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THE CASE OF THE SINGAPOREAN ROGUE AND THE CORRUPT CIVIL SERVANT

Credit Lyonnais Bank Nederland NV v *Export Credits Guarantee Department*[1]

I. INTRODUCTION

IT is a well established principle of tort law that an employer can be held vicariously liable for a tort which is committed by an employee during the course of his employment. Many vicarious liability cases have addressed the issue of whether the employee was, or was not, acting in the course of his employment when the tort was committed;[2] rather fewer have needed to focus specifically on whether or not the act complained of was in fact tortious.[3] In a recent vicarious liability case, however, the House of Lords had to consider the subtle question of whether an employer could be held liable for acts which, although performed during the course of an employee's

1 [1999] 2 WLR 540 ("the *Credit Lyonnais*" case). Credit Lyonnais Bank Nederland NV is now known as Generale Bank Nederland NV. It will be referred to here as "the Bank". The Export Credits Guarantee Department (which has since been privatised, but which was at the material time a part of central government) will be referred to as "the EGCD".

2 See, *eg, Whatman* v *Pearson* (1868) LR 3 CP 422, *Storey* v *Ashton* (1869) LR 4 QB 476, *Bayley* v *Manchester, Sheffield & Lincolnshire Railway Co* (1873) LR 8 CP 148, *Beard* v *London General Omnibus Co* [1900] 2 QB 530, *Century Insurance Co Ltd* v *Northern Ireland Road Transport Board* [1942] AC 509, *Crook* v *Derbyshire Stone Ltd* [1956] 1 WLR 432, *Ilkiw* v *Samuels* [1963] 1 WLR 991, *Kay* v *ITW Ltd* [1968] 1 QB 140 and *General Engineering Services Ltd* v *Kingston and Saint Andrew Corp* [1988] 3 All ER 867.

3 The focus is more commonly on whether the nature of the tort complained of is such as to take it outside the employee's employment. For example, where the tort complained of is also a crime such as theft or fraud, the courts have to determine whether the employee had ostensible authority to act as he did, and whether the misappropriation or fraudulent act could be regarded as a manner (however wrongful and dishonest) of performing the tasks for which he was engaged – see, *eg, Barwick* v *English Joint Stock Bank* (1867) *Lloyd* v *Grace, Smith & Co* [1912] AC 716, *Uxbridge Permanent Benefit Building Society* v *Pickard* [1939] 2 KB 248, *Morris* v *CW Martin & Sons Ltd* [1966] 1 QB 716 and *Nahhas* v *Pier House (Cheyne Walk) Management Ltd* (1984) 270 EG 328.

employment, were not, under the existing law, technically in themselves sufficient to constitute a completed tort, but arguably became so only when linked with the fraudulent acts of a non-employee.

Their Lordships' unanimous decision in this case – that the employer could not in the circumstances be held liable – included some interesting observations both on the undesirability of extending the law to make persons liable in tort simply because they intentionally facilitate the violation of other persons' rights, and on the kinds of situation in which employers might possibly be liable for the acts of dishonest employees who act in concert with third parties.

II. The Facts

The *Credit Lyonnais* case revolves around the fraud of one Roland Chong, described by Lord Woolf MR in the House of Lords as a 'rogue',[4] who moved to England from Singapore in 1980. Mr Chong, who was well-versed in the ways of financing international trade, knew that British-based exporters could obtain insurance in the form of guarantees from the ECGD against the risk of non-payment by foreign purchasers. The ECGD guarantees stated that, in the event of overseas purchasers defaulting, exporters would be paid 90% of the purchase price owing for the goods. The aim of these guarantees was to allow exporters to obtain expedited financing, thus facilitating international trade. Mr Chong knew, too, that the Bank could be persuaded to buy bills of exchange drawn by exporters on foreign purchasers against such guarantees from the ECGD that the foreign purchasers would, in due course, pay for the goods as their contracts of sale required.

