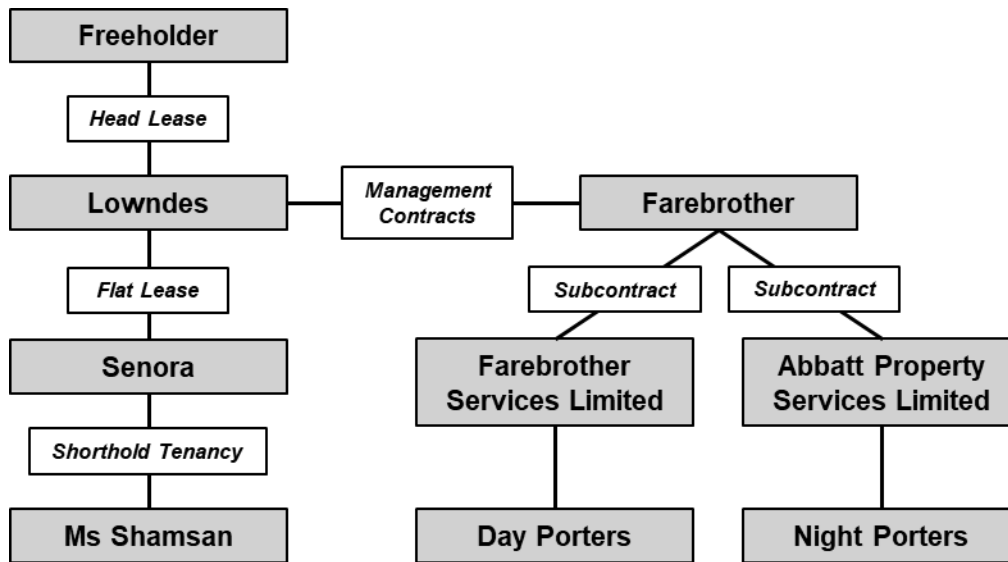
Ms Shamsan's shorthold tenancy said: *"[Ms Shamsan] shall perform and observe [Senora's] covenants in the [Flat Lease] ..."*. Those included the covenant to pay the service charge. The Judge at first instance considered the term *"covenants"* also included clause 8(c) and Ms Shamsan was, for that reason, prevented from claiming against Lowndes. On appeal that was held to be incorrect – clause 8(c) was not one of the *"covenants"* and did not bind Ms Shamsan.

Pursuant to its obligation under the Head Lease to *"employ Messrs. Farebrother ... in relation to the provision of the services ... referred to in the Third Schedule to the Flat Leases"* which included *"employing ... a porter ..."* Lowndes was party to two **Management Agreements** with **Farebrother** (the managing agent specified in the Head Lease). These appointed Farebrother as managing agents of Lowndes in respect of the Building. Farebrother agreed to carry out the management services diligently and protect and promote the best interests of Lowndes, and to use its best endeavours in the provision of the management services to comply with Lowndes' obligations under the Head Lease, the Flat Leases, common law, and statutory requirements. As regards portage staff, the Management Agreement required Farebrother:

- "10 To engage such portage staff as shall be necessary for the performance by the Agent of its obligations under this Agreement and to comply with all necessary employment and other legislative requirements in respect of portage staff and in relation to resident porters to arrange that their licence to occupy any Porter's Flat ceases on termination of their employment.*
- 11. To liaise with and supervise the portage staff in the performance of their duties."*

Farebrother procured the portage services by way of two subcontracts. Day porters were employed by a sub-contractor of Farebrother called Farebrother Services Limited; and night porters who were employed by a separate sub-contractor of Farebrother called Abbatt Property Services Limited.

# HAYNES BOONE



## The contractual scheme

The Head Lease required Lowndes to employ either Farebrother to provide management services or, with the approval of the Freeholder, another firm of surveyors to provide the services. So Lowndes was bound to provide those services by means of a contractor, and the choice of contractor was dictated by the freeholder. The services in question, listed in the third schedule to the Flat Leases, included employing porters. As between Lowndes and Senora it was agreed that Senora could not sue Lowndes for any negligence on the part of the porters. Any porters providing any service to Senora were deemed to be acting on Senora's behalf, rather than as agents for Lowndes. This provision came into existence at a time when the Lessor under the Flat Lease had employed the porters itself, rather than their being employed by an independent contractor.

