Neutral Citation Number: [2018] EWCA Civ 431

Case No: A3/2017/0539 & A3/2017/0539(A)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
HIS HONOUR JUDGE DIGHT (Sitting as a Deputy High Court Judge)
CH-2016-000213; [2017] EWHC 643 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/03/2018

Before:

LADY JUSTICE RAFFERTY
LORD JUSTICE FLAUX
and
LADY JUSTICE ASPLIN

- -

Between:

FREDERICK and OTHERS	**Appellants**
- and -	
POSITIVE SOLUTIONS (FINANCIAL SERVICES) LIMITED	**Respondent**

- -
- -

Thomas Grant QC and Edward Bennion-Pedley (instructed by **Irwin Mitchell**) for the **Appellants**
Roger ter Haar QC and Simon Howarth (instructed by **Reynolds Porter Chamberlain**) for the **Respondent**

Hearing date: 21 February 2018

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Approved Judgment

Lord Justice Flaux:

Introduction

1. The appellants appeal with the permission of Gloster LJ against the order dated 9 February 2017 of His Honour Judge Dight, sitting as Deputy High Court Judge in the Chancery Division allowing the respondent's appeal against the decision of Master Bowles dated 5 August 2016 and entering judgment for the respondent pursuant to CPR Part 24 and dismissing the appellants' cross-appeal.

The factual background

2. The matter came before Master Bowles as an application by the respondent to strike out the claim under CPR 3.4, alternatively for "reverse" summary judgment under CPR 24 and accordingly, the Master took the facts as being as set out in the Particulars of Claim. There were also witness statements from each of the appellants in response to the application.

3. The facts as set out in the pleading and evidence can be summarised as follows. The first and second appellants are husband and wife, the third appellant is their daughter and the fourth appellant is the sister of the second appellant. In early 2008, the appellants were approached by a man called Qureshi, who had been a school friend of the third appellant. He persuaded them to make short term loans in a property development scheme that his business partner, Luke Warren, was intending to carry out in Wembley. At the end of six months they would secure a fixed return on their investment and the return of their monies.

4. Qureshi explained that the monies needed for the investment could be raised by way of re-mortgage of properties of the respective appellants which could be arranged by Warren. It was pleaded that Warren was an Independent Financial Adviser "employed or otherwise authorised" by the respondent and that his "regulated position" gave comfort to the appellants in entering into the re-mortgages. The evidence was that the third appellant had found Warren's entry in the FSA Register online as a "client facing" investment adviser for the respondent and it is said that she and the other appellants derived comfort from the fact that Warren was FSA regulated. It was not disputed however, that they had no personal dealings with Warren and did not meet him or receive any written communications from him. They also did not receive any communications from the respondent. It follows that there was no semblance of an advice process, such as one would normally have expected to take place.

5. The respondent is a company providing independent financial advice to the public. It is an "authorised person" regulated by the Financial Conduct Authority and operates through agents. Warren was appointed as an agent of the respondent by an agreement dated 29 November 2005 (the "Agency Agreement"). He was a "Registered Individual" for the purposes of the Agency Agreement, which was defined in clause 1.1 as: "the Registered Individual of the Company, Registered Individuals having the meaning ascribed to Investment Adviser Function, Investment Adviser (Trainee) Function or Pension Transfer Specialist Function by the FSA and in the Financial Services and Markets Act 2000."

6. The relevant provisions of the Agency Agreement were as follows:

> "2 Appointment of Registered Individual
>
> 2.1 The Company hereby appoints the registered individual as its Registered Individual for the purpose only of introducing applications by clients for new contracts for submission to institutions specified by the registered individual and approved by the Company.
>
> 2.4 The relationship between the Company and the registered individual shall be strictly that of principal and registered individual and not in any way that of employer and employee. The company shall be responsible for acts, omissions and representations of the registered individual in the course of carrying out the business in the agency hereby created or in the course of performance of the duties hereby contracted but only to the extent that it would be so responsible at common law by virtue of any statutory enactment or regulation or by virtue of the rules of any organisation, including FSA, of which the company is a member for the time being. In particular, the company shall not be bound by acts of a registered individual which exceed the authority granted under provision of this agreement or by fraudulent acts of the registered individual or of the registered individual's staff.
>
> 4 The Registered Individual's Duties
>
> 4.10 The Registered Individual shall not engage in any conduct which in the opinion of the Company is prejudicial to the Company's business or interests or the marketing of the Products generally and/or is prejudicial to any of the Company's customers.
>
> 5 Financial Provisions
>
> 5.1.1 In consideration of the obligations undertaken by the Registered Individual hereunder, the Company shall pay the Registered Individual commission at such percentage of the Commissions as agreed in Schedule 2 to the Agreement . . .
>
> 5.5 The Registered Individual shall be a self employed person . . .

10 FSA Undertaking

10.1 The Registered Individual shall conduct himself to the strict adherence of the FSA rules.

10.9 The Registered Individual will comply with any requirement, direction, order or award made under the investment referee scheme. The registered individual will also be required to follow and carry out compliance as laid out in the Company's Procedures manuals."

10.10 The Registered Individual shall not effect any transactions relating to an investment at any time if he knows that the company is forbidden by any of the FSA rules to effect that transaction at that time on the Company's own account or if to do so would to his knowledge involve the registered individual in a conflict in its own interest with that of any clients or with its duty to any clients.

14 Indemnity

14.3 Without prejudice to the generality of Clause14.1 the Registered Individual shall indemnify the Company against any liability claims, loss, damage, costs and expenditure incurred in respect of, arising out of or otherwise connected with any misrepresentation, negligence, dishonesty, misconduct or fraud by the Registered Individual or by any employee, agent or representative of the Registered Individual or by reason of any act, advice or omission of the Registered Individual or persons employed by or connected with the Registered Individual which is contrary to the provisions of the Financial Services and Markets Act 2000, FSA rules or the provisions of this agreement. Such indemnity shall extend to the Company's costs and any costs charged to the Company by FSA in respect of investigations of the registered individual or the affairs of the registered individual by the FSA."

7. The re-mortgages were duly arranged by Warren. He submitted the applications for loans on behalf of appellants through an online portal operated by Abbey National plc, to which he only had access because he was an agent of the respondent. Unknown to the appellants, the applications were based upon false information in relation to their income and employment, dishonestly put forward by Warren so as to justify the borrowing which would not otherwise have been advanced. There is no dispute that the applications were dishonest and fraudulent.