Armed with this knowledge, Mr Chong convinced the Bank that he was involved in exporting large quantities of goods to America and Nigeria. He then devised a scheme to invent completely fictitious contracts for the sale of goods, backed up by fraudulently drawn bills of exchange containing the forged signatures of apparent purchasers. Starting in July 1983, he obtained money by selling the Bank these supposed bills of exchange. From 1983 until 1985, the fake bills were backed by nine comprehensive bank guarantees (CBGs) issued by the ECGD, which provided cover with respect to a number of transactions. Subsequently, in 1987 and 1988, the ECGD issued four specific bank guarantees (SBGs), which related to particular contracts for capital goods. Mr Chong managed to hide the fraud for some time by arranging for the money obtained when he sold later bills to be used to pay off the amounts outstanding on earlier ones.

[4] *Supra*, note 1, at 543.

In order to ensure that no difficult questions would be asked within the ECGD, which was guaranteeing these illusory transactions, Mr Chong obtained the assistance of a corrupt employee, a Mr Pillai (who died before the legal proceedings in the case commenced). In spite of being a comparatively junior civil servant, Mr Pillai was a senior underwriter of ECGD guarantees. He enabled Mr Chong to obtain the guarantees over a five year period without any eyebrows being raised within the ECGD, and signed letters on ECGD letterhead stating that the transactions were acceptable to the ECGD. In 1988, having used the scheme to obtain more than £10m from the Bank, Mr Chong disappeared and the fraud came to light.[5]

III. The Action

The Bank initially sought to sue the ECGD in both contract and tort. The claim in contract was based on the argument that the ECGD's guarantees secured payment of the bills which the Bank had purchased. This claim was later dropped.[6] In tort, the claim was based on the argument that the ECGD was vicariously liable for Mr Pillai's acts in underwriting the guarantees.

With respect to the tort claim, both the High Court and the Court of Appeal drew a distinction between the transactions from 1983 to 1985, backed by the CBGs, and the later transactions, backed by the SBGs. The trial judge, Longmore J, held that, although at the time when the nine CBGs were issued Mr Pillai had already received bribes from Mr Chong, he was not yet sufficiently knowledgeable about or involved in Mr Chong's fraud to be liable as a joint tortfeasor. On the other hand, the Court of Appeal accepted (in a finding not subsequently challenged by the ECGD) that, by the time the four SBGs were issued between December 1987 and April 1988, Mr Pillai was a party to a common design with Mr Chong to perpetrate a fraud on the Bank.

This fact was not, however, enough to lead the Court of Appeal to find in favour of the Bank. For although the bills of exchange and other documents which Mr Chong had presented to the Bank contained the forged signatures of respectable parties who knew nothing of the supposed transactions, none

5 See Longmore J's summary of the facts [1996] 1 Lloyd's Rep 200, 203, as referred to by Lord Woolf MR, *supra*, note 1, at 543.

6 The claim was dropped because the guarantees related only to bills "in connection with which the bank had taken all reasonable steps to satisfy itself as to its validity and enforceability in the buyer's country ...". However, the Bank apparently took no such precautions. It was therefore clear that the contractual claim could not succeed. See discussion *infra*, text at note 7, for the significance of the Bank's lack of care with respect to its action in tort.

of these forgeries had been perpetrated by Mr Pillai. The Court of Appeal therefore held that there was nothing actually unlawful in him issuing the SBGs which supported the documents, and that, as a consequence, the ECGD could not be held vicariously liable for deceit in this respect.

In the statement of facts prepared for the appeal to the House of Lords it was agreed that it would not have been within the course of Mr Pillai's employment or the scope of his authority to do the acts which deceived the Bank, and that he had no actual or ostensible authority to sign the letters indicating that the ECGD found the transactions in question acceptable. Therefore, there could be no question of the ECGD being held vicariously liable for those acts.

There was no finding that any of the Bank's employees had been party to the fraudulent scheme, nor had any of them been guilty of complicity or bad faith. It was, however, found that there had been a "remarkable lack of caution"[7] on the part of the Bank in general and on the part of a Mr Herod (with whom Mr Chong usually dealt) in particular in entering into the SBG transactions. This was potentially significant, since it led the ECGD to argue that, even if it *could*, in theory, be vicariously liable for Mr Pillai's acts, it would nevertheless not have to compensate the Bank, because the chain of causation had been broken by the Bank's own recklessness. In the event, however, the House of Lords did not consider it necessary to deal with this argument.