## Ms Shamsan's claim

Ms Shamsan's lawyers sent letters threatening claims against, and had various pre-action correspondence with, the Freeholder, Lowndes, Senora, Farebrother and a management agency called Tandem (whose role is never explained). In the end Ms Shamsan settled on Lowndes and pursued a claim against Lowndes. Lowndes applied for summary judgment, and the judge at first instance granted it, dismissing Ms Shamsan's claim against Lowndes. Ms. Shamsan appealed and the appeal was dismissed, albeit on somewhat different grounds to those relied upon at first instance.

Something never discussed in the judgment is who would ultimately have borne the loss if Lowndes had been liable? Each Flat Lease said it was: *"to the intent that [Lowndes] shall be fully indemnified ... in respect of all ... liabilities incurred by [Lowndes] in connection with ... the provision of services to the tenants ..."*. If Lowndes had been liable in connection with the provision of the portage service, there would likely have been a further dispute as to whether Lowndes could recover that liability from Senora and the other Flat Lease tenants.

## Theoretical underpinnings of vicarious liability

# HAYNES BOONE

In essence, Ms Shamsan was concerned to make some other party liable for the porters' negligence. Vicarious liability is where a defendant, who may be personally innocent of any wrongdoing, is made liable for the acts/omissions of a wrongdoer - often an employee though (as discussed below) other relationships can give rise to such liability. Why do we hold innocent people liable for the wrongdoing of others? As Lord Millett observed 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".

In an individual case, imposing vicarious liability may permit the victim of a tort to recover compensation where otherwise they would not do so, because the immediate wrongdoer may not be worth suing. The burden of the loss or injury is thereby transferred from one person who was not at fault (the victim) to another person who was not at fault (the employer) but who is assumed to be better able to bear that burden than the immediate victim. Vicarious liability, in such a case, serves as a mechanism for wealth redistribution or a kind of *ad hoc* social insurance scheme. Making a given business liable for the wrongdoing of an employee may encourage that business, and other businesses, to take steps aimed at preventing similar wrongdoing in the future or reducing its impact. Vicarious liability, in such a case, serves as a mechanism for social engineering – encouraging better recruitment, selection and training of employees, better design of work systems and practices by other businesses.

One might think those were worthy goals. But vicarious liability is judge-made common law, and it is not obvious why unelected judges should be redistributing wealth through an *ad hoc* social insurance scheme or imposing liability on the business which appears before them because they think that doing so might encourage other businesses to adopt better working practices.

If these are the goals to which the doctrine is directed, vicarious liability also seems a blunt tool for achieving them. It may be true that, on average, a tortfeasor's employer will typically have deeper pockets than their victim. But that will not always be the case and it is no part of the test for vicarious liability to enquire as to the relative wealth of the victim and the defendant (see the discussion of the *Christian Brothers* and *Cox* cases). There is no guarantee that the doctrine will never operate to redistribute loss away from a wealthy victim onto someone less well able to bear it. One suspects that will quite often be the effect of the doctrine in a case where the victim was insured against the loss in question, and has been compensated by insurance. A subrogated claim is then brought against the blameless employer by the insurer. Since around three-fifths of employees are employed by small businesses (with fewer than 50 employees) the effect of the employer's vicarious liability in such a case is to shift the burden from a deep-pocketed insurer to some more modest enterprise.

## The test for vicarious liability - relationship

Two elements have to be shown before one person can be made vicariously liable for the torts committed by another. The **first** is a relationship between the two persons which makes it proper for the law to make the one pay for the fault of the other. Historically, that was limited to the relationship between employer and employee, but that has now been somewhat broadened.

*Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 (the "*Christian Brothers case*") concerned whether the Institute of the Brothers of the Christian Schools, an international unincorporated association was vicariously liable for the sexual abuse of children by members of the institute, known as brothers, who taught at an approved school. Another organisation managed the school and employed the brothers as teachers. It had been held to be vicariously liable for the abuse. The issue was whether the institute was also vicariously liable. The Supreme Court held it was. Vicarious liability was thus imposed on a body which did not

# HAYNES BOONE

employ the wrongdoers, in circumstances where another body did employ them and was also vicariously liable for the same tort. Lord Phillips said:

*“The relationship that gives rise to vicarious liability is in the vast majority of cases that of employer and employee under a contract of employment. The employer will be vicariously liable when the employee commits a tort in the course of his employment. There is no difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied: (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee’s activity is likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; (v) the employee will, to a greater or lesser degree, have been under the control of the employer.”*

*“At para 35 above, I have identified those incidents of the relationship between employer and employee that make it fair, just and reasonable to impose vicarious liability on a defendant. Where the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the ground that it is ‘akin to that between an employer and an employee’.”*

In *Cox v Ministry of Justice* [2016] AC 660, the Supreme Court held the Ministry of Justice was vicariously liable for the negligence of a prisoner working in a prison canteen who had negligently caused injury to a prison service employee. Their Lordships found the relationship was sufficiently akin to that of employment, applying the *Christian Brothers* incidents. The court noted that, of these, (i) was unlikely to be significant (“*The mere possession of wealth is not in itself any ground for imposing liability*”) and as for (v) “*it is not realistic in modern life to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee; nor indeed was it in times gone by, if one thinks for example of the degree of control which the owner of a ship could have exercised over the master while the ship was at sea. Accordingly, as Lord Phillips stated, the significance of control is that the defendant can direct what the tortfeasor does, not how he does it. So understood, it is a factor which is unlikely to be of independent significance in most cases. On the other hand, the absence of even that vestigial degree of control would be liable to negative the imposition of vicarious liability*”. The position was thus summarised in *Cox* at [24] to be: “*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), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question.*”, with it being made clear that words such as ‘business’ do not confine vicarious liability to activities of a commercial nature.

In *Armes v Nottinghamshire County Council* [2017] UKSC 60, the Supreme Court (by a majority) held that, applying the *Christian Brothers* factors, a local authority was vicariously liable for the abuse which the claimant suffered at the hands of her foster parents whose relationship to the local authority was sufficiently similar to that of employer and employee. Their torts were committed in the course of an activity carried on for the benefit of the local authority, who recruited the foster parents to discharge the local authority’s responsibility to care for the child. That created the risk in question.

*Barclays Bank plc v. Various Claimants* [2020] UKSC 13 concerned a bank which had contracted a doctor to carry out medical examinations of new employees to establish their eligibility for life insurance offered as part of the bank's employment benefits. 126 claimants claimed to have been sexually assaulted by the doctor in the course of these examinations, and sought to claim damages from the bank. The Supreme Court found the bank was not vicariously liable. Per Lady Hale:

*"27. The question ... is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant. In doubtful cases, the five "incidents" identified by Lord Phillips may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. Although they were enunciated in the context of non-commercial enterprises, they may be relevant in deciding whether workers who may be technically self-employed or agency workers are effectively part and parcel of the employer's business. But the key, as it was in *Christian Brothers, Cox and Armes*, will usually lie in understanding the details of the relationship. Where it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents.*

*28. Clearly, although Dr Bates was a part-time employee of the health service, he was not at any time an employee of the Bank. Nor, viewed objectively, was he anything close to an employee. He did, of course, do work for the Bank. The Bank made the arrangements for the examinations and sent him the forms to fill in. It therefore chose the questions to which it wanted answers. But the same would be true of many other people who did work for the Bank but were clearly independent contractors, ranging from the company hired to clean its windows to the auditors hired to audit its books. Dr Bates was not paid a retainer which might have obliged him to accept a certain number of referrals from the Bank. He was paid a fee for each report. He was free to refuse an offered examination should he wish to do so. He no doubt carried his own medical liability insurance, although this may not have covered him from liability for deliberate wrongdoing. He was in business on his own account as a medical practitioner with a portfolio of patients and clients. One of those clients was the Bank."*

## The test for vicarious liability - course of employment

The **second** part of the test for vicarious liability concerns the connection between the employer/employee relationship and the tortfeasor's wrongdoing. Historically, the tort had to be committed in the course of or within the scope of the tortfeasor's employment, but that too has been somewhat broadened. This second part of the test is of less relevance to the issues in *Shamsan*, but is still interesting and rewards a short detour.

