Moonlighting: the latest word on vicarious liability

Frederick and others v Positive Solutions (Financial Services) Limited [2018] EWCA Civ 431

The Court of Appeal has handed down the latest in a run of appellate decisions on vicarious liability in the case of *Frederick and others v Positive Solutions (Financial Services) Limited* [2018] EWCA Civ 431. Dismissing the appeal, the Court unanimously held that the respondent financial adviser was not vicariously liable for fraudulent "*moonlighting*" by one of its registered agents.

The facts

The appellants were persuaded to advance funds to a purported property investment scheme operated by a Mr Qureshi. Those funds were to be obtained by the appellants' re-mortgaging their respective properties with the help of Mr Qureshi's business partner, a Mr Warren, who was a registered agent of the respondent financial advice company.

Mr Warren subsequently applied for the loans on behalf of the appellants via the respondent's online portal. But unbeknownst to the appellants, Mr Warren filled out those applications fraudulently to ensure their success. When the bank duly advanced the loan monies, each appellant passed a significant portion to the putative property investment scheme.

None of the appellants received any monies back from what they allege to have been a fraudulent scheme.

The claim

The appellants brought proceedings against the respondent alone (there being no realistic prospect of enforcement against Messrs Qureshi and Warren) on a number of bases including vicarious liability and negligence.

On the respondent's application, Master Bowles struck out most of the appellants' causes of action, including negligence, but allowed the claim in vicarious liability for fraud to proceed.

On appeal by the respondent, HHJ Dight sitting as a Deputy of the High Court overturned the Master's decision on vicarious liability and refused a cross-appeal by which the appellants argued that the respondent had in fact owed them a duty of care.

The appellants then appealed HHJ Dight's decision on both vicarious liability and duty of care.

The decision in the Court of Appeal

Flaux LJ, with whom Asplin and Rafferty LJJ agreed, dismissed the vicarious liability appeal on three grounds.

First, the Court considered that Mr Warren's involvement in the purported investment scheme fell into the category described by Lord Reed at [24] in *Cox v Ministry of Justice* [2016] UKSC 10 as "*activities being entirely attributable to the conduct of a recognisably independent business*". Principals cannot be vicariously liable for such "*moonlighting*" (per Flaux LJ at [68] adopting Lord Millett's phrase in *Dubai Aluminium Co Limited v Salaam and others* [2003] 2 AC 366 at [126]).

Second, the Court drew an analogy to *Credit Lyonnais v Export Credits Guarantee Department* [2000] 1 AC 486 and other cases where the principal escaped vicarious liability because all the acts and omissions necessary to make the primary tortfeasor personally liable did not take place within the alleged course of employment or agency (per Flaux LJ at [74]). In the present case, there could be no suggestion that Mr Qureshi's inducement of the appellants to invest in the scheme, nor either primary tortfeasors' receipt of funds from the appellants after the bank had advanced its loans, were undertaken in the course of Mr Warren's relationship with the respondent.

Third, it was fatal to the appellants' case on vicarious liability that the respondent had done no more than provide the opportunity for Mr Warren to commit the fraud or wrongdoing by giving him access to the online portal (per Flaux LJ at [75]).

The Court also dismissed the appeal on duty of care, deciding that the submission that the respondent had assumed responsibility for the appellants was "*lacking in merit*" (per Flaux LJ at [78]).

The next frontier

It was submitted on behalf of the respondent that reliance based torts such as deceit or misrepresentation committed by an agent are in a distinct category from the *Cox* line of cases so that the principal cannot be vicariously liable unless the agent had actual or ostensible authority. Given the conclusions above, the Court of Appeal declined to deal with that proposition on this occasion, noting only that *Cox* was not a case concerned with agency (per Flaux LJ at [77]). There is no sign, therefore, that the recent run of high authority on vicarious liability has reached the end of the road.

Read the full judgment here.

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