8. The applications for the loans were duly accepted and mortgage offers from Abbey National plc were made, which stated: "Positive Solutions Financial Services Limited recommended that you take out this mortgage." Some of the monies released were used to pay off the appellants' existing mortgages. The balance of the monies was advanced by the appellant to Warren or HGQ, a company of which he and Qureshi were directors. Those monies were misappropriated and lost in the property development scheme. Warren was made bankrupt.

9. Commission was paid to the respondent by Abbey National in respect of the transactions but that commission was paid by the respondent into a suspense account because it could not be matched with any transaction on the respondent's systems. Thereafter, Warren is said to have created a false paper trail in order to access his percentage of the commissions. In the meantime, the appellants' properties remain subject to mortgages which they cannot discharge.

10. The appellants commenced proceedings against the respondent alone on 2 March 2015. The claim as pleaded sets out a number of bases on which the respondent is said to be legally responsible for Warren's wrongdoing. The primary basis so far as relevant to this appeal, is that by reason of the relationship between the respondent and Warren, it bore vicarious liability for his wrongdoing. The secondary basis is that the respondent is said to have assumed responsibility to the appellants, by reason of Warren only having access to the portal as its agent, such as to give rise to a duty of care owed by the respondent to the appellants.

11. In view of the way in which the argument developed before this Court, it is to be noted that the loss and damage is pleaded by the appellants as follows: "The Claimants will claim the net sums lost in the property schemes or such other sums as the court shall determine as damages for breach of the contractual, tortious and/or fiduciary duties owed by Mr Warren and/or the Defendant to the Claimants".

12. By an application dated 5 October 2015, after the close of pleadings, the respondent sought to strike out the claim under CPR Part 3.4, alternatively sought summary judgment under CPR Part 24 on a number of grounds, including, so far as relevant to this appeal, that it was not vicariously liable for Warren's conduct and that it did not owe the appellants a direct duty of care. Master Bowles granted the respondent summary judgment, save to the extent that the claim was founded on vicarious liability.

13. The respondent appealed that decision on vicarious liability and the appellants cross-appealed the decision that the respondent did not owe them a duty of care. There was no cross-appeal against the Master's decision dismissing the various other ways in which the appellants put their case. The appeal was heard by His Honour Judge Dight sitting as a Deputy High Court Judge in the Chancery Division on 7 December 2016 and the Judge delivered his judgment orally on 9 February 2017.

The judgment below

14. Having set out the facts, the Judge noted that the first two grounds of appeal in relation to the issue of vicarious liability were that the Master had erred in applying the decision of the Supreme Court in *Cox v Ministry of Justice* [2016] UKSC 10, which it was contended by the respondent had no application to the question of

vicarious liability for an agent. At [22] the Judge cited [15] of the judgment of Lord Reed in which the Judge said: "Lord Reed made it plain that the case before the Supreme Court was not an agency case." At [23] the Judge said that, nevertheless, *Cox* shows a developing jurisprudence and that the relevant starting point in the modern jurisprudence is the judgment of Lord Phillips PSC in *Various Claimants and Catholic Child Welfare Society and Others* [2012] UKSC 56 (the *Christian Brothers* case).

15. The Judge proceeded to consider that judgment and the judgment of Lord Reed in *Cox* and concluded at [26] that it was not necessary to go back beyond those two decisions to determine the law of vicarious liability. He referred to what Lord Reed said at [24] in *Cox* about a "modern theory of vicarious liability" and the result of Lord Phillips' approach being 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."

16. The Judge therefore rejected the first two grounds of appeal. The third ground was that, if *Cox* was relevant, the Master had misapplied the law as explained in that case. At [28] the Judge noted the respondent's argument that the Master had failed to draw the distinction made in [24] to [29] of *Cox* between the situation where the primary tortfeasor is acting in the course of an integral part of the business activities of the defendant and the situation where the primary tortfeasor's activities were entirely attributable to the conduct of a recognisably identifiable business of his own or of a third party. Liability would not attach in the latter case. The respondent contended that the Master should have found that Warren had been engaged in a recognisably identifiable business of his own or with Qureshi, so that the respondent was under no liability.

17. At [30] the Judge identified two elements which have to be established for a finding of vicarious liability derived from [24] of Lord Reed's judgment in *Cox*:

> "(1) was the harm wrongfully done by an individual who carried on activities as an integral part of the business activities of the defendant and for its i.e. the defendant's benefits, rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or that of a third party; and
>
> (2) as Lord Reed says, whether the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question, in which case liability will be imposed."

18. The Judge then cited further passages from the judgment of Lord Phillips in the *Christian Brothers* case before reaching the conclusion at [36]-[37] that the Master had been wrong to find the respondent vicariously liable for Warren's conduct:

> "36. It seems to me that bearing in mind what the Supreme Court said in that case, one has to stand back and look at what the situation was in reality. The creation of the risk is a factor but it is not, in my judgment, as Lord Phillips says in the *Christian Brothers* case, a sufficient factor. It is simply an important factor to be borne in mind. One has to look carefully at the first question: were the acts carried on by Mr. Warren an integral part of the business activities carried on by the defendant and for its benefit; and looking at the second question, was the commission of the risk created sufficient to attract the conclusion that vicarious liability should be imposed in all the circumstances of the case? As Lord Phillips said in para.21, the synthesis of the two stages requires the relationship between the wrongdoer and the principle [sic] and the acts and omissions of the wrongdoer to be looked at together.
>
> 37. If one stands back and looks at this problem objectively, in my judgment the only conclusion that one can form is that this is a case, using the old fashioned phraseology, where Mr. Warren was off on a frolic of his own. It is true that the risk of him carrying out the fraud was, in the "but for" sense, created by him having been appointed the defendant's agent and having been given access to the portal but that is only one small part of the overall test which one has to look at. It cannot properly be said, in my judgment, having regard to Lord Reed's analysis of the test, that Mr. Warren was, in perpetrating this particular fraud in this particular way, in any sense carrying on those activities as an integral part of the business activities of the defendant and for its benefit. This is not a legitimate transaction which had been brought to the defendant and which the defendant had allocated to Mr. Warren to undertake and which Mr. Warren had undertaken in a fraudulent way. This is a case where Mr. Warren (with or without Mr Qureshi) had designed the fraud himself. He had, without asking for information from the claimants, overstated their income, misdescribed their employment and suggested transactions which were not to their benefit. He had not processed the applications via the defendant's own systems. There was no communication between the defendant and the claimants in any sense. The only point of connection was the use of Abbey National's portal system. The activity was not one assigned to Mr. Warren as an integral part of the defendant's operation and for its benefit but was completely extraneous to that and in my judgment and in that material respect the learned Master misdirected himself and wrongly found that there was a vicarious liability when there was none."