In the House of Lords it was recognised that the Bank could have sued both Mr Chong and Mr Pillai and succeeded in an action for deceit for which the two men would have been jointly and severally liable. The problem in suing the ECGD, however, was that the fraud which had caused the Bank's loss did not take the form of a single act, but occurred through a course of conduct, and only part of that conduct – the issue of the guarantees on behalf of the ECGD – took place during Mr Pillai's employment. The Court of Appeal had found that the issue of the guarantees was not in itself tortious. (Nor would the guarantees alone have caused the Bank's loss, since if the Bank had acted carefully to check the documentation and protect its own interests, it would actually have been the ECGD which would have lost money had it been called on to honour the guarantees). Therefore, based on the findings of the lower courts, only by superimposing Mr Chong's acts onto those of Mr Pillai could the tort of deceit be established, and the problem in this respect was that (even though Mr Pillai was jointly responsible for his conduct) Mr Chong had never been authorised to act on behalf of the ECGD.

[7] See the judgment of Lord Woolf MR, *supra*, note 1, at 544.

This was the hurdle which the Bank had to overcome if it was to succeed in its action. In framing the case, counsel for the Bank made two alternative arguments. The first was that where an employee knowingly and in order to achieve a common design assists some other person to violate an individual's rights, then his employer can be liable (as a joint tortfeasor) for the consequences of the enterprise as long as the assistance given by the employee takes place within the course of his employment. This argument was based on the premise that the breach of duty giving rise to liability should be "'rationalised' as a duty not to assist in that violation pursuant to that design".[8] The second argument – which effectively challenged the Court of Appeal's finding that Mr Pillai's acts in issuing the guarantees were not themselves tortious – was that his acts of assistance were actionable torts because they were carried out with the aim of violating the Bank's rights.

IV. The Decision of the House of Lords

Lord Woolf MR delivered the judgment of the court on behalf of himself and all four of his colleagues.[9] In doing so, he dealt separately with the two alternative arguments, which he termed the 'joint vicarious liability' argument and the 'primary liability' argument.

(a) *The 'joint vicarious liability' argument*

Lord Woolf summarised the 'joint vicarious liability' argument in this way:

> 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.[10]

In Lord Woolf's opinion, it would not be relevant in deciding this point whether the other acts to which he referred (*ie*, those outside the employment relationship) were performed by the employee himself or by another person. Nor, if another person were involved, would it matter whether that other person was a fellow employee or someone unconnected with the employer. His Lordship reasoned thus:

8 *Ibid*, at 545.
9 Lord Slynn of Hadley, Lord Steyn, Lord Clyde and Lord Millett.
10 *Supra*, note 1, at 546.

> If the tort is committed jointly, then it is conduct which is within the course of employment sufficient to commit 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 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.[11]

Applying this reasoning, Lord Woolf held that there could be no liability on the facts of this case, because the combined conduct of Mr Pillai and Mr Chong did not constitute – and could not have constituted – acts carried out in the course of Mr Pillai's employment, given that the acts of Mr Chong which completed the tort were (as the court had already established) acts which Mr Pillai alone would not have had actual or ostensible authority to perform.

Lord Woolf justified his insistence that *all* the acts necessary to complete the tort – whether they be the acts of the employee or of his co-conspirator – must be 'in the course of the employee's employment' by looking first at 'normal' vicarious liability situations. In a standard vicarious liability scenario involving only one wrongdoing employee, the basic principles of vicarious liability require that all of the employee's acts must be performed within the course of his employment. It is not enough that all the acts leading to the completed tort are performed by the employee. If some of the acts are performed within the course of the employee's employment and some are outside it, the employer will escape liability on the ground that not all of the necessary acts are within the critical framework of the employment relationship. This 'safety net' ensures that employers will not unjustly be held responsible for acts unconnected with their business.[12]

[11] *Ibid*, at 547.

