appear "officious bystander obvious" that demurrage could not have been intended to accrue in perpetuity following such an event. Janet O'Sullivan has recently drawn attention to the law's distaste for perpetual obligations, when considering possible exceptions to the *White & Carter* principle: see S. Worthington and G. Virgo (eds), *Commercial Remedies* (Cambridge, 2017, forthcoming).

It is a shame that the Court of Appeal did not consider in detail Leggatt J.'s interesting approach to the "legitimate interest" exception (for the role of mitigation, see J. Morgan [2015] L.M.C.L.Q. 575). Moore-Bick L.J. did briefly discuss the cases on Lord Reid's proviso, observing at [35] merely that "the debate has been, perhaps inevitably, inconclusive". Very reassuring for parties caught in a *White & Carter* deadlock. Leggatt J. had also held that, were MSC not prevented from claiming demurrage by Lord Reid's proviso, it would anyway have been an unenforceable penalty. Although the point did not arise on appeal, Moore-Bick L.J. very sensibly (with respect) deplored this as having never previously been suggested: [46] (see [2015] L.M.C.L.Q. 575, 590). Finally, as Leggatt J. had gone out of his way to suggest that "good faith" might lie at the core of the *White & Carter* proviso, so Moore-Bick L.J. at [45] pointedly thought this rationalisation neither necessary nor desirable. In the end, courts are the prisoners of counsel's argument and no "root and branch" challenge was mounted here to the foundations of the *White & Carter* "legitimate interest" doctrine (see [31]). So the debate continues – perhaps perpetually – with another marginal gloss.

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## FROM OPPORTUNITY TO OCCASION: VICARIOUS LIABILITY IN THE HIGH COURT OF AUSTRALIA

IN *Prince Alfred College Incorporated v ADC* [2016] HCA 37, the High Court of Australia (HCA) has once again considered the appropriate test for establishing vicarious liability of employers for the wrongful acts of their employees. The decision will be of interest to tort lawyers in the common-law world for at least four reasons. First, the Court looked afresh at the test for vicarious liability in the context of intentional wrongdoing and has accordingly clarified the confusion arising from its earlier decision in *New South Wales v Lepore* [2003] HCA 4; (2003) 212 C.L.R. 511. Secondly, the Court expressed very strong disagreement with the decision of the UK Supreme Court handed down just months earlier in *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11; [2016] A.C. 677. The

Court apparently regarded *Mohamud* as having in effect abandoned the *Lister* qualification that mere opportunity was not enough to satisfy the close connection test (*Lister v Hesley Hall Ltd.* [2001] UKHL 22; [2002] 1 A.C. 215). Thirdly, the Court appears to have interpreted the relevant English authorities as espousing a *Caparo*-like criterion of fairness and justice as a separate stage of the close connection test (*Caparo Industries plc v Dickman* [1990] 2 A.C. 605). That interpretation is questionable. Finally, the Court has articulated a new test in Australian law for vicarious liability reasoning based on whether the employment provided the "occasion" for the wrongdoing to be committed. This prompts a reflection on the difference between "occasion" and "opportunity", and how this new test is to be applied in practice.

The claimant was a former pupil of the defendant boarding school who had been sexually abused by a housemaster. A preliminary issue in the case was whether the claim was statute-barred. The High Court agreed with the original decision of the trial judge on this point and held that the relevant limitation period should not be extended, and ultimately therefore did not determine the liability issue in the case. But, because the precise basis of potential liability was a relevant factor in determining whether or not the time should be extended, the majority – there is a brief concurring opinion by Gageler and Gordon JJ. – gave a detailed examination of the law on vicarious liability.

There were two other bases on which liability could potentially have been imposed. One was primary liability in negligence, which was rejected on the basis that it had not been established on the evidence. The second was breach of the non-delegable duty of care – but this would have required a revisiting of the non-delegable duty reasoning in *Lepore*, which the majority declined to do on the basis that a sufficiently clear case had not been presented for reconsidering a previous High Court decision (citing *Queensland v The Commonwealth* (1977) 139 C.L.R. 585 and subsequent case law).