19. The Judge then considered the fourth and fifth grounds of appeal which contended that the Master had failed to apply what Lord Nicholls said in *Dubai Aluminium v Salaam* [2002] UKHL 48; [2003] 2 AC 366 at [31]-[32] about the question of an employee or agent acting on a "frolic of his own". At [41] the Judge said that although this predated the *Christian Brothers* and *Cox* cases, it still provided valuable guidance to Judges in deciding the boundary between vicarious liability and no liability. He then cited a passage from [32] of Lord Nicholls' speech:

> "The mere fact that the act was of a kind the employee was authorised to do will not, of itself, fasten liability on the employer. In the absence of 'holding out' and reliance, there is no reason in principle why it should. Nor would this accord with authority. To attribute vicarious liability to the employer in such a case of dishonesty would be contrary to the familiar line of 'driver' cases, where an employer has been held not liable for the negligent driving of an employee who was employed as a driver but at the time of the accident was engaged in driving his employer's vehicle on a frolic of his own."

20. The Judge concluded at [42] that although that case was not on all fours with the present agency case, the limits of the doctrine were applicable by analogy and the Master had been wrong to direct himself otherwise.

21. At [43]-[47] the Judge considered the sixth ground of appeal, which was that the Master had been wrong to distinguish the decision of the Privy Council in *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1982] AC 462, where the defendant was held not to be vicariously liable for a rogue valuer who had been employed by the defendant and had carried out valuations on behalf of others which he had not been authorised by the defendant to carry out but had done so using the defendant's own notepaper. The respondent contended that *Kooragang* was on point and that, as Lord Millett said in *Dubai Aluminium* at [126], describing the employee in *Kooragang*, Warren was "moonlighting".

22. At [47], the Judge concluded on this point:

> "In my judgment, insofar as he did so, the learned Master was wrong to draw a distinction between the notepaper in the *Kooragang* case and the portal in the instant case. This is a case which, standing back and properly analysing it, is one where in my judgment it would have been right to hold that Mr. Warren so clearly departed from the scope of his agency that his principal should not be liable for his wrongful acts. He was moonlighting in a very real sense. There is no connection between this transaction and the business of the defendant. The acts relied on cannot properly be said to have been intended to be in any sense for their benefit or carried out in the course of the agency of Mr. Warren while he was under the direction of the defendant. It was something which he did off his own back for his own purposes and this ground of appeal is therefore good in my judgment."

23. He went on to consider the indemnity provision in the Agency Agreement which the Master had concluded demonstrated that the respondent acknowledged the possibility of its own liability for the dishonesty of its agent. The respondent contended that he had been wrong to do so as the appellants were not party to that agreement so it could not affect their relationship with the respondent. The Judge referred to the decision of the Court of Appeal in *Gravil v Carroll* [2008] EWCA Civ 689; [2008] ICR 1222, upon which the appellants relied but concluded at [50] that the Master had been wrong to rely on the indemnity provision.

24. The Judge went on to conclude that the receipt of commission by the respondent did not assist the appellants. It had been automatically generated as a consequence of the transactions having been put through the books of Abbey National. Whilst the applications could not have been submitted unless Warren had had access to the portal, the Judge considered that was very far from saying that the transactions were carried out in the course of his agency and that the receipt of commission was somehow a recognition of that. Since the Judge had concluded that Warren was on a frolic of his own and moonlighting, neither the fact that commission was paid on a false basis nor the fact that through the portal he had access to the Abbey National system took the matter further.

25. The final ground of appeal in relation to vicarious liability was that the Master had been wrong to conclude that Warren had acted without supervision. The Judge concluded that the respondent had not been aware of the fraudulent transaction and that Warren had been able to access the system in a way he was not authorised to do but whilst this might mean there were defects up the chain, that was different from finding that he was unsupervised.

26. For all those reasons, the Judge concluded that the appeal should be allowed and gave summary judgment against the appellants on vicarious liability.

27. In relation to the cross-appeal on duty of care, the Judge held that the Master had correctly applied the three stage test in *Caparo Industries v Dickman* [1990] 2 AC 605. The Judge concluded that the second and third stages were not satisfied: there was not sufficient proximity between the appellants and the respondent and it would not be fair, just and reasonable to impose a duty of care directly on the respondent as principal. Accordingly, he dismissed the cross-appeal.

The grounds of appeal

28. In summary, the grounds of appeal in relation to vicarious liability are that the Judge was wrong to conclude that vicarious liability could not attach on the assumed facts of this case by making the following errors of law:

    (1) He misdirected himself as to the correct test to apply when determining whether vicarious liability should attach as a result of having misunderstood or mis-stated the guidance in *Christian Brothers* [2012] UKSC 56 as re-stated by Lord Reed in *Cox v Ministry of Justice* [2016] UKSC 10;

    (2) He misdirected himself that he need not have regard to authorities of superior courts which pre-dated the *Christian Brothers* case, in particular, to *Dubai Aluminium Co Limited v Salaam and Ors* [2003] 2 AC 366;

(3) He was wrong to hold that the following matters were of no assistance to him in determining the vicarious liability issue, namely: that Positive Solutions received a commission on the impugned transactions; Positive Solutions had an indemnity from Warren in respect of the very conduct complained of; and Warren caused the harm by using the electronic portal to which he had access only by reason of his agency;

(4) He was wrong to apply *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1982] AC 462.

29. In relation to the duty of care, the grounds of appeal are that the Judge was wrong to conclude that such a duty did not exist because:

(1) He correctly identified that a sufficiently close connection for the purposes of vicarious liability ought to translate into sufficient proximity for the purposes of a common law duty but concluded wrongly that there was no sufficiently close connection;

(2) He should either have concluded that it was just and reasonable to impose the limited duty of care contended for or that prior to disclosure it was not possible to decide that there was no reasonable prospect of establishing the duty.

30. By its Respondents Notice, the respondent seeks to uphold the Judge's decision on three additional grounds:

(1) that the Judge ought to have found that the decision in *Cox v Ministry of Justice* [2016] UKSC 10 was not relevant;

(2) when concluding that Warren's conduct was attributable to a "frolic of his own" the Judge ought also to have relied upon the fact that the true cause of the Claimants' loss was the recommendation to make an alleged investment in property development and that the means by which the monies were raised was only incidental to that recommendation;

(3) that the Judge ought to have found that receipt of commission was irrelevant not only for the reasons given but also because its receipt could only fix Positive Solutions with liability in respect of the transaction if it amounted to a ratification of the tort.