[12] See in this respect the comments made by Lord Woolf, *ibid*, at 546. His Lordship referred to the judgment of Lord Macnaghten in *Lloyd* v *Grace, Smith & Co* (*supra*, note 3), who was in turn referring to the judgment of Blackburn J in *McGowan & Co* v *Dyer* (1873) LR 8 QB 141 at 145, quoting *Story on Agency*: "... although the principal is ... liable for the torts and negligences of his agent, yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorised them to be done, or he has subsequently adopted them for his own use and benefit".

Having established the basic position, Lord Woolf concluded that it would be an odd result if an employer in a more complex vicarious liability situation – one involving both a wrongdoing employee and another person – *were* to be held responsible if the acts which the employee carried out during the course of his employment were supplemented by acts which not only fell outside the scope of that employment but were actually performed by someone else.

This reasoning is unimpeachable, and it would indeed require a wholesale re-evaluation of the fundamental principles of vicarious liability to place on one side the requirement that the acts complained of must be performed within the course of the employee's employment. On the other hand, such rigid adherence to the 'course of employment' point, does mean that plaintiffs such as the Bank in the *Credit Lyonnais* case will be remediless even when their loss could not have occurred but for the dishonest acts of the defendant's employee – dishonest acts which, moreover, while not enough in themselves to constitute the tort complained of, are nevertheless committed in the course of the employee's employment.

Perhaps more interesting, though, is the comment which Lord Woolf made about the converse situation – that where the critical acts are carried out not by the employee but by his partner in circumstances where, had they been carried out by the employee himself, they would have been performed in the course of his employment. In such a situation, his Lordship considered that it *might* be possible to hold the employer 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.[13]

This suggests that an employer can in certain circumstances be liable for the acts of a third party who completes a tort partially effected by the employee. As long as the completed tort consists of acts which, had they been performed by the employee, would have been regarded as being within the course of his employment, then it will not matter that some of the acts necessary to complete the tort were actually performed by someone else. Since there are cases in which employees have been held to be acting within the scope of their authority (whether actual or apparent) and within the course of their employment even when perpetrating torts such as fraud and

[13] *Supra*, note 1, at 547.

theft,[14] and since it is not impossible to imagine scenarios in which third parties might assist in the completion of such torts, Lord Woolf's dictum on this point in the *Credit Lyonnais* case is potentially significant. Of course, the dictum is limited by the requirement that the acts in question must be the kind which the employee himself could have performed within the employment relationship, and this will inevitably restrict the scope of its application. But the door to vicarious liability for third party acts has nevertheless been left open to this extent.

(b) *The 'primary liability' argument*

Lord Woolf then dealt with the second argument – that which suggested that Mr Pillai's acts were themselves tortious and therefore actionable. This his Lordship, perhaps slightly confusingly (given that it, too, focused on the vicarious liability of the ECGD), described as the 'primary liability' argument.

The primary liability argument, as Lord Woolf observed, avoided the difficulty that the ECGD was not responsible for Mr Chong's conduct, since it focused exclusively on Mr Pillai's acts. In this respect, counsel for the Bank argued that acts of assistance in connection with another's wrong should themselves be regarded as tortious when carried out 'with the intention of bringing about the violation of a third party's rights'.[15] Counsel conceded that this would require a development (or, at least, a clarification) of the existing law, but submitted that it did not make sense for such a principle, which has long been recognised in connection with procuring breaches of contract and statutory duty, to be confined to such limited areas.

Counsel for the Bank based his proposition in this respect on the decision of Erle J in *Lumley* v *Gye*[16] (a case in which the defendant had famously procured a singer to break her contract with a theatre). In that case, Erle J had stated that:

> It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security: he who procures the wrong is a joint wrongdoer,

[14] See, *eg*, cases such as *Barwick* v *English Joint Stock Bank, Lloyd* v *Grace*, *Smith & Co Ltd, Uxbridge Permanent Benefit Building Society* v *Pickard, Morris* v *CW Martin & Sons Ltd* and *Nahhas* v *Pier House (Cheyne Walk) Management Ltd*, all referred to *supra*, at note 3.