The test, laid down in *Lister v Hall*, requires that there be a "*close connection*" between the tortfeasor's acts/omissions and what he has been entrusted to do by the defendant, so that they can be said to have been acting in the course of their employment. The test is easily stated, but its application is more difficult.

In *Mohamud v Morrisons* [2016] AC 677 the Supreme Court held a supermarket was liable for the acts of a petrol pump attendant who 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. Abusing and assaulting a customer was not part of the employee's role. However, there was still a sufficiently close connection. The Court first asks what functions or "*field of activities*" have been entrusted to the employee. This must be assessed broadly, not by reference to fine distinctions based on the interpretation of the contract of employment. 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. Lord Toulson said: "*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".*

The elasticity of the concept of "close connection" is most evident in cases involving dishonesty by employees (though note that the close connection test does not apply to claims in deceit, which are subject to a different test, which is beyond the scope of this article and is discussed in *The Ocean Frost* [1986] AC 717, and essentially requires that an employee making a misrepresentation either by acting within the course of his actual authority, or that the claimant has relied on a representation by the employer that the employee had some wider authority).

For other dishonesty torts, the *Mohamud* "close connection" test applies. Vicarious liability is not excluded just because an employee is acting for their own benefit. The leading case on that is *Lloyd v Grace Smith* [1912] AC 716 (HL) where a managing clerk of a law firm conducted a conveyance for a client of the firm, but instead of conveying the property as the client had instructed, conveyed the property to himself and disposed of it for his benefit. The law firm did not benefit from this and the clerk was acting dishonestly towards his employers as much as towards the client, but the firm was still vicariously liable.

In *Morris v Martin* [1966] 1 QB 716 (CA) a claimant sent a mink stole to be cleaned. The fur was given to a junior employee to clean but he instead stole it. The company was held liable. Per 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*".

The fact that conduct has been prohibited by an employer does not negate vicarious liability. Indeed, prohibiting employees from doing something may reinforce the case for vicarious liability, because it demonstrates the risk of the employee doing that thing was known to the employer and it was all the more incumbent on the employer to have prevented it. In *Rose v Plenty* [1976] 1 WLR 141 (CA), a milkman paid a boy to help him collect and deliver milk despite his employer's express prohibition. The boy fell off the milk float and was injured as a result of the milkman's negligence. The Court of Appeal held the employer liable for the milkman's negligence notwithstanding the express prohibition.

A concept which recurs in the case law is that of asking whether an employee was on a 'frolic of their own' which took them outside the course of their employment. This has been discussed in two relatively recent cases. In *Group Seven v Notable Services LLP* [2020] Ch. 129 (CA) a Mr Louanji was employed as a relationship manager by a Swiss bank. He assisted a fraudster, Mr Nobre, to launder €100 million of stolen funds through a law firm's client account by providing statements to the solicitors operating the account purporting to vouch for the source of the funds to assist the fraudster in passing the firm's KYC checks. The bank argued it should have no vicarious liability: (i) the bank had rejected Mr Nobre as a client and refused to accept his €100 million because it was not satisfied as to its origin; (ii) the bank had told Mr Louanji to have nothing to do with Mr Nobre; and (iii) Mr Nobre had bribed Mr Louanji to make statements purporting to be from the bank to assist Mr Nobre. Nonetheless, the Court of Appeal found there was a sufficiently close connection, and rejected the bank's submission that Mr Louanji had been on a frolic of his own. Mr Louanji was assisting someone who wasn't a client of the bank, had been bribed to do so and was seeking to further only his own interests, but this was not sufficient for the bank to escape liability.

*Group Seven* can be contrasted with *Various Claimants v Morrisons* [2020] 2 WLR 941, a decision of the Supreme Court. There, a Mr Skelton who was employed by (again) Morrisons supermarket as an internal auditor was asked to collect payroll data and provide it to an external auditor. He did so, but also unlawfully copied the data, uploaded it to a public website and sent it to newspapers, as an act of revenge for a perceived slight. Employees whose data had been unlawfully published sued Morrisons. The Supreme Court, purporting to apply the *Mohamud* test, held there was an insufficiently close connection between the wrongful conduct and the acts the employee was authorised to do. He was acting on a frolic of his own, pursuing a personal vendetta.