The parties' submissions

31. Given the complexity of the argument before the Court on both sides I propose to set out in this section of the judgment, in more detail than might otherwise be the case the passages from the various judgments on which reliance was placed, which will avoid further citation in the later section dealing with the Analysis and Conclusion.

32. In his submissions on behalf of the appellants, Mr Thomas Grant QC, who did not appear below, emphasised the importance of the fact that this was an application to strike out or for summary judgment and that the evidence put forward by the respondent was limited to a short witness statement from its solicitor. There had been no disclosure of documentation explaining the relationship between the respondent and Warren.

33. Whilst it was accepted that the appellants could not establish that Warren had acted with actual or apparent authority, it did not follow that the respondent could not be vicariously liable for his conduct. Mr Grant QC advanced four fundamental propositions of law in relation to vicarious liability.

34. First, that the label of employment or agency or partnership is irrelevant to the question whether to impose vicarious liability on a defendant. Here the respondent conducted its business through a number of Registered Individuals such as Warren and it was simply not known whether his day to day working life was analogous to that of an employee. Ascribing the label of agency did not determine the actual position. The suggestion that designating him as an agent rather than an employee could avoid vicarious liability was inimical to the unified modern law of vicarious liability as set out by Lord Phillips in the *Christian Brothers* case and Lord Reed in *Cox.* Those cases made clear that the application of the doctrine was not limited to cases of employment.

35. Mr Grant QC submitted that it was clear that a principal could be vicariously liable for an agent even when that agent acted without authority, citing what was said in *Dubai Aluminium* by Lord Nicholls at [21]-[22]:

> "21. However, this latter fact [that the agent had no authority] does not of itself mean that the firm is exempt from liability for his wrongful conduct. Whether an act or omission was done in the ordinary course of a firm's business cannot be decided simply by considering whether the partner was authorised by his co-partners to do the very act he did. The reason for this lies in the legal policy underlying vicarious liability. The underlying legal policy is based on the recognition that carrying on a business enterprise necessarily involves risks to others. It involves the risk that others will be harmed by wrongful acts committed by the agents through whom the business is carried on. When those risks ripen into loss, it is just that the business should be responsible for compensating the person who has been wronged.
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> 22. This policy reason dictates that liability for agents should not be strictly confined to acts done with the employer's authority. Negligence can be expected to occur from time to time. Everyone makes mistakes at times. Additionally, it is a fact of life, and therefore to be expected by those who carry on businesses, that sometimes their agents may exceed the bounds of their authority or even defy express instructions. It is fair to allocate risk of losses thus arising to the businesses rather than leave those wronged with the sole remedy, of doubtful value, against the individual employee who committed the wrong. To this end, the law has given the concept of 'ordinary course of employment' an extended scope."

36. Mr Grant QC also relied upon what Lord Millett said in that case at [122]:

> "The vicarious liability of an employer does not depend upon the employee's authority to do the particular act which constitutes the wrong. It is sufficient if the employee is authorised to do acts of the kind in question: see *Navarro v Moregrand Ltd* [1951] 2 TLR 674, 680 per Denning LJ. This is equally true of partners, though it is perhaps less obvious in their case, since the relation between partners is essentially one of agency. An employer may authorise his employee to drive, but he does not authorise him to drive negligently. A firm of solicitors may authorise a partner to draft agreements for a client, but it does not authorise him to draft sham agreements. Lord Lindley wrote: "it is obvious that it does not follow from the circumstance that such tort or fraud was not authorised, that therefore the principal is not legally responsible for it" cited in *Lindley & Banks on Partnership* 17th ed (1995) pp 332-333."

37. Second, he submitted that the law of vicarious liability was ultimately founded upon policy considerations, as was made clear in a number of appellate decisions. For present purposes it is only necessary to refer to what Lord Millett said in *Lister v Hesley Hall Limited* [2001] UKHL 22; [2002] 1 AC 215 at [65]:

> "Fleming observed (*The Law of Torts,* 9th ed (1998), p 410) that the doctrine cannot parade as a deduction from legalistic premises. He indicated that it should be frankly recognised as having its basis in a combination of policy considerations, and continued: 'Most important of these is the belief that a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise . . .' Atiyah, *Vicarious Liability in the Law of Torts* wrote to the same effect. He suggested, at p 171: 'The master ought to be liable for all those torts which can fairly be regarded as reasonably incidental risks to the type of business he carries on'. These passages are not to be read as confining the doctrine to cases where the employer is carrying on business for profit. They are based on the more general idea that a person who employs another for his own ends inevitably creates a risk that the employee will commit a legal wrong. If the employer's objectives cannot be achieved without a serious risk of the employee committing the kind of wrong which he has in fact committed, the employer ought to be liable. The fact that his employment gave the employee the opportunity to commit the wrong is not enough to make the employer liable. He is liable only if the risk is one which experience shows is inherent in the nature of the business."

38. Third, the absence of contact between the respondent and the appellants was not a relevant consideration. Mr Grant QC relied upon what Lord Millett said in *Dubai Aluminium* at [124] citing the decision of the Court of Appeal in *Hamlyn v John Houston & Co* [1903] 1 KB 81:

> "[In that case] a partner obtained confidential information of a competitor's business by means of a bribe. Collins MR said that if it was within the scope of his authority to obtain the information by legitimate means, then for the purpose of vicarious liability it was within the scope of his authority to obtain it by illegitimate means. In the Court of Appeal Evans LJ distinguished this case on the ground that the corrupt employee who received the bribe could have believed that the party who offered it to him had his firm's authority to do so. But it does not matter what he thought. The action was not brought in respect of a reliance-based tort, nor was it brought by the employee. It was brought by his employer who did not rely on the partner's authority and had no relevant dealings with the defendant firm at all."

39. Fourth, the fact that the primary wrongdoer was acting intentionally or criminally and solely for his own benefit is no answer to a defendant being held vicariously liable. Mr Grant QC relied upon various passages from the speeches of Lord Steyn and Lord Millett in *Lister* citing *Lloyd v Grace, Smith & Co* [1912] AC 716 and the decisions which have followed it including the decision of the Court of Appeal in *Morris v CW Martin & Sons Ltd* 1966] 1 QB 716. Lord Millett concluded at [79]:

> "So it is no answer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty. The cases show that where an employer undertakes the care of a client's property and entrusts the task to an employee who steals the property, the employer is vicariously liable. This is not only in accordance with principle but with the underlying rationale if *Atiyah* has correctly identified it. Experience shows that the risk of theft by an employee is inherent in a business which involves entrusting the custody of a customer's property to employees."

