IN THE SUPREME COURT OF BERMUDA

Civil Jurisdiction

2008: No. 134

BETWEEN:

BERMUDA RESTAURANTS LTD.
(t/a Chopsticks Restaurant)

Plaintiff

-v-

JONATHAN DASPIN

1st Defendant

-and-

CONVERGEX GLOBAL MARKETS LIMITED

2nd Defendant

JUDGMENT

Date of Hearing: 19th January, 2009

Date of Judgment: 30th January, 2009

Mr. Michael Smith, Smith & Co., for the Plaintiff

Mr. Kelvin Hastings-Smith, Appleby, for the 1st Defendant

Mr. Woloniecki & Mr. Nathaniel Turner, Attride-Stirling & Woloniecki, for the 2nd Defendant

Introduction

1. These proceedings are taken by the plaintiff, to which I will refer either as the "Plaintiff" or "Bermuda Restaurants", seeking damages for libel contained in an email transmission made on or about 16 May 2008. The first defendant ("Mr. Daspin") is the managing director of the second defendant ("Convergex" or "the Company"). Although the statement of claim maintains that Mr. Daspin is employed both by Convergex and by certain related companies, these proceedings are concerned with Mr. Daspin's position as managing director of Convergex.

2. The proceedings arise by virtue of an email which Mr. Daspin sent (it is unclear to whom) on 16 May 2008, which contained serious allegations concerning the restaurant operated by the Plaintiff known as "Chopsticks." I will refer to that email as the Chopsticks Email. The allegations in it were to the effect that the restaurant had been closed down by the Corporation of Hamilton after a service worker had attended the basement of the restaurant and discovered rats being cut into pieces, said to simulate chicken, with a view to these being served in the restaurant. The email included some nine or so photographs. For Mr. Daspin, it was accepted that he had sent the email; however, he did not admit that the words used in the email bore the meaning contended for by the Plaintiff. He admitted that photographs were embedded into the email but contended that such photographs were demonstrably not photographs of the Plaintiff's restaurant or its employees, admitted that the contents of the email as against the Plaintiff were untrue, and offered a retraction, apology, and amends.

3. The statement of claim averred that Mr. Daspin and/or Convergex had sent the Chopsticks Email, with an alternative plea that Mr. Daspin had sent it on behalf of Convergex. For Convergex, it was admitted that Mr. Daspin had sent the email, but denied either that Convergex had done so, or that Mr. Daspin had done so on behalf of Convergex. Convergex then admitted that the email had been sent from

its offices using a computer it owned, that the sending of that email had not been authorised by Convergex, and that in so sending it Mr. Daspin had been acting outside the ordinary scope of his employment with Convergex. By reason of these matters, it was pleaded that Convergex was neither the publisher of the email, nor vicariously liable for the publication of the email by Mr. Daspin.

4. On 10 September 2008, Convergex sought an order for the determination of a preliminary issue in the following terms:

> "A determination of the issues whether having regard to paragraphs 5.2 and 5.3 of its Amended Defence the Second Defendant: (a) is a publisher of the E-mail dated 16 May 2008 referring to "*Chopsticks"* which was received by third parties; and (b) is vicariously liable for the publication by the First Defendant of the same E-Mail (together, hereafter, the "Preliminary Issues").

5. The summons was supported by an affidavit sworn by an attorney for Convergex, Alexander Jenkins, and this affidavit with its exhibits constitute the only evidence in relation to the application. There was then an order made by consent in relation to the determination of the preliminary issue, on 2 October 2008. Although the order provided that the Plaintiff should have a period within which to file evidence in response, no such evidence was filed.

The Determination of the Preliminary Issue

6. For the Plaintiff, Mr. Smith relied heavily upon Mr. Daspin's seniority, and the fact that he was effectively indistinguishable from Convergex, as its most senior Bermuda employee. As Mr. Smith put it, Mr. Daspin is not only "the boss" in Bermuda, but represents the Company's "ears, eyes, mouth, and mind." Mr. Smith maintained that because Mr. Daspin was in total charge of Convergex's Bermuda office, he was not the kind of employee referred to in the authorities upon which Covergex relied, or in the relevant textbooks. Mr. Smith maintained that in his capacity as Convergex's managing director, Mr. Daspin necessarily

gave advice to its clients, not simply on matters involving the Company's core business, but in relation to other "client management activities", such as advising in relation to the appropriate hotel to stay at, golf course to visit, or restaurant to dine at. It was on this basis that Mr. Smith sought to distinguish the authorities on which Convergex relied, contending that it was absurd to say that the Company did not act through Mr. Daspin, and that because Convergex made Mr. Daspin their "supremo" in Bermuda, they necessarily had to be held to account.

7. With all respect to Mr. Smith, I cannot accept those submissions, which seem to me to fly in the face of the well established rules that the common law has developed in relation to vicarious liability, and which in this case extend to the related issue of publication in defamation proceedings.