[15] *Supra*, note 1, at 548.

[16] (1853) 2 E & B 216.

> and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of.[17]

Lord Woolf, however, considered Erle J's dictum to be of little use to the Bank. First, it related to a specific area in which liability for procurement was already recognised – but the recognition that procurement could be actionable in one area of tort law was not sufficient to justify the creation of new "stand alone" tort.[18] In addition, his Lordship interpreted *Lumley* v *Gye* as deciding only that there could be secondary (rather than primary) liability on the part of a defendant for procuring another person to commit an actionable wrong. Since, on the facts of the *Credit Lyonnais* case, the acts of Mr Pillai which actually procured the actionable wrong – as opposed to merely facilitating the deceit – were performed outside the course of his employment, the ECGD could not be held vicariously (or secondarily) liable for them.[19]

In considering whether there could – or indeed *should* – be liability in civil law for acts of assistance intended to bring about the violation of a third party's rights, Lord Woolf examined various authorities in which the possibility of making a defendant liable for acts procuring or assisting in tortious or other actionable conduct had been discussed. The first was *John Hudson & Co Ltd* v *Oaten*,[20] a case in which a defendant had been sued for procuring a third party to enter into a contract with the plaintiff, which the third party had then failed to honour. In that case, Oliver LJ had observed:

> Apart from the tort of conspiracy ... there is no separate tort of procuring as such. A man who procures the commission by another person of a tortious act becomes liable because he then becomes a principal in the commission of that act. It is his tort.[21]

17 *Ibid*, at 232.

18 *Supra*, note 1, at 548.

19 His Lordship also dismissed the relevance of an article cited by counsel for the Bank, which focused on conspiracies to injure another by lawful and unlawful means. See Philip Sales "The Tort of Conspiracy and Civil Secondary Liability" [1990] CLJ 491-514. Lord Woolf stated that "the problem with arguments based on conspiracy and secondary liability is that in both cases liability would depend upon the deception of the [B]ank and deceiving the [B]ank would be outside the scope of Mr Pillai's employment". (See *supra*, note 1, at 549).

20 (Unreported) 19 June 1980; Court of Appeal (Civil Division) Transcript No 500 of 1980.

21 *Ibid*. See, too, the similar dictum (also referred to by Lord Woolf) of Diplock *Jin Smith* v *Pywell and Spicer* (1959) 173 EG 1009: "There was no separate tort of procuring a third person to commit a tort, but the procurer was a joint tortfeasor with the person who actually committed it."

Applying this reasoning, Lord Woolf came back to the finding that, on the facts of the *Credit Lyonnais* case, the only tortious acts which had actually been committed by Mr Pillai as a principal were those performed outside the course his employment. Since these acts could not be covered by the concept of vicarious liability, the ECGD could not be made to account for them.

Lord Woolf also considered in some detail two intellectual property cases involving Amstrad Consumer Electronics plc. Both cases related to the manufacture and advertisement by Amstrad of audio systems containing double cassette decks which enabled members of the public to copy cassettes in breach of copyright. In the first case, *Amstrad Consumer Electronics plc* v *British Phonographic Industry Ltd*,[22] where it had been argued that Amstrad was acting as an accessory in assisting the public to infringe copyright, Slade LJ in the Court of Appeal had observed that:

> The concept of accessories is a familiar one in the criminal law. However, no authority has been cited to us which shows that a person can be civily liable as 'accessory' to the tortious act of another (whether the relevant tort arises under the common law or by virtue of statute) unless he is actually a joint tortfeasor ...[23]

Counsel for the Bank in the *Credit Lyonnais* case argued – principally at the Court of Appeal level but also, to a lesser extent, before the House of Lords – that the concept of accessories in the criminal law ought to be extended to the law of tort. Lord Woolf, however, agreed with Slade LJ that the idea should be rejected, observing that: "to seek to draw analogy between the criminal and civil law in this area is unhelpful".[24]