40. Mr Grant QC submitted that as that passage made clear and as was clear from *Lloyd v Grace, Smith* itself, vicarious liability for the wrongdoing of another would extend to fraudulent acts of that other. He referred to the historical exegesis of the origins and development of the law of vicarious liability in the judgment of Lord Toulson JSC in *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11; [2016] AC 677 (heard at the same time as *Cox*) and pointed out that there was no suggestion there that fraud cases were on a different footing, so any suggestion by the respondent that they were was incorrect.

41. Mr Grant QC submitted that reliance by the respondent on the decision of the House of Lords in *Credit Lyonnais v Export Credits Guarantee Department* [2000] 1 AC 486 was misplaced. The wrongdoing by Warren was (i) dishonestly filling out the application forms for the re-mortgages; (ii) failing to give the appellants advice as to whether it was a good idea for them to take out the re-mortgages and (iii) failing to inform the appellants that he had a conflict of interest and that they should take

independent advice. As a consequence of the wrongdoing, the re-mortgages were executed, the monies were released and then lost. This was not simply a case of Warren having assisted the main tortfeasor, Qureshi, so it was nowhere near the situation being considered in *Credit Lyonnais*.

42. In answer to questions from the Court to the effect that the reason for Qureshi having induced the appellants to take out the re-mortgages was so that they would make the loans to the property investment scheme and it was the property investment scheme which had led to the loss of the monies, Mr Grant QC submitted that that was a question of causation for any trial. The respondent's application in relation to vicarious liability had been on the specified grounds of lack of actual or apparent authority, not on absence of causation. That was the case which the appellants had come to meet. This submission that any issue as to the loss was a matter of causation for trial was reiterated by the appellants' counsel in a Note to the Court after the hearing of the appeal.

43. Mr Grant QC next submitted that *Armagas Ltd v Mundogas SA ("The Ocean Frost")* [1986] 1 AC 717, which the respondent's counsel said in their Skeleton Argument was of "critical importance", was of no relevance. It had not been cited by the respondent before either the Master or the Judge. That was a case of deceit and fraudulent misrepresentation, reliance based torts, and the analysis of Lord Keith of Kinkel at 781-2 was limited to such torts and, indeed, to deceit as to the scope of an agent's authority to bind his principal. It had no application to the law of vicarious liability generally.

44. In relation to the ratio of the Judge's decision on vicarious liability at [36]-[37] (which I set out at [18] above), Mr Grant QC submitted that the Judge had wrongly looked at the acts said to give rise to liability and asked if those acts themselves were an integral part of the business activities of the respondent and for its benefit. That was a fundamental misunderstanding of the relevant test and would put the law back to where it was before *Lloyd v Grace, Smith*. The correct question was whether the field of activity in which the wrongdoer was engaging was one which was an integral part of the respondent's operation, to which the answer was yes, as Warren was engaged in finding clients and making applications on their behalf which generated income for the respondent. He submitted that the only difference between this case and *Lloyd v Grace, Smith* was that there had been no holding out.

45. Mr Grant QC submitted that the Judge had wrongly downplayed the significance of the indemnity provision in the Agency Agreement. He relied on what Sir Anthony Clarke MR said in *Gravil v Carroll* at [24] as to the significance of the contract between the defendant and the wrongdoer in establishing the closeness of connection between the wrongdoer's employment by the defendant and the wrongful act.

46. In relation to the appeal as to a direct duty of care, Mr Grant QC submitted that the Judge had erroneously approached this issue on the basis that his decision that there was no vicarious liability was determinative. He submitted that the necessary proximity to satisfy the *Caparo v Dickman* test was made out by the fact that the respondent puts out into the world agents who deal with clients like the appellants where there is a risk that they are going to suffer loss.

47. Mr Roger ter Haar QC submitted, on behalf of the respondent, that the line of cases on which the appellants founded their case of vicarious liability was essentially one where the courts were grappling with how to rationalise a just solution in the case of sex abuse or physical or psychological injury, where the abuser or wrongdoer could not afford to pay the victims damages for the losses they had suffered and the courts had found that solution through making the relevant defendant (the schools in the sex abuse cases or the Ministry of Justice in *Cox*) vicariously liable for the wrongdoing. However, the courts had not gone that far in cases of financial loss arising out of commercial relationships. One reason for that was that normally such relationships were governed by contract.

48. In the present case, the appellants were seeking to fix the respondent with vicarious liability for the wrongdoing of Warren, when not only was there no contractual relationship between them but, as the Judge had found, there could be no direct tortious liability. Mr ter Haar QC submitted that since this was a case of fraud, the issue of vicarious liability was treated differently and it was clear from [15] of *Cox* that the Supreme Court was not intending to address cases of fraud.

49. The correct approach to the issue of vicarious liability in cases of fraud or dishonesty was that set out by Lord Keith in *The Ocean Frost* at 779H-780C:

> "The next matter for consideration is the claim on the ground of vicarious liability on the part of Mundogas for Mr. Magelssen's deceit. The broad proposition of law founded upon is that an employer is vicariously liable for the torts of his employee committed in the course of his employment. "Course of employment" is a concept which has engendered much disputation and spawned a plethora of reported decisions. The starting point should be to consider the fundamental principles which govern vicarious liability in the field of intentional wrongdoing by the servant, particularly by way of dishonest conduct. It is unnecessary to consider the development of the basis of vicarious liability in relation to torts such as negligence or trespass, which has followed a somewhat different line. Dishonest conduct is of a different character from blundering attempts to promote the employer's business interests, involving negligent ways of carrying out the employee's work or excessive zeal and errors of judgment in the performance of it. Dishonest conduct perpetrated with no intention of benefiting the employer but solely with that of procuring a personal gain or advantage to the employee is governed, in the field of vicarious liability, by a set of principles and a line of authority of peculiar application."

50. Mr ter Haar QC submitted that not only had Lord Reed made it clear in *Cox* at [15] that that case was not concerned with fraud, but there was no hint in *Cox* or the *Christian Brothers* case that the previous authorities on cases of fraud where the wrongdoer was acting solely for his own benefit did not remain good law.

51. Mr ter Haar QC submitted that the appellants' case both of a direct duty of care and of vicarious liability of the respondent for Warren's wrongdoing was based upon the

respondent having placed Warren in the position, having given him access to the portal, where he could carry out the fraud. However, this demonstrated no more than that the respondent had provided the opportunity for Warren to commit the fraud. It was well-established that merely providing the wrongdoer with the opportunity to commit fraud was not sufficient to fix the defendant with vicarious liability, absent some holding out of the wrongdoer as having had authority.