8. As Mr. Woloniecki said, vicarious liability is a legal issue, not a moral one. He was prepared to accept for the purpose of the application that the Chopsticks Email was defamatory, but was not prepared to accept Mr. Smith's characterisation that it represented advice on Mr. Daspin's part. He referred to the fact that the exhibited email did not identify the recipients, so that it was not possible to say whether these were clients of Convergex. Mr. Woloniecki also referred to the terms of Mr. Daspin's contract with Convergex and his obligation to abide by its code of conduct (which had been exhibited to Mr. Jenkins' affidavit), which the Chopsticks Email clearly breached.

Vicarious Liability

9. In relation to the law, Mr. Woloniecki started with the Privy Council case of *Meridian Global Funds Management Asia Ltd –v- Securities Commission* [1995] 2 AC 500. In that case, Lord Hoffman set out the legal basis upon which the actions of human beings are attributable to corporations by rules of attribution. Mr. Woloniecki also relied upon the statements of general principle in relation to the liability of a principal for torts committed by his agent set out in Bowstead on Agency. For my part, I find greater assistance in the judgment of Lord Steyn

given in the case of *Lister –v- Hesley Hall Ltd* [2002] 1 AC 215, to which Mr. Woloniecki also referred.

10. That case was concerned with the liability of the owners and managers of a school for the tortious acts of the warden of an attached boarding house, who had sexually abused children resident at the school boarding house, under his care.

11. In paragraph 14 of his judgment, Lord Steyn referred to vicarious liability in the following terms:

> "Vicarious liability is legal responsibility imposed on an employer, although he is himself free from blame, for a tort committed by his employee in the course of his employment. Fleming observed that this formula represented "a compromise between two conflicting policies: on the one end, the social interest in furnishing an innocent tort victim with recourse against a financially responsible defendant; on the other, a hesitation to foist any undue burden on business enterprise": *The Law of Torts,* 9th ed (1998), pp 409-410."

12. Having then referred to the assistance derived from two cases decided by the Supreme Court of Canada, Lord Steyn at paragraph 28 of his judgment said:

> "Employing the traditional methodology of English law, I am satisfied that in the case of the appeals under consideration the evidence showed that the employers entrusted the care of the children in Axeholme House to the warden. The question is 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. On the facts of the case the answer is yes. After all, the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in Axeholme House. Matters of degree arise. But the present cases clearly fall on the side of vicarious liability."

13. There are also some helpful comments on the nature of vicarious liability to be found in the judgment of Lord Hobhouse of Woodborough. He referred to the argument that sexual abuse, being a particular offensive and criminal act of personal gratification on the part of its perpetrator, could therefore be easily

described as the paradigm of those acts which an employee could not conceivably be employed to do. Hence it was argued that an employer should never be made vicariously liable for such acts. In paragraph 55 of his judgment, Lord Hobhouse said this:

> "The classes of persons or institutions that are in this type of special relationship to another human being include schools, prisons, hospitals and even, in relation to their visitors, occupiers of land. They are liable if they themselves fail to perform the duty which they consequently owe. If they entrust the performance of that duty to an employee and that employee fails to perform the duty, they are still liable. The employee, because he has, through his obligations to his employers, adopted the same relationship towards and come under the same duties to the plaintiff, is also liable to the plaintiff for his own breach of duty. The liability of the employers is a *vicarious* liability because the actual breach of duty is that of the employee. The employee is a tortfeasor. The employers are liable for the employee's tortious act or omission because it is to him that the employers have entrusted the performance of their duty. The employers' liability to the plaintiff is also that of a tortfeasor. I use the word "entrusted" in preference to the word "delegated" which is commonly, but perhaps less accurately, used. Vicarious liability is sometimes described as a "strict" liability. The use of this term is misleading unless it is used just to explain that there has been no *actual* fault on the part of the employers. The liability of the employers derives from their voluntary assumption of the relationship towards the plaintiff and the duties that arise from that relationship and their choosing to entrust the performance of those duties to their servant. Where these conditions are satisfied, the motive of the employee and the fact that he is doing something expressly forbidden and is serving only his own ends does not negative the vicarious liability for his breach of the "delegated" duty."