Their Lordships did not discuss *Group Seven*. The decision sits uncomfortably with some of the previous case law. Their Lordships emphasised that Skelton was not seeking to further Morrisons' interests, but neither was the clerk in *Lloyd*. Their Lordships relied on Skelton having been entrusted with collecting the payroll data, but not authorised to post it on the internet for his own purposes. The employee in *Morris* was equally entrusted with the milk stole and not authorised to steal it for his own benefit. Their Lordships stressed that Skelton's motive was to harm Morrisons in furtherance of his personal vendetta, but dishonest employees will usually be acting for their own benefit, and intending, or at least reckless as to, the associated financial or reputational harm to their employer. It is not obvious why, if Skelton was on a frolic of his own, Louanji, the clerk in *Lloyd* or the cleaner in *Morris* were not.

## The position of the porter's employer

Having noted that the porters themselves could be assumed to be liable for Ms Shamsan's loss, Edis LJ said in passing: "42. ... and their employers would be vicariously liable". That, presumably, meant whichever of Farebrother's subcontractors (Farebrother Services Limited or Abbatt Property Services Limited) had employed the relevant porter.

That conclusion seems straightforward. The porters appear to have been employees of those companies. There was clearly a close connection between their wrongdoing (handing over keys to the burglars) and what they had been tasked / entrusted with doing by the employer – namely, to hold the keys and to provide them to proper persons in certain circumstances – e.g. to permit the fire brigade access in an emergency, to deal with an emergency such as a flood or permit the tenant themselves access if they lost their keys.

## The position of Farebrother

Farebrother, it will be recalled, was retained by Lowndes to "engage porterage staff". Farebrother appears not to have employed porters itself directly, but to have subcontracted that to Farebrother Services Limited or Abbatt Property Services Limited.

As for **Farebrother** itself, Edis LJ said: "60. It is not necessary in these proceedings to decide whether Farebrother owes a duty of care directly to the occupants of the flats, but such a claim would appear to be arguable if, as seems likely, Nahhas is correctly decided. If so, [Farebrother] may also be directly liable if the loss was caused by a failure by them to select or supervise the porters or to put in place suitable management systems for the protection of the Flats from unlawful entry and burglary".

This *obiter* comment seems questionable for a few reasons. Edis LJ was referring to a first instance case called *Nahhas v. Pier House (Cheyne Walk) Management Limited* [1984] 1 EGLR 160. In that case Ianucci, a porter who turned out to be a professional thief with 33 convictions and 11 prison sentences, had used a tenant's keys to gain access to her flat and had stolen £23,250 worth of jewellery. The tenant had sued: (1) "*Cheyne Walk Management Ltd, a management company incorporated with the primary object of the management and provision*

# HAYNES BOONE

*of services at Pier House, the directors of whom are residents in the flats”; and (2) “Harold Williams Bennett & Partners, a firm of chartered surveyors who are engaged by the first defendants to act as managing agents for the flats, their duties including the engagement and dismissal of the staff of the management company”.*

The judge described the tedious nature of working as a porter, the very high turnover of employees even in times of high unemployment, and the mediocrity of candidates - but observed that the: “*system was dependent on the honesty of the porters, who knew which flats were empty, had the keys to them and could reasonably infer that rich pickings would be there. In my opinion, the investigation into their honesty ought, under this system, to be just as thorough as if they had been security guards who handled money or managers, for under the system their opportunities for theft would have been as great as, if not greater than, even a trusted manager*”. The judge held both defendants liable on the basis that “*both defendants were negligent in that they did not do enough to find out the full details of Iannucci’s past history or to check his account of it*”. Alternatively he held the first defendant “*vicariously liable for the theft committed by their servant, Iannucci*”, relying on *Morris v Martin*.

The management company, the first defendant, was the porter’s employer, and the finding that the first defendant was vicariously liable for its employee’s theft must be correct. It is not obvious, though, why the first defendant was also thought to be directly liable for negligently having failed to check Iannucci’s background. The first defendant had retained the second defendant “*to act as managing agents ... including ... the engagement ... of the staff of the management company*”. It was the second defendant’s employees who had interviewed Mr Iannucci and checked his references. The decision to employ him was theirs. One might have thought it was at least arguable that, by engaging the second defendant as an independent contractor to vet its employees, the first defendant had exercised the requisite care. This point is not addressed in the judgment. It might be that the first defendant was, in fact, not itself negligent as regards the recruitment but was being fixed with the negligence of the second defendant who, though a subcontractor, was acting as the first defendant’s agent.