52. In that context, Mr ter Haar QC relied in particular on what was said by Diplock LJ in *Morris v Martin* at 737D-E:

> "The mere fact that his employment by the defendants gave him the opportunity to steal it would not suffice [to make the defendants vicariously liable]. The crucial distinction between *Lloyd v. Grace, Smith & Co.* and *Ruben v. Great Fingall Consolidated* [1906] AC 439 is that in the latter case the dishonest servant was neither actually nor ostensibly employed to warrant the genuineness of certificates for shares in the company which employed him. His fraudulent conduct was facilitated by the access which he had to the company's seal and documents in the course of his employment for another purpose: but the fraud itself which was the only tort giving rise to a civil liability to the plaintiffs was not committed in the course of doing that class of acts which the company had put the servant in its place to do."

53. The same principle that, absent a holding out of authority, merely providing the agent with the opportunity to commit fraud is insufficient to establish vicarious liability of the principal also emerged from the decision of the Privy Council in *Kooragang*. At 474G-475C, Lord Wilberforce, giving the judgment of the Board said:

> The distinction thus drawn between the 'driving' cases, to which reference has been made, and cases where a third party deals with an agent is no doubt valid and useful: it is so because it enables, in the latter cases, an argument to be based upon ostensible or apparent authority. In the *Uxbridge* case the third party (the building society) was dealing with the (fraudulent) servant: that was the essence of the case: to quote again the Master of the Rolls 'the authority of a clerk occupying the position of the principal to deal with third parties ... cannot be denied' (p. 253). But where, as here, there was no dealing with the servant or agent, and where the issue is one of actual authority or total absence of authority, the case gives no support for an argument that authority need not be proved but is to be inferred from the fact that the acts done are of a class which the master could himself have done or have entrusted to the servant.
>
> In the present case, the defendants did carry out valuations. Valuations were a class of acts which Rathborne could perform on their behalf. To argue from this that any valuation done by Rathborne, without any authority from the defendants, not on

> behalf of the defendants but in his own interest, without any connection with the defendants' business, is a valuation for which the defendants must assume responsibility, is not one which principle or authority can support. To endorse it would strain the doctrine of vicarious responsibility beyond the breaking point and in effect introduce into the law of agency a new principle equivalent to one of strict liability. If one then inquires, as their Lordships think it correct to do, whether Rathborne had any authority to make the valuations in question, the answer is clear: it is given in clear and convincing terms by the trial judge. Rathborne was not authorised to make them: he made them during a period when the G.B. group were not in a client relationship with the defendants, when valuers were ordered not to do business with them. Rathborne did them, not as an employee of the defendants, but as an employee, or associate, in the G.B. Group and on their instructions.

54. Mr ter Haar QC submitted that this requirement of a holding out (so that the agent had ostensible or apparent authority) in the case of reliance based torts such as fraudulent misrepresentation or deceit also emerges clearly from the judgment of Lord Keith in *The Ocean Frost.* In addition to the passage at 779-780 which I have already set out above, he referred to the argument of counsel. Mr Richard Mawrey QC for the appellants had argued (at 771H) for a wider test of liability than actual or ostensible authority based on employment, whereas Mr Gordon Pollock QC for the respondents had urged on their Lordships (at 772H) a narrower test based on actual or ostensible authority.

55. It was the narrower test which had found favour with the House of Lords. At 780G, Lord Keith said, citing the passage from the judgment of Diplock LJ in *Morris v Martin* which I set out above:

> "It is well settled that a master is not liable for the dishonest tort of his servant merely because the latter's employment has given him the opportunity to commit it."

Lord Keith then proceeded to discuss *Lloyd v Grace, Smith* before saying at 781F:

> "The essential feature for creating liability in the employer is that the party contracting with the fraudulent servant should have altered his position to his detriment in reliance on the belief that the servant's activities were within his authority, or, to put it another way, were part of his job, this belief having been induced by the master's representations by way of words or conduct."

56. Lord Keith then referred to the dictum of Denning LJ in *Navarro v Moregrand Ltd* [1951] 2 TLR 674 to the effect that absence of actual or ostensible authority was not decisive as to whether a servant or agent was acting within the course of his employment, before saying at 782E:

> "This dictum, which was not concurred in by the other two members of the Court of Appeal, may have some validity in relation to torts other than those concerned with fraudulent misrepresentation, but in my opinion it has no application to torts of the latter kind, where the essence of the employer's liability is reliance by the injured party on actual or ostensible authority."

57. Mr ter Haar QC submitted that, contrary to Mr Grant QC's submissions, the case against the respondent as pleaded was a reliance case, specifically the case about the duty to give advice in [8] of the Particulars of Claim. The advice which should have been given was only relevant if it was going to be relied upon and the plea at [8.1] of a duty to give full disclosure had inherent in it an assertion that if there had been full disclosure, the appellants would have acted in a particular way and were thus relying on the respondent. Furthermore, he submitted that underlying the whole claim was the allegation that Warren was involved in a fraud. If fraud had been pleaded, it would have been on the basis that he was liable because he had represented that he was acting honestly in an honest transaction, but that representation was fraudulent.

58. Mr ter Haar QC submitted that it should make no difference as a matter of analysis that the claim was pleaded in negligence which was effectively part and parcel of a fraud (as I put it in argument effectively in a sandwich between the fraud of Qureshi in inducing the appellants to lend monies to the property investment scheme and the fraud in misappropriating the monies supposedly towards that scheme once they became available from the re-mortgaging). The claim was still one of a reliance based tort. In those circumstances, the fundamental reasoning of *The Ocean Frost* should be applicable here and, in the absence of Warren having had actual or ostensible authority, the respondent was not vicariously liable.

59. It was also submitted on behalf of the respondent that, even if the argument that there was a separate line of authority applicable in the case of deceit and other reliance based torts was wrong, and this case fell to be considered on the basis of a unified modern law of vicarious liability set out in the *Christian Brothers* case and *Cox*, the Judge had still been right to enter summary judgment against the appellants. Mr ter Haar QC put his case as follows.

60. He submitted that it is well-established that before the principal can be vicariously liable all the acts or omissions which are necessary to make the servant or agent personally liable must have taken place within the scope of his employment or agency. He relied on the decision of the House of Lords in *Credit Lyonnais*. The issue in that case was formulated by Stuart-Smith LJ in the Court of Appeal adopted by Lord Woolf MR in his speech in the House of Lords at 490F-G as:

> "Where A becomes liable to B as a joint tortfeasor with C in the tort of deceit practised by C on B on the basis that A and C have a common design to defraud B and A renders assistance to C pursuant to and in furtherance of the common design, does D, A's employer, become vicariously liable to B, simply because the act of assistance, which is not itself the deceit, is in the course of A's employment with D?"

61. That issue was decided by their Lordships in the negative. At 494D-F Lord Woolf cited the statement of principle of Lord Macnaghten in *Lloyd v Grace Smith* in turn citing from the approval by Blackburn J in an earlier case of a passage in *Story on Agency*. Lord Woolf then continued at 494G-495A:

> "This statement makes clear the principle on which vicarious liability depends. It is that the wrong of the servant or agent for which the master or principal is liable is one committed in the case of a servant in the course of his employment, and in the case of an agent in the course of his authority. It is fundamental to the whole approach to vicarious liability that an employer or principal should not be liable for acts of the servant or agent which are not performed within this limitation. In many cases particularly cases of fraud, the question arises as to whether the particular conduct complained of is an unauthorised mode of performing what the servant or agent is engaged to do. This case however is not concerned with this feature of vicarious liability because there is no dispute as to what acts were done in the course of Mr. Pillai's employment.
>
> This case therefore raises starkly the question of whether, in the case of a joint tort, it is sufficient to make the master liable if the acts of his servant for which he is responsible do not in themselves amount to a tort but only amount to a tort when linked to other acts which were not performed in the course of the employee's employment."

62. He answered that question as follows at 495B-F:

> "The other acts may or may not be in the course of the employee's employment whether the other acts are performed by the same person or a different person. In addition, if by a different person, that person may or may not be a fellow employee.
>
> In resolving this issue, as a matter of principle it does not matter whether there is one tortfeasor or two tortfeasors or whether both tortfeasors are employees or only one is an employee. The conduct for which the servant is responsible must constitute an actionable tort and to make the employer responsible for that tort the conduct necessary to establish the employee's liability must have occurred within the course of the employment. If the tort is committed jointly, then it is conduct which is within the course of the employment sufficient to constitute the tort, irrespective of which tortfeasor performed the acts, which is necessary. As both tortfeasors are responsible for the tortious conduct as a whole in the case of joint torts it is not necessary to distinguish between the actions of the different tortfeasors. For vicarious liability what is critical, as long as one of the joint tortfeasors is an employee, is that the combined

> conduct of both tortfeasors is sufficient to constitute a tort in the course of the employee's employment.
>
> Were the position otherwise, you could have the extraordinary result that if an employee carried out all the acts complained of there would be no liability on the employer, but if the acts were carried out partly by the employee and partly by a non-employee, the employer would be liable. The obverse situation is the same. If an employer would be liable if the employee personally took the action complained of the situation is no different because some of the acts were done by some one who was not an employee as part of a joint enterprise with the employee.
>
> The short answer to Mr. Sumption's first argument is that before there can be vicarious liability, all the features of the wrong which are necessary to make the employee liable have to have occurred in the course of the employment. Otherwise there is no liability."

63. This issue also arose in *Dubai Aluminium* where, at [39] Lord Nicholls said:

> "Evans LJ [in the Court of Appeal in that case] stated that vicarious liability is not imposed 'unless all of the acts or omissions which make the servant personally liable as a tortfeasor took place within the course of his employment': see [2001] QB 113, 133. Aldous LJ was of a similar view. I respectfully consider this proposition, as it stands, is ambiguous. The ambiguity would be removed if the proposition were amended to read that vicarious liability is not imposed unless all the acts or omissions which *are necessary to* make the servant personally liable took place within the course of his employment. That is the present case. That was not the position in *Credit Lyonnais*..."

64. Mr ter Haar QC also relied upon a similar passage in the judgment of Lord Millett at [114] who said of *Credit Lyonnais*:

> "The House concluded that, before there can be vicarious liability, all the features of the wrong *which are necessary* to make the employee liable must have occurred in the course of the employment: see per Lord Woolf at p 495. The claim failed because the employee's conduct, taken by itself, was not sufficient to constitute a tort. An essential element in the cause of action, viz. the representation, was not made by the employee in the course of his employment."

65. He submitted that, applying that principle to the present case, the acts or omissions necessary to make Warren liable in tort included his own and Qureshi's fraud in misappropriating the monies the appellants invested in the property development scheme. Qureshi's acts necessarily could not be those of Warren in the course of his

agency. Warren's acts in relation to the property investment scheme were carried out in the course of a recognisably independent business of his and Qureshi's. Contrary to Mr Grant QC's argument, this was not merely an issue of causation. The appellants only suffered loss because they handed over monies to Warren who then misappropriated them. That was thus a necessary ingredient of the appellants' cause of action in tort whether against Warren or against the respondent on the basis of vicarious liability. Accordingly, applying *Credit Lyonnais* and *Dubai Aluminium* the respondent was not vicariously liable for Warren's wrongdoing.

66. In relation to the appeal on the direct duty of care, Mr ter Haar QC submitted that the Judge had been right to dismiss the appeal against the Master's order. In cases of economic loss, where the *Caparo v Dickman* three stage test is being applied, at the second stage of proximity, the Court is looking for some relationship between the parties, something akin to a contractual relationship. Here there was no relationship whatsoever and no holding out of Warren as having authority. Accordingly the second stage was not satisfied. The same factors would lead to the third stage not being satisfied.

Analysis and conclusions

67. In my judgment, the Judge was right to enter summary judgment against the appellants on the issue of vicarious liability for a number of reasons. First, even assuming in the appellants' favour that a case of agency such as the present case is to be analysed pursuant to a unitary modern law of vicarious liability applicable in all cases, as set out in the judgment of Lord Phillips PSC in the *Christian Brothers* case as it was interpreted and summarised by Lord Reed in *Cox* at [24], the Judge rightly concluded that the appellants could not satisfy the two stage test or the two elements, which he correctly identified at [30] of his judgment. The reality is that, on the appellants' pleaded case, Warren was essentially engaged on a "recognisably independent business" of his and Qureshi's, the property investment scheme in which Qureshi induced the appellants to invest. Warren then made the admittedly dishonest applications to Abbey National for re-mortgages in order to generate the funds for such investment. Warren's use of the portal was simply the means by which he was able to obtain funds from the appellants to invest in the scheme. To describe that activity as in any sense an integral part of the business activities of the respondent would be a complete distortion of the true position on the facts.

68. Mr Grant QC was critical of the Judge for referring to Warren as engaged on a frolic of his own or, to use Lord Millett's word "moonlighting" but I consider that criticism unwarranted. Those expressions seem to me to be a convenient colloquial summary of what Lord Reed described as the wrongdoer's "activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party".