14. Lord Hobhouse carried on to set out the correct approach to answering the question whether the tortious act of an employee falls within the scope of his employment or not at paragraph 59 and 60, in the following terms:

> "59 The classic *Salmond* test for vicarious liability and scope of employment has two limbs. The first covers authorised acts which are tortious. These present no relevant problem and the present cases clearly do not fall within the first limb. The defendants did not authorise Mr Grain to abuse the children in his charge. The argument of the respondent (accepted by the Court of Appeal) is that Mr Grain's acts of abuse did not come within the second limb either: abusing children cannot properly be described as a

mode of caring for children. The answer to this argument is provided by the analysis which I have set out in the preceding paragraphs. Whether or not some act comes within the scope of the servant's employment depends upon an identification of what duty the servant was employed by his employer to perform. (See Diplock LJ above.) If the act of the servant which gives rise to the servant's liability to the plaintiff amounted to a failure by the servant to perform that duty, the act comes within "the scope of his employment" and the employer is vicariously liable. If, on the other hand, the servant's employment merely gave the servant the opportunity to do what he did without more, there will be no vicarious liability, hence the use by Salmond and in the Scottish and some other authorities of the word "connection" to indicate something which is not a casual coincidence but has the requisite relationship to the employment of the tortfeasor (servant) by his employer: *Kirby v National Coal Board* 1958 SC 514; *Williams v A & W Hemphill Ltd* 1966 SC(HL) 31.

60 My Lords, the correct approach to answering the question whether the tortious act of the servant falls within or without the scope of the servant's employment for the purposes of the principle of vicarious liability is to ask what was the duty of the servant towards the plaintiff which was broken by the servant and what was the contractual duty of the servant towards his employer. The second limb of the classic *Salmond* test is a convenient rule of thumb which provides the answer in very many cases but does not represent the fundamental criterion which is the comparison of the duties respectively owed by the servant to the plaintiff and to his employer. Similarly, I do not believe that it is appropriate to follow the lead given by the Supreme Court of Canada in *Bazley v Curry* 174 DLR (4^{th}) 45. The judgments contain a useful and impressive discussion of the social and economic reasons for having a principle of vicarious liability as part of the law of tort which extends to embrace acts of child abuse. But an exposition of the policy reasons for a rule (or even a description) is not the same as defining the criteria for its application. Legal rules have to have a greater degree of clarity and definition than is provided by simply explaining the reasons for the existence of the rule and the social need for it, instructive though that may be. In English law that clarity is provided by the application of the criterion to which I have referred derived from the English authorities."

15. I respectfully adopt and apply all that their Lordships said in that case in considering the issue before me.

16. Lastly in regard to this aspect of matters, Mr. Woloniecki relied upon the case of *Dubai Aluminium Co Ltd –v- Salaam* [2003] 2 A.C. 366, and the following

passage from the judgment of Lord Nicholls of Birkenhead contained in paragraph 23 of the judgment:

> "the wrongful conduct must be so closely connected with acts the …employee was authorised to do that, for the purpose of the liability of … the employer to third parties, the wrongful conduct *may fairly and properly* be regarded as done by the [employee] while acting in the ordinary course of … the employee's employment."

17. On the basis of the above authority, Mr. Woloniecki submitted that there was plainly no connection between Mr. Daspin's actions in sending the Chopsticks Email and his employment with Convergex, commenting that defamation of a restaurant is not a risk that can fairly be regarded as reasonably incidental to Convergex's business. I agree. In my view, this case presents none of the difficulties which arose in cases such as *Lister –v- Hesley Hall*. To use the other phrase which one sees in relation to issues such as this, and which was used by Mr. Woloniecki, I entirely agree that Mr. Daspin appears to have been on a frolic of his own. I therefore agree that the facts of the case before me clearly fall on the other side of the line of vicarious liability, and Convergex has no vicarious liability for the act of Mr. Daspin in sending the Chopsticks Email.

Publication

18. As appears from the terms of the preliminary issue, and from the statement of claim, there is a separate contention that Convergex was also, or alternatively, the publisher of the Chopsticks Email. In his submissions, Mr. Smith essentially relied upon the same matters as were relied on in relation to the vicarious liability issue. Mr. Woloniecki analysed the position in more detail, contending that Convergex could only be liable for Mr. Daspin's publication if it were either vicariously liable for his actions, or if it actively participated in the publication of the offending email. In this regard, as Mr. Woloniecki noted, there were no primary facts pleaded in support of any allegation that Convergex authorised the publication of the email, participated in its publication in any other way, or even knew of it at the time. Although Mr. Woloniecki referred to and relied upon cases

in relation to internet service providers, I do not think that these afford any real assistance. The reality is that email was simply the means of publication, but the principles applicable to publication generally clearly apply in this case, and (vicarious liability apart) liability therefore only extends to a person who participated in, secured or authorised the publication. There is no question of any such participation or authorisation in this case.

Conclusion

19. I therefore answer the questions raised in the preliminary issue by holding that Convergex is neither the publisher of the Chopsticks Email, nor vicariously liable for its publication by Mr. Daspin.

20. It therefore follows, as Mr. Smith acknowledged that it would, that Convergex is entitled to judgment in its favour dismissing the Plaintiff's claim for damages as against it, and I so order.

Costs

21. I anticipate that costs will follow the event in the normal way, but I am prepared to hear counsel on the issue should they so wish.

Dated this day of January 2009.

Hon. Geoffrey R. Bell
Puisne Judge