In the second case, *CBS Songs Ltd* v *Amstrad Consumer Electronics plc*,[25] where it had been argued that Amstrad must be made to ensure that its equipment could not be used for illegal copying, Lord Templeman in the House of Lords had also indicated that the only way to make Amstrad liable would be as a joint tortfeasor and that to this end "generally speaking, inducement, incitement or persuasion to infringe ... must identifiably procure a particular infringement in order to make the defendant liable".[26] In Lord

[22] [1986] FSR 159.
[23] *Ibid*, at 212. Glidewell LJ (at 218) concluded that there was no distinct tort of procuring or inciting infringement of copyright.
[24] *Supra*, note 1, at 551.
[25] [1988] AC 1013.
[26] *Ibid*, at 1058.

Woolf's opinion, Lord Templeman's speech in that case suggested that there was 'little scope'[27] for recognising the tort of intentionally bringing about the violation of a third party's rights in circumstances such as those in the *Credit Lyonnais* case.

Having considered all the cases and arguments, Lord Woolf concluded:

> The tort upon which [the Bank] seeks to rely is unsupported by authority. The authority which does exist strongly suggests that there is no such tort. The only purpose for establishing its existence is to make [the] ECGD vicariously liable for Mr Pillai's conduct. This is not a justification for the recognition of the new tort. Direct liability for conduct which could be caught by the new tort exists independently of that tort on the well established grounds for making a secondary tortfeasor jointly and severally liable with a principal tortfeasor.
>
> The fact that [the] ECGD in this situation is not vicariously liable for Mr Pillai's actions for which he is personally liable does not justify the development of a new foundation for tortious liability.[28]

V. Conclusion

The reasoning of Lord Woolf in the *Credit Lyonnais* case is clear, logical and generally convincing. The nature of the case does, however, illustrate the very reason for the concept of vicarious liability being necessary in the first place, and it leads one to wonder whether the principle is really doing its job if it is unable to assist plaintiffs in situations of this kind. Of course, in every case where an employee commits a wrong, that employee is technically the primary tortfeasor, but this rarely offers any comfort to an aggrieved plaintiff, either because that employee is a man of straw, or because, in cases involving criminal acts, he has disappeared without trace. It is true that, in the *Credit Lyonnais* case, it was Mr Chong who did the disappearing, but Mr Pillai was dead before the action commenced, and neither he (had he lived) nor his estate would have been able to come close to compensating the Bank for its enormous losses. His employer, the ECGD, however, would have been in a position to do so.

As Lord Woolf observed, you cannot create a new tort or extend the existing rules to compensate a party just because it has been wronged by persons who cannot be found or are not able to compensate it. On the other

[27] *Supra*, note 1, at 551.
[28] *Ibid*.

hand, it could be argued that the narrow interpretation of vicarious liability adopted in the *Credit Lyonnais* case honours the letter but not necessarily the spirit of the principle that employers should be responsible for the wrongful acts of their employees. Whilst it is essential for the proper functioning of the concept that it be restricted to acts which are committed within the course of an employee's employment, this limitation could, perhaps, be regarded with rather more flexibility than was shown in this case.

Moreover, although Lord Woolf and his colleagues had little sympathy for the argument that an employer should be held liable in tort for acts of assistance by his employee which are committed with the intention of violating a third party's rights, the possible need for such a tort should, perhaps, be considered rather more carefully before the argument is conclusively rejected. Certainly, if it were not for the fact that its own employees' recklessness would probably have destroyed its suit on the causation issue anyway, the Bank in the *Credit Lyonnais* case might have had some right to feel aggrieved. Indeed, it might justifiably have argued that its claim on the vicarious liability point failed not so much because it lacked intrinsic merit as because the relevant law was applied in so technical a way as to mask the very reasons for that law's existence. And whilst one's sympathy for a large corporate plaintiff such as the Bank might be very limited, it is important to remember that the precedent will apply whatever the nature – or relative strengths – of plaintiffs and defendants in future actions. We must wait, with interest, to see whether future courts will adopt a similarly narrow approach to vicarious liability to that displayed by the House of Lords in the *Credit Lyonnais* case.

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