While the case supports the view that the immediate employers in the *Shamsan* case (Farebrother Services Limited or Abbatt Property Services Limited) would have been vicariously liable for the theft, it is unclear why Edis LJ thought it supported a conclusion that “*Farebrother may also be directly liable if the loss was caused by a failure by them to select or supervise the porters or to put in place suitable management systems*”. Neither of the defendants in *Nahhas* was in a position analogous to that of Farebrother in *Shamsan*. Farebrother was not the employer of the porters. It subcontracted provision of the porters to Farebrother Services Limited or Abbatt Property Services Limited, who employed the porters and, presumably, were responsible for their selection and supervision with Farebrother having no hand in it. Farebrother may, of course, have had a hand in designing whatever system was in place for handling keys. But, ultimately, this discussion of Farebrother’s potential direct liability seems academic, anyway – *Shamsan*’s claim was not alleging there to have been any negligence in the recruitment of the porter who handed over the key or in the design of the system for key holding.

The block of flats in the *Nahhas* case - Pier House - incidentally, is the mid-1970s building that forms a corner of Oakley Street and Cheyne Walk. It has no interesting history, but right on that corner, in front of the Mercedes Dealership which forms part of the same development, is Sir David Wynne’s beautiful *Boy With a Dolphin* – probably my favourite sculpture in London.

# HAYNES BOONE



*Sculpture Of Boy With A Dolphin-Chelsea.JPG* from Wikimedia Commons Author Lonpicman licensed under the Creative Commons Attribution-Share Alike 3.0 Unported license

## **The case against Lowndes**

At the hearing before the judge at first instance, Shamsan abandoned a claim that Lowndes was vicariously liable for the porter's negligence.

Edis LJ also observed that: *"no claim has ever been advanced that [Lowndes] may be vicariously liable for any breach by Farebrother of any direct duty of care it may owe to the occupiers of the flats"*. As explained above, the suggestion that Farebrother had breached any such direct duty of care seems questionable anyway. Even if Farebrother was in breach of some direct duty of care, Farebrother was not Lowndes' employee or akin to an employee. Rather, Farebrother was an independent contractor, which (like Dr Bates in the *Barclays* case) was in business on its own account with a portfolio of clients, of whom Lowndes was one.

What, then, was supposed to be the basis for Ms Shamsan's claim against Lowndes? The argument appears to have been founded on the following passage in *Bowstead on Agency*, 23rd Edition at 8-176:

*"A very rough summary of the usual view would be to say that people are liable for torts committed by another which they specifically instigate or authorise, or which are committed by their servants acting*

# HAYNES BOONE

*within the course of employment, or which involve a breach of a non-delegable duty owed by them, though the acts leading to such breach were actually performed by another (usually an independent contractor)."*

*"However, the law of agency appears to be important in the operation of some torts, especially those involving liability for statements, including deceit, negligent misstatement and, more doubtfully, defamation. It may also be relevant to tortious claims for negligent performance of services, where, as with negligent misstatement, the underlying explanation is, arguably anyway, the near-contractual one of assumption of responsibility."*

The rule formulated by Bowstead was:

*"(2) A principal is liable in tort for loss or injury caused by an agent, whether or not an employee, and if not an employee, whether or not the agent can be called an independent contractor, in the following cases:*

*(a) if the wrongful act was specifically instigated, authorised or ratified by the principal.*

*(b) (semble) in the case of a statement made in the course of representing the principal within the actual or apparent authority of the agent: and for such a statement the principal may be liable notwithstanding that it was made for the benefit of the agent alone and not for that of the principal.*

*(c) where the principal can be taken to have assumed a responsibility for the actions of the agent."*

There was no suggestion that Lowndes had instigated, authorised or ratified the provision of the keys to the burglars by the porters. Ms Shamsan's suggestion was that the porters, though not Lowndes' employees, were Lowndes' agents for whose actions Lowndes could be taken to have assumed responsibility.