69. The suggestion that, in [37] of the judgment there was a fundamental misapprehension by the Judge of the correct legal test derived from the *Christian Brothers* case and *Cox* is also an unwarranted criticism and seeks to take an isolated passage in the judgment out of context. It is quite clear from the judgment as a whole that the Judge was well aware of the appropriate legal test and that he applied it correctly.

70. Furthermore, I agree with the Judge that the fact that commission was received by the respondent does not assist the appellants. It was clearly generated automatically by the Abbey National systems and when received was held by the respondent in a suspense account, because the transaction to which it related did not appear on the respondent's books. That if anything is support for the Judge's conclusion that this transaction was not carried out as an integral part of the respondent's business or for its benefit, but was moonlighting by Warren.

71. I also agree with the Judge that the indemnity provision in the Agency Agreement does not take matters further. It cannot begin to establish a closeness of connection between Warren's agency and the specific wrongdoing being carried out for his own purposes and for his and Qureshi's benefit. *Gravil v Carroll* is clearly distinguishable.

72. Likewise, it does not seem to me that the fact that the Abbey National mortgage offers contained the statement: "Positive Solutions recommended that you take out this mortgage" assists the appellants. As Mr ter Haar QC submitted, there was no suggestion by the appellants that they relied upon that representation in making the investment in the scheme, so that the loss they suffered did not come about as a consequence of that representation. Its purpose seems to me to have been to protect Abbey National against any claim from the mortgagor that the mortgage was not suitable, making the point that it was not Abbey National which had given any advice.

73. I was unimpressed by the suggestion, implicit in Mr Grant QC's emphasis on the fact that the Court is dealing with an appeal on a summary judgment or strike out application, that the case should be allowed to go to trial because the respondent had not produced evidence of its relationship with Warren beyond the Agency Agreement. The position is that it is accepted on behalf of the appellants, correctly, and as I see it, inevitably, that Warren did not have actual or ostensible authority to act on behalf of the respondent when he engaged in this wrongdoing. The suggestion that the appellants should be given the opportunity, Micawber-like, to go to trial in the hope that something will turn up, cannot alter that position on absence of authority, nor could it alter the conclusion that Warren was engaged on a frolic of his own or moonlighting.

74. Second, I consider that Mr ter Haar QC is correct that this is one of those cases, like *Credit Lyonnais*, where, on any view, not all the acts and omissions which would be necessary to make Warren personally liable in tort took place within the alleged course of his employment or agency, from which it must follow that the respondent is not vicariously liable for his wrongdoing: see the passages from the speech of Lord Woolf MR in *Credit Lyonnais* set out at [60] to [62] above and the passages from the speeches in *Dubai Aluminium* set out at [63] and [64] above. To begin with, a necessary ingredient of the appellants' case is that they were induced to agree to make loans by way of investment in the property investment scheme, not by Warren but by Qureshi, who was never an employee or agent of the respondent. Equally significantly, Warren clearly received the monies raised by the re-mortgages and misappropriated them pursuant to a "recognisably independent business" of his and Qureshi's, which could not in any sense be described as an integral part of the respondent's business activities. Indeed, the appellants did not suggest the contrary. It was the handing over of the monies to Warren or his company which caused the appellants' loss. On their pleaded case, they did not suffer any loss through the actual re-mortgaging or their receipt of the monies from Abbey National. Rather, they were

able to pay off their existing mortgages and were left with substantial funds, which they only lost when they handed the monies over to warren or his company.

75. Mr Grant QC's argument that this is an issue of causation which he should not have to meet on the respondent's summary judgment/strike out application is misconceived. Given that this is a case of alleged vicarious liability for tortious wrongdoing which caused the appellants financial loss, a necessary ingredient of the appellants' cause of action in tort is that the tort has caused the appellants some loss and damage. Whatever tortious wrongdoing Warren had committed, until the appellants handed over the re-mortgage monies to him, they had not suffered a loss and therefore, his conduct in receiving and misappropriating the monies is a necessary feature or ingredient of the tort, without which he could not be personally liable. That feature or ingredient did not, on any view, occur in the course of his agency for the respondent.

76. Third, it seems to me that Mr ter Haar QC is also correct that, at most, the respondent provided the opportunity for Warren to commit the fraud or wrongdoing by giving him access to the portal. It is well-established that merely providing the opportunity for wrongdoing is not sufficient without more to give rise to vicarious liability, absent a holding out of someone in Warren's position as having authority to act for the defendant sought to be made vicariously liable: see the passages from the judgments of Diplock LJ in *Morris v Martin* cited at [52] above, Lord Wilberforce in *Kooragang* cited at [53] above and Lord Keith in *The Ocean Frost* cited at [55] above. There is no suggestion in the decisions of the Supreme Court in the *Christian Brothers* case, *Cox* or *Mohamud* that those statements of principle do not still represent good law.

77. In the circumstances, it is not necessary to go further and determine whether Mr ter Haar QC's submission is correct that reliance based torts such as deceit or misrepresentation committed by an agent are in a distinct category from other cases such the *Christian Brothers* case, *Cox* or *Mohamud*, so that the principal cannot be vicariously liable unless the agent had actual or ostensible authority. I would simply repeat that the position of agency was not being considered in *Cox*, as Lord Reed made clear at [15] of his judgment, and the line of cases on which Mr ter Haar QC relied was not discussed in this context.

78. In relation to the appeal against the conclusion of both the Master and the Judge that the respondent did not owe the appellants a direct duty of care, it is fair to say that this was not pursued with any particular vigour or enthusiasm by Mr Grant QC in his oral submissions. That is perhaps scarcely surprising as the point is lacking in merit. Given the complete absence of any contact or relationship between the respondent and the appellants and, indeed, the fact that the respondent was unaware of the acts of Warren vis-à-vis the appellants, the conclusion that the second stage of the *Caparo v Dickman* test could not be satisfied, was inevitable.

79. There is no question of the mere fact that, in the abstract, the respondent had provided Warren with the opportunity to cause loss to clients through providing access to the portal, giving rise to a duty of care, in the complete absence of any relationship between the respondent and the appellants. In the circumstances of this case, there was no assumption of responsibility by the respondent and no proximity which could found such a direct duty.

80. In a case of economic loss such as the present that conclusion is fatal to this part of the appeal but, to the extent necessary, I would also conclude that the third stage of the *Caparo v Dickman* test that the imposition of a duty was "fair, just and reasonable" did not begin to be satisfied.

81. For all those reasons, I would dismiss this appeal.

Lady Justice Asplin

82. I agree.

Lady Justice Rafferty

83. I also agree.