One particularly noteworthy feature of the majority's analysis of the law on vicarious liability is its reading of the Canadian and UK case law since *Bazley v Curry* [1999] 2 S.C.R. 534 and *Lister*, respectively. In a telling passage, the majority commented (at [43]): "In recent decisions of the courts of Canada and the United Kingdom [the Salmond test] appears to have provided a springboard for the development of tests which have regard, more generally, to the connection between the wrongful act and the employment and, in the United Kingdom, to what a judge determines to be fair and just."

It does not seem right to conclude that the test in the UK case law involves a separate stage of asking what a judge considers to be fair and just. In arriving at that conclusion, the majority said (at [67]): "The question ultimately posed in *Lister v Hesley Hall Ltd.* contained the means by which

the requisite 'closeness' of the connection was to be assessed. It was 'whether the warden's torts were so closely connected with his employment that *it would be fair and just* to hold the employers vicariously liable'" (emphasis added).

The adding of these italics by the majority places the wording of *Lister* under unsustainable strain. The references to fairness and justice in *Lister* only occurred because the close connection test had been satisfied. This is manifestly not the same inquiry as the *Caparo* stand-alone third limb of inquiring whether in all the circumstances it is fair, just and reasonable to impose a duty of care in negligence. Consider, then, the High Court's return to the cautionary note sounded in its earlier decision in *Sullivan v Moody* [2001] HCA 51; (2001) 207 C.L.R. 562, at [49], that the question of what is fair, just and reasonable can be misunderstood as an invitation to formulate policy rather than to search for principle. Whilst the Court does acknowledge that this warning was issued "in a different context", it is difficult to escape the conclusion that the High Court regards *Lister* and subsequent case law as effectively conflating vicarious liability analysis with that contained in the third limb of *Caparo*.

The elision of these two concepts must be avoided. Whether one agrees with *Mohamud* or not, it is because of the finding of a close connection in *Mohamud* that the Supreme Court decided that it was fair and just to impose liability. Certainly, the language of "fair and just" or "fair, just and reasonable" when used separately to a consideration of the close connection test appears, at best, tautologous and confusing. And it is true that references to what is "fair, just and reasonable" in an entirely different vicarious liability context (namely the *type of relationship* between the defendant and the wrongdoer, which should be capable of attracting vicarious liability) do appear in, inter alia, the judgment of Lord Phillips in *Catholic Child Welfare Society v Various Claimants and Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1, at [94]. But Lord Reed in *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660, clearly stated (at [41]) that having recourse to a separate inquiry as to what is fair, just and reasonable was not only unnecessarily duplicative, but also apt to give rise to uncertainty and inconsistency. That note of caution applies with at least equal force to the close connection test itself at issue in *Mohamud*, as it does to the nature of the relationship capable of attracting vicarious liability under consideration in *Cox*. Attempts at elevating those two (or three) epithets to the status of an additional prong in the *Lister* test are, accordingly, undesirable. No such additional prong exists. If the connection is sufficiently close, then it will be fair and just to impose vicarious liability. Evidence for this is abundantly clear from *Lister* itself. Thus, Lord Steyn at [20] stated of Salmond's test that "[i]n reality it is simply a practical test serving as a dividing line between cases where *it is or is not just* to impose vicarious liability" (my emphasis).

Further support for questioning the HCA's interpretation of *Lister* and *Mohamud* is to be discerned from *Mohamud* where Lord Dyson, pre-empting objections to the close connection test on the basis of imprecision, specifically gave the example (at [54]) of the "fair, just and reasonable" test, which he described as "central" in negligence, as an example of imprecision from other areas in tort law – thereby clearly indicating that this test does *not* apply in the context of vicarious liability. In explaining that fairness and justice are not a separate criterion but are in fact integral to the close connection test identified in *Lister* and *Bazley*, Lord Dyson described (at [58]) those decisions as achieving the "simple expedient of explicitly incorporating the concept of justice into the close connection test".