As Edis LJ observed, however: "76. ... *there is no act or representation by Lowndes which is relied upon as constituting or demonstrating an assumption of responsibility ... Therefore, the assumption of responsibility either arises out of the contracts or does not exist*".

The contractual scheme did not show any assumption of responsibility by Lowndes to Shamsan for the actions of the porters. Indeed: "*Lowndes ... went to some trouble to ensure that it did not assume any responsibility for the adequacy of the portage services*". That, then, was the end of it – Lowndes owned no duty, and the judge had been right to give summary judgment for Lowndes.

In a succinct concurring judgment Underhill LJ said:

*"It was Lowndes' contractual responsibility to engage managing agents for the building, who would provide such portage services as were considered appropriate. The managing agents engaged pursuant to that obligation were Farebrother, and they duly supplied portage services as envisaged. It was not Lowndes' contractual responsibility to provide those services itself. Since Farebrother were plainly independent contractors, Lowndes could not, on established principles, be vicariously liable for any negligence on their part. That seems to me to be the end of the matter. As Lady Hale emphasised in ... the Barclays Bank case ... recent developments in the law of vicarious liability do not undermine the "classic" distinction between liability for the acts of an employee (or someone in an analogous relationship) and liability for the acts of an independent contractor. I see no justification for the Appellant's attempt in this case to sidestep that well-established distinction by seeking (quite contrary to the message of Robinson) to apply*

# HAYNES BOONE

*the threefold test in Caparo or by relying on a supposed assumption of responsibility for the careful provision of services which it was Farebrother's job to provide.”*

## **Caparo test and assumption of responsibility**

In *Caparo Industries PLC v Dickman* [1990] UKHL 2, the House of Lords held auditors who prepared a company's statutory annual accounts did not owe a duty of care to shareholders who, relying on the accounts, had lost money by buying additional shares. The purpose of the accounts was to enable shareholders to decide how to vote at general meetings, not to make investment decisions. Lord Bridge said: “... a series of decisions of the Privy Council and of your Lordships' House, ... have emphasised the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope ... what emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of “proximity” or “neighbourhood” and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes”.

*Caparo* was sometimes said to have identified a ‘three stage test’ for establishing new categories of liability - 1. foreseeability of damage, 2. proximity and 3. it being fair just and reasonable to impose a duty. But one can see that, in the same breath, Lord Bridge denied the “utility” of these as “practical tests”, and these categories are so nebulous or subjective that it is hard to see how they could be relied on to allow different judges consistently to arrive at the same answer in any novel case.

In *Robinson* (referenced above) Lord Reed said:

“The proposition that there is a Caparo test which applies to all claims in the modern law of negligence, and that in consequence the court will only impose a duty of care where it considers it fair, just and reasonable to do so on the particular facts, is mistaken. ... that understanding of the case mistakes the whole point of Caparo, which was to repudiate the idea that there is a single test which can be applied in all cases in order to determine whether a duty of care exists, and instead to adopt an approach based, in the manner characteristic of the common law, on precedent, and on the development of the law incrementally and by analogy with established authorities.”

*“It is normally only in a novel type of case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised. Following Caparo, the characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority. The drawing of an analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned. The courts also have to exercise judgement when deciding whether a duty of care should be*

# HAYNES BOONE

*recognised in a novel type of case. It is the exercise of judgement in those circumstances that involves consideration of what is 'fair, just and reasonable'."*

It had been suggested that a touchstone for imposing liability was in cases where there had been an assumption of responsibility by the defendant. This was recently discussed at length in *Benyatov v Credit Suisse (Securities) Europe Ltd* [2023] EWCA Civ 140 which contains a useful discussion of the case law and the concept of 'assumption of responsibility', concluding:

*"The correct course for a Court which has to decide whether a duty of care should be recognised in a novel situation is to take the incremental approach endorsed in Robinson. That will in principle involve consideration of the three "Caparo factors" to the extent that they are in issue. It may be a useful analytical tool, particularly in considering the factors of proximity and/or "fairness, justice and reasonableness", to ask whether the defendant can be regarded as having assumed a responsibility to take care to protect the claimant against a loss of the kind claimed; but its usefulness will depend on the issues in the particular case".*

The judge at first instance in *Shamsan* had referred to the *Caparo* test, without reference to *Robinson*, and Ms Shamsan had sought to argue for liability based on a supposed assumption of responsibility by Lowndes. The Court of Appeal made clear that this was not the right approach, and the judge ought properly to have sought to decide the question of whether there was a duty of care by reasoning incrementally from similar cases. But it made no difference to the end result.

## **Contractual structure**

In finding there to have been no duty owed by Lowndes, the judge at first instance had relied on Clause 8(c) in Flat Lease being binding on Ms Shamsan (which the Court of Appeal held was not the case). In giving permission to appeal, Popplewell LJ observed that another reason given for rejecting Ms Shamsan's claim at first instance had been:

*"... that the existence of a duty was inconsistent with the contractual structure of the leases/subleases, relying on Henderson v Merrett, Pacific Associates v Baxter and Architype Projects. The relevant principle is that where there is a chain of contracts, a voluntary assumption of responsibility will not be implied where such implication would be inconsistent with the mutual intention of the participants in the chain that claims for compensation between them should only be advanced sequentially as between direct contracting parties. This has typically been applied in the construction industry, which was the example given by Lord Goff in Henderson v Merrett. Pacific Associates and Architype were also both construction cases. The principle is not so obviously applicable to the contractual structure in the present case, where a portage service involving custody of spare keys was made available to the tenants as occupiers, and that was a service in fact provided by the defendant performing a building management role, notwithstanding that under the terms of its own lease there was no obligation to do so."*

Though it made no difference to the result, the judge's reasoning on this point was not upheld on appeal. Edis LJ said:

*"I would not have granted summary judgment on the separate basis that a duty is legally unsustainable because it would undermine or negate the contractual arrangements in this case. ... care is required in transposing a consideration which is obviously a relevant feature of building contract litigation into a principle of law which is of general application. That area of work involves complex contractual structures*

*often using industry standard terms of contract. They also very commonly involve the provision of professional advice and services. The parties often reach agreements about liability for losses which are fully incorporated into the contractual scheme and although it is common to find concurrent duties in contract and tort, it would be much less common to find a duty in tort which was inconsistent with the contractual scheme.”*

## Lessons

*Shamsan* confirms that there remains a bright line between employment / relationships akin to employment on the one hand, and independent contractors on the other. Businesses desiring to carry out a given activity can avoid vicarious liability for the risks associated with it by the expedient of using contractors rather than employees to perform it. The case illustrates the essential arbitrariness of the doctrine. Had Lowndes employed the porters itself, the law would have considered it just to have redistributed the burden of this loss from the victim (*Shamsan*) to Lowndes. By the expedient of inserting a contractor between it and the porters, Lowndes avoided that result, though the same porters were doing the same job and for, ultimately, the same reason (because Lowndes desired it, and paid them for it, albeit through the medium of Farebrother and its subcontractors). One might have thought that if a redistribution was thought warranted in the former situation, it would have been no less deserved in the latter.

Law aside, the case presents some **practical lessons** for tenants of portered properties. Evidently the presence of porters does not necessarily render property materially more secure and may do the opposite. Tenants fortunate enough to live in places like Lowndes Square should not assume that just because they are paying £2,700 a week in rent, for a flat in a building where the flats presently change hands for around £5.5 million, that some deep pocketed employer must be sitting behind the building's staff, because - as *Shamsan* illustrates - it is easy to arrange things to ensure that the porters' employers are straw men. It must be said that these are contractual arrangements which are very much imposed take-it-or-leave-it. So it seems pointless to advise prospective tenants to take more care, and to try to investigate the contractual structure and negotiate something more favourable. If anything, the case illustrates the value of insuring high value items against such contingencies, rather than gambling that *de facto* insurance might be available, premium-free, through the unreliable vagaries of vicarious liability. . Strikingly, there seems to have been nothing in Ms *Shamsan's* lease which had placed her under any obligation at all actually to deposit a set of keys with the porters. It seems entirely possible, then, that she was just following a practice or custom which the other tenants unthinkingly went along with, but none was under any legal obligation. So perhaps the other lesson to draw from the case is: don't give out your keys if you don't have to.