Having rejected both the Canadian and the UK approaches, the majority in *Prince Alfred College* concluded that the question to be asked when considering the imposition of vicarious liability for intentional wrongdoing is whether the employment provided the "occasion" for the wrongful act. In so doing, the majority invoked the language of Dixon J. in *Deatons Pty. Ltd. v Flew* (1949) 79 C.L.R. 370. In analysing *Mohamud*, the High Court explained why the "occasion" test was not met on those facts: there were no special features of the villainous Mr. Khan's employment that would be associated with the wrongdoing; and his lack of authority, power or control over customers was confirmed by the fact that he was clearly subject to supervision. The High Court elaborated on its "occasion test" by explaining (at [81]) that, in determining whether the test is met, particular features of the employee's role may be taken into account, including authority, power, trust, control and the ability to achieve intimacy with the victim (a factor of potentially special importance). Where the employee takes advantage of his or her position vis-à-vis the victim, that may suffice to trigger vicarious liability.

It is not at all easy to discern any meaningful difference between the employment providing the *occasion* for the wrongdoing and the *opportunity* for it. Even in ordinary parlance, the two terms are frequently used interchangeably: each is a matter of degree; and each could be said to be entirely open-ended. In this respect, it is noteworthy that the majority in *Prince Alfred College* propounded the "occasion test" at such length with the express aim of providing clarity to lower courts and thus minimising future appeals. Consider, then, the ominous comment of Gageler and Gordon JJ. in their short concurring opinion (at [131]) when their Honours state that "[t]he Court cannot and does not mark out the exact boundaries of any principle of vicarious liability in this case".

After *Prince Alfred College*, the distinction between occasion and opportunity in vicarious liability may be elusive, but the prospect of future

appellate litigation in this context in Australia and elsewhere seems absolutely clear.

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## ILLEGALITY AND RESTITUTION EXPLAINED BY THE SUPREME COURT

IN the Court of Appeal in *Patel v Mirza* [2014] EWCA Civ 1047; [2015] Ch. 271, Gloster L.J., in sympathy with the "hapless law student", said of the illegality concept "it is almost impossible to ascertain … principled rules from the authorities relating to the recovery of money or other assets paid or transferred under illegal contracts" (at [47]). The Supreme Court ([2016] UKSC 42; [2016] 3 W.L.R. 399) has clarified the law in many respects. In other respects, it may have created some new uncertainties and no diminution in work for inventive lawyers and some of their more dubious clients.

The facts were simple. Mr. Patel paid £620k to Mr. Mirza to bet on the price of shares in the Royal Bank of Scotland (RBS). The agreement was based on the fact that Mr. Mirza had access to inside information from his RBS contacts which would enable him to anticipate movements in the market price of the shares. This was a conspiracy to commit an offence of insider trading contrary to the Criminal Justice Act 1993, s. 52. The inside information never arrived. Although he said he would return the money, Mr. Mirza decided to keep it. When sued for its return, he pleaded illegality and invoked the two classic maxims: "no action arises from a disgraceful cause" and "where both parties are equally in the wrong the position of the defendant is the stronger".

In the Supreme Court, all nine Justices were agreed in the result, namely that Mr. Patel should be entitled to restitution of his £620k. Another way of analysing the result is that Mr. Patel would neither be profiting from his admitted participation in an illegal agreement, nor would he be invoking the court process for the purpose of enforcing the agreement.

At first glance, this result appears to offend against the spirit and possibly even the letter of Lord Mansfield's nearly 250-year-old dictum in *Holman v Johnson* (1775) 1 Cowp. 341, 343:

> The principle of public policy is this; … No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted.