Case No: B3/2016/0479

Neutral Citation Number: [2018] EWCA Civ 1157

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
Recorder Steynor

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/05/2018

Before :

LORD JUSTICE UNDERHILL
LORD JUSTICE IRWIN
and
LORD JUSTICE SINGH

- -

Between :

NASSIR KAFAGI	**Appellant**
- v -	
JBW GROUP LTD	**Respondent**

- -
- -

The Appellant appeared in person
Mr David R White (instructed directly by the Defendant under the Public Access Rules) for the **Respondent**

Hearing date: 18 April 2018

- -

Judgment

Lord Justice Singh :

Introduction

1. This is an appeal from the County Court at Central London (Recorder Steynor), which, in a decision dated 12 January 2016, dismissed the Appellant's appeal against the decision of the County Court at Croydon (DJ Coonan) dated 23 April 2015. By that decision the District Judge dismissed the Appellant's claim for various torts alleged to have been committed by two bailiffs (Sean Boylan and Craig Fenwick) for whose actions, it was argued, the Respondent company was vicariously liable.

2. Permission to appeal to this Court was granted on the papers by Floyd LJ. Permission was restricted to one ground of appeal, namely whether the courts below erred as a matter of law because they held that, for there to be vicarious liability, there had to be a relationship of employment between the Respondent and Mr Boylan and Mr Fenwick.

3. Before this Court the Appellant appeared in person, having received some assistance in drafting a succinct and eloquent submission, which was read out at the hearing before us. On behalf of the Respondent we heard from Mr David White, who also appeared below. We express our gratitude to both Mr Kafagi and Mr White for their submissions.

Background

4. The underlying claim in the County Court alleged that on 13 March 2012

> "… Sean Boylan ('SB') and Craig Fenwick ('CF'), employees or agents duly appointed or engaged by D under contracts of service/for services and acting on the specific and direct authority and instructions of D, forcibly and unlawfully entered C's home … assaulted and battered him and proceeded to execute an unlawful levy in the sum of £792-04 by way of fraudulent misrepresentations." (Para. 3 of the Particulars of Claim)

5. Various torts were alleged, including trespass to property and trespass to the person. There was also an allegation of fraudulent misrepresentation.

6. In its Amended Defence, at paras. 5-9, the Respondent denied that it had ever been Mr Boylan's employer. It averred that Mr Boylan was at all material times a certificated self-employed bailiff. It also stated that it had no record of having engaged Mr Fenwick at all.

The judgment of the District Judge

7. The claim was allocated to the fast track and came on for trial on 23 April 2015. At the start of the hearing the District Judge suggested that it would be helpful for there to be a trial of a preliminary issue and the parties agreed. That issue was defined by her as follows at para. 1 of her judgment:

> "Is the Defendant vicariously liable for the actions of Mr Boylan and Mr Fenwick? This will depend on whether Mr Boylan and Mr Fenwick were employees of the Defendant, or merely subcontractors. If Mr Boylan and Mr Fenwick were subcontractors, the liability of the Defendant would have to be found in breach of a non-delegable duty. No such duty, or breach of it, has been pleaded."

8. Having considered all the evidence before her, DJ Coonan concluded, at para. 11, that the contract was one for services, and not one of service. At para. 12 she observed that there "is indeed no contract at all exhibited in relation to Mr Fenwick covering the requisite period of time." In the same paragraph she went on to state that:

> "in my judgment the evidence quite clearly shows that the reality was that Mr Boylan was employed at the relevant time on a self-employed basis, and Mr Fenwick was not employed, *or in any form of contractual relationship with the Defendant* at the relevant time." (Emphasis added)

9. Accordingly, at para. 13, she concluded:

> "… It therefore follows inevitably that the claim brought by Mr Kafagi must be dismissed."

The first appeal

10. Strictly speaking, the grounds of appeal did not raise any issue concerning the correctness of the District Judge's decision about Mr Fenwick. The grounds on their face related only to Mr Boylan.

11. The appeal from the District Judge was considered by Mr Recorder Steynor sitting at the County Court at Central London. At para. 6 the Recorder noted that it was common ground that the legal basis on which the claim was brought was that the Respondent was alleged to be vicariously liable for the acts and omissions of Mr Boylan and Mr Fenwick. He said:

> "This depended firstly on whether these men were employees of JBW or whether they were independent contractors who were self-employed."

12. At para. 9 of his judgment the Recorder said:

> "… The distinction which matters in the present case is between an employee of JBW and a person who may carry out work for JBW under some other relationship. This is the important distinction to make, as JBW can only be vicariously liable for torts of their employees, although there are exceptions to this rule."

13. At para. 10 the Recorder observed that, although earlier before the District Judge it had been contended that Mr Boylan and Mr Fenwick were indeed employed by the Respondent, at the hearing before the Recorder it was conceded that they were not employees of the Respondent.

14. At para. 11 the Recorder said that the District Judge had rightly held that her decision meant that the claim brought by Mr Kafagi must be dismissed.

15. At para. 15, in summarising the submissions that were made by Mr White on behalf of the Respondent, the Recorder noted that there were three questions to be considered: (1) has a tort been committed; (2) was the tortfeasor an employee "or in a relationship with D akin to employment"; and (3) was the tort committed in the course of the tortfeasor's employment? Mr White emphasises the words I have quoted in setting out question (2) because it is clear that the Recorder was aware that there can be vicarious liability even where there is not a relationship of employment in the strict sense but a relationship which is "akin" to it.

16. At para. 18 the Recorder concluded that:

> "… In my judgment DJ Coonan applied the correct legal test to the evidence before her and the conclusion that she reached, that neither SB nor CF were employees of JBW at the material time and therefore D cannot be vicariously liable for the alleged torts they committed, cannot be faulted."

17. Although therefore he gave permission to appeal, he dismissed the appeal itself.

Permission to appeal to this Court

18. In an order sealed on 6 February 2017 Floyd LJ granted permission to appeal to this Court but limited that permission "to the issue of whether the District Judge directed herself to the correct question".

19. The only issue on which permission to appeal was granted related to an issue which was raised in the supplementary/amended grounds:

> "In the light of the decision in *E G Cox v Ministry of Justice* [2016] UKSC 10 the question of whether a tortfeasor was an employee or an independent contractor can no longer be regarded as dispositive of vicarious liability. Attention needs to be focussed on three questions identified in paragraph 24 of Lord Reed's judgment in that case. Although the judgment in *Cox* was delivered after the District Judge and Recorder gave their judgments in this case, it does not appear that their attention was drawn to earlier relevant Supreme Court authority, namely *Various Claimants v The Catholic Child Welfare Society and others* [2012] UKSC 56. In consequence they appear to have adopted too narrow a focus.
>
> Although the law on this topic must now be regarded as broadly settled, its application to the activities of bailiffs and others involved in enforcement is of potentially wider significance. I also take account of the strength of the argument identified above as it appears to me at the moment, and the fact that this was the sole basis on which the action was dismissed. I consider these to be sufficiently compelling reasons for granting permission to appeal."

Recent authorities on vicarious liability

20. Historically the common law has imposed vicarious liability on a person where there was a relationship of employment between that person and the tortfeasor. That has required the courts to consider the distinction between a relationship of employment and the relationship that may exist with an "independent contractor". That in turn has required the courts to draw a distinction between a contract of employment (or contract of service, as it was described in the Particulars of Claim in this case) and a contract for services.

21. In recent years the courts have had to address the question whether there can be vicarious liability even where there is no relationship of employment in the strict sense but where there is something "akin to employment". However, it is important to note that this development has not undermined the conventional distinction between a contract of employment and a contract for services, which continues to be relevant in the vast majority of situations.

22. The first of the main authorities to which it is necessary to refer is the decision of the Supreme Court in *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1. That case is sometimes called the "Christian Brothers" case and concerned an institute which was a lay Roman Catholic Order, whose mission was to provide a Christian education to children. Its members took vows of chastity, poverty and obedience. They renounced any salaries payable for their teaching work. In return the institute met all of the Brothers' material needs. In the 1990s evidence emerged of serious sexual and physical abuse of boys by teachers which had spanned more than three decades. On a preliminary issue the High Court determined that the defendants who had vicarious liability for any abuse which could be established were the two diocesan bodies which had been responsible under statute for the management of the school and had employed the brother teachers. The Court of Appeal upheld that decision. The defendants appealed on the grounds that the institute should share joint vicarious liability for the acts of its members. The Supreme Court allowed that appeal.

23. The main judgment was given by Lord Phillips PSC with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Carnwath JJSC agreed.

24. At para. 35 Lord Phillips said:

> "*The relationship that gives rise to vicarious liability is in the vast majority of cases that of employer and employee under a contract of employment*. The employer will be vicariously liable when the employee commits a tort in the course of his employment. There is no difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied: (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; (v) the employee will, to a greater or lesser degree, have been under the control of the employer." (Emphasis added)

25. At para. 47 he said:

> "At para. 35 above, I have identified those incidents of the relationship between the employer and employee that make it fair, just and reasonable to impose vicarious liability on a defendant. Where the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the ground that it is 'akin to that between

> an employer and employee'. That was the approach adopted by the Court of Appeal in *E's* case [2013] QB 722."

26. At paras. 56-57 Lord Phillips applied those general principles to the particular context with which the Court was concerned in that case and said:

> "56. In the context of vicarious liability the relationship between the teaching brothers and the institute had many of the elements, and all the essential elements, of the relationship between employer and employees. (i) The institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body. (ii) The teaching activity of the brothers was undertaken because the provincial directed the brothers to undertake it. True it is that the brothers entered into contracts of employment with the Middlesbrough defendants, but they did so because the provincial required them to do so. (iii) The teaching activity undertaken by the brothers was in furtherance of the objective, or mission, of the institute. (iv) The manner in which the brother teachers were obliged to conduct themselves as teachers was dictated by the institute's rules.
>
> 57. The relationship between the teacher brothers and the institute differed from that of the relationship between employer and employee in that: (i) The brothers were bound to the institute not by contract, but by their vows. (ii) Far from the institute paying the brothers, the brothers entered into deeds under which they were obliged to transfer all their earnings to the institute. The institute catered for their needs from these funds."

27. These principles were next considered by the Supreme Court in *Cox v Ministry of Justice* [2016] UKSC 10; [2016] AC 660. In that case the claimant worked as the catering manager in a prison. She was moving supplies with the help of prisoners who were on prison service pay, when a bag of rice was dropped spilling its contents on the floor. The claimant instructed the prisoners to stop work until the rice was cleared. Ignoring her instruction, one prisoner attempted to get past and dropped a heavy bag of rice on the claimant's back, so injuring her. The claimant brought proceedings against the Ministry of Justice, alleging that it was vicariously liable for the negligence of the prisoner. The trial judge found that the prisoner had been negligent but dismissed the claim because the defendant was not vicariously liable for that negligence. The Court of Appeal allowed the claimant's appeal. The Supreme Court dismissed the defendant's further appeal. The main judgment was given by Lord Reed JSC, with whom Lord Neuberger PSC, Lady Hale DPSC, Lord Dyson MR and Lord Toulson JSC agreed.

28. At paras. 20-22 Lord Reed said:

"20. The five factors which Lord Phillips mentioned in para. 35 [of the *Christian Brothers* case] are not all equally significant. The first – that the defendant is more likely than the tortfeasor to have the means to compensate the victim, and can be expected to have insured against vicarious liability – did not feature in the remainder of the judgment, and is unlikely to be of independent significance in most cases. It is, of course, true that where an individual is employed under a contract of employment, his employer is likely to have a deeper pocket, and can in any event be expected to have insured against vicarious liability. Neither of these, however, is a principled justification for imposing vicarious liability. The mere possession of wealth is not in itself any ground for imposing liability. As for insurance, employers insure themselves because they are liable: they are not liable because they have insured themselves. On the other hand, given the infinite variety of circumstances in which the question of vicarious liability might arise, it cannot be ruled out that there might be circumstances in which the absence or unavailability of insurance, or other means of meeting a potential liability, might be a relevant consideration.

21. The fifth of the factors - that the tortfeasor will, to a greater or lesser degree, have been under the control of the defendant - no longer has the significance that it was sometimes considered to have in the past, as Lord Phillips immediately made clear. As he explained at para. 36, the ability to direct how an individual did his work was sometimes regarded as an important test of the existence of a relationship of master and servant, and came to be treated at times as the test for the imposition of vicarious liability. But it is not realistic in modern life to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee; nor indeed was it in times gone by, if one thinks for example of the degree of control which the owner of a ship could have exercised over the master while the ship was at sea. Accordingly, as Lord Phillips stated, the significance of control is that the defendant can direct what the tortfeasor does, not how he does it. So understood, it is a factor which is unlikely to be of independent significance in most cases. On the other hand, the absence of even that vestigial degree of control would be liable to negative the imposition of vicarious liability.

22. The remaining factors listed by Lord Phillips were that (1) the tort will have been committed as a result of activity being taken by the tortfeasor on behalf of the defendant, (2) the tortfeasor's activity is likely to be part of the business activity of the defendant, and (3) the defendant, by employing the

> tortfeasor to carry on the activity, will have created the risk of the tort committed by the tortfeasor."

29. At para. 24 Lord Reed continued:

> "Lord Phillips's analysis in the *Christian Brothers* case [2013] 2 AC 1 wove together these related ideas so as to develop a modern theory of vicarious liability. The result of this approach is 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."

30. At para. 29, Lord Reed said that it is important to understand that the general approach which Lord Phillips described in the *Christian Brothers* case is not confined to some special category of cases, such as the sexual abuse of children:

> "… It is intended to provide a basis for identifying the circumstances in which vicarious liability may in principle be imposed outside relationships of employment. … It results in an extension of the scope of vicarious liability beyond the responsibility of an employer for the acts and omissions of its employees in the course of their employment, but *not to the extent of imposing such liability where a tortfeasor's activities are entirely attributable to the conduct of a recognisably independent business of his own or of a third party*. …" (Emphasis added)

31. At para. 30 Lord Reed emphasised that, in this context, words such as "business" and "enterprise" do not mean that the defendant needs to be carrying on activities of a commercial nature. Otherwise the defendant in the *Christian Brothers* case could not have been vicariously liable nor could public authorities and hospitals. Lord Reed continued:

> "…It is sufficient that there is a defendant which is carrying on activities in the furtherance of its own interests. The individual for whose conduct it may be vicariously liable must carry on activities assigned to him by the defendant as an integral part of its operation and for its benefit. The defendant must, by

> assigning those activities to him, have created a risk of his committing the tort. …"

32. The third case to which I must make reference is the decision of the Supreme Court in *Armes v Nottinghamshire County Council* [2017] UKSC 60; [2017] 3 WLR 1000. In that case the claimant, as a child, was abused physically and sexually by foster parents with whom she had been placed while in the care of the defendant local authority. One of the issues was whether the defendant was vicariously liable for the wrongdoing of the foster parents. The main judgment was given by Lord Reed JSC, with whom Lady Hale PSC and Lord Kerr and Lord Clarke JJSC agreed.

33. At para. 54, Lord Reed said:

> "Under the doctrine of vicarious liability, the law holds a defendant liable for a tort committed by another person. Plainly, the doctrine can only apply where the relationship between the defendant and the tortfeasor has particular characteristics justifying the imposition of such liability. *The classic example of such a relationship is that between employer and employee*. As was explained in *Cox* and in the earlier case of the *Christian Brothers*, however, *the doctrine can also apply where the relationship has certain characteristics similar to those found in employment*, subject to there being a sufficient connection between that relationship and the commission of the tort in question." (Emphasis added)

34. Having considered what had been said in *Cox*, in particular at para. 24 (which was quoted at para. 58 in *Armes*), Lord Reed applied the five factors mentioned in both the *Christian Brothers* case and in *Cox* to the circumstances of *Armes*. At para. 60 he said:

> "Although the picture presented is not without complexity, nevertheless when considered as a whole it points towards the conclusion that the foster parents provided care to the child as an integral part of the local authority's organisation of its child care services. If one stands back from the minutiae of daily life and considers the local authority's statutory responsibilities and the manner in which they were discharged, it is impossible to draw a sharp line between the activity of the local authority, who were responsible for the care of the child and the promotion of her welfare, and that of the foster parents, whom they recruited and trained, and with whom they placed the child, in order for her to receive care in the setting which they considered would best promote her welfare. In these circumstances, it can properly be said that the torts committed against the claimant were committed by the foster parents in the

> course of an activity carried on for the benefit of the local authority."

35. At para. 61 Lord Reed considered the question of risk creation. At para. 62 he considered the issue of control. At para. 63 he considered the ability of a defendant to satisfy an award of damages. At para. 64 he concluded that consideration of the factors discussed in *Cox* therefore pointed towards the imposition of vicarious liability in that context. At para. 65 Lord Reed stressed that it is important not to overstate the extent to which external control is required for there to be vicarious liability. For example:

> "…There are countless cases where vicarious liability has been imposed for torts committed by professional persons who carry out their work without close supervision. …"

36. At para. 74, Lord Reed concluded that the defendant local authority in *Armes* should be held to be vicariously liable for the torts committed by the foster parents. Accordingly the appeal was allowed by a majority (Lord Hughes gave a dissenting judgment).

The Appellant's submissions

37. The Appellant submits that the District Judge erred in law because she asked herself the wrong question: was there a contract of service or a contract for services? He submits that, as the law has recently developed, that is no longer the right question, since it is now recognised that, even if there is no contract of employment, there may be a relationship which is "akin to employment". He further submits that the Recorder failed to correct that error of law in the first appeal, so this Court should allow this second appeal.

38. The Appellant submits that the Respondent's case from the outset has been that the only category of legal person who can be vicariously liable is an employer in a contract of service. He submits that the Recorder described whether a defendant qualifies for this "label" as "the basic test". However, he submits that the Recorder wrongly in fact treated this as the only test.

39. The Appellant submits that, in contrast, it has been his case throughout that there are other categories of persons who can be vicariously liable, for example those who engage individuals under a contract for services which is "akin" / sufficiently similar to a contract of service. He submits that, as para. 3 of his Particulars of Claim made clear, he had never confined his case to that of a "contract of service", since it expressly also referred to a "contract for services" in the alternative.

40. The Appellant submits, by reference to the five factors mentioned by Lord Reed in para. 24 of *Cox*, that there should be vicarious liability on the facts of the present case also. In particular he submits that the risk to members of the public that the bailiffs

might commit a tort was created by the Respondent; the bailiffs were acting to serve the commercial interests of the Respondent; and they should therefore be regarded as having been "integral to the Defendant's business."

41. Finally the Appellant submits that this is only fair because "where you have control, you also have responsibility – where you enjoy the benefits, you must take the burdens that go with them".

The Respondent's submissions

42. On behalf of the Respondent Mr White submits, first, that it is not open to the Appellant to advance the argument which he now does, because he has never argued the point before. I would not accept that argument. Permission to appeal has been granted to argue the point. Indeed Floyd LJ considered that the point was of sufficient wider importance to grant permission for a second appeal. I also take the view that this Court has all the evidence before it that it needs to address this argument, even if it was not dealt with in terms by the courts below. This is because the Court has been provided with a transcript of the oral evidence that was given on behalf of the Respondent by Ms Christine Eva before the District Judge. Ms Eva was cross-examined on the Appellant's behalf by Mr Ballard.

43. Mr White submits, secondly, that there was no need for the Courts below to address the sort of exceptional cases where the "akin to employment" test may be met even though there is no contract of employment. He submits that the way in which the case was presented below was initially, before the District Judge, to argue that there was a contract of service, which explains why she addressed the issue as she did.

44. Mr White submits that, when the case came before Recorder Steynor on appeal, the Appellant had the assistance of a Mr Ballard, who made submissions primarily by reference to the decision in *Mattis v Pollock* [2003] EWCA Civ 887; [2003] 1 WLR 2158: see paras. 12-13 of the Recorder's judgment. At the oral hearing before the Recorder it was accepted on behalf of the Appellant "that neither SB nor CF were employees of JBW": see para. 10 of the Recorder's judgment. The focus of the argument was as set out in his skeleton argument for the appeal dated 9 October 2015, the material part of which is quoted at para. 13 of the Recorder's judgment: that the present case was analogous to that of *Mattis* and, in particular, that "SB acted directly, unequivocally and continuously in the course of his prescribed employment and for the exclusive benefit of [the Respondent], who specifically authorised his actions."

45. In *Mattis* the judgment of the Court was given by Judge LJ (as he then was). That was, as Judge LJ said at para. 3, a "stark" case on its facts, as the claimant was a person who was stabbed by a man called Cranston, who was working as a doorman or "door supervisor" at a nightclub owned by the defendant. Cranston was convicted of a criminal offence: causing grievous bodily harm with intent, contrary to section 18 of the Offences Against the Person Act 1861. There was no dispute in *Mattis* that Cranston was an employee of the defendant. The issue was whether the stabbing incident occurred at a time when he was still acting in the course of his employment. This Court held, allowing the claimant's appeal, that the High Court had taken too

narrow a view by separating different incidents during the course of the night in question. Judge LJ said:

> "… The stabbing of Mr Mattis represented the unfortunate, and virtual culmination of the unpleasant incident which had started within the club, and could not fairly and justly be treated in isolation from earlier events, or as a separate and distinct incident. Even allowing that Cranston's behaviour included an important element of personal revenge, approaching the matter broadly, at the moment when Mr Mattis was stabbed, the responsibility of Mr Pollock for the actions of his aggressive doorman was not extinguished. Vicarious liability was therefore established. …"

46. As Mr White correctly submits, the question with which *Mattis* was concerned is the question whether a tortious act was done within the scope of a person's employment. That question is not the same as the prior question which has to be addressed: whether there is a relationship which is one which gives rise to vicarious liability at all in the first place. It is that question which is in issue in the present case.

47. The other case on which Mr Ballard placed reliance before the Recorder was the decision of this Court in *Dyer v Munday* [1895] 1 QB 742. In that case the defendant employed a person to manage a branch of his business, which was the sale of furniture on hire-purchase. The manager sold some furniture to a person who was lodging in the plaintiff's house. Because an instalment was not paid by the purchaser, the manager went to the plaintiff's house and removed the furniture. While doing so he assaulted the plaintiff. He was convicted of that assault and paid the fine imposed. The plaintiff sued the defendant and the issue for the jury on a civil action was whether the assault was committed in the course of the manager's employment. The jury found that it was. The appeal to this Court was dismissed. As the headnote accurately records, "the mere fact that the assault was a criminal offence, and not only a tortious act, did not affect the liability of the defendant for the act of his servant": see, for example, the judgment of Lord Esher MR at p.746. In my view, that decision takes the argument for the Appellant no further and the argument relying on it was rightly rejected by the Recorder. In *Dyer* there was no dispute that the manager was a "servant" of the defendant, in the language of the day, and the only issue was whether he was still acting in the course of his employment when he committed the criminal assault.

48. Having cleared those matters out of the way I now turn to the main issue which is raised in this appeal: whether the relationship between the Respondent and the bailiffs was "akin" to employment so as to lead to there being vicarious liability.

Analysis of the main issue

49. In the present case Mr White submits that the essential facts of this case are straightforward and no different from those which will lead to the conclusion in the vast majority of cases that there is nothing akin to employment. He also submits that,

in the case of Mr Fenwick, there was no contractual relationship with the Respondent at any material time.[1]

50. The Respondent is a judicial services company which subcontracted the collection of certain council tax debts, which were owed to the London Borough of Wandsworth, to Mr Boylan. Mr Boylan ran his own business. He could turn down work that was offered by the Respondent (see the evidence of Ms Eva, at p.21 of the transcript, line 25, to p.22, line 4). As Ms Eva said in evidence, this was not ideal from the Respondent's point of view because Mr Boylan could "cherry pick" the work he wanted to do (see p.24 of the transcript, lines 2-5).

51. As Mr White submits, Mr Boylan was at liberty to conduct the collection of a debt in whatever legal manner he saw fit, without control from the Respondent. In particular, he was at liberty not to conduct the collection himself but share that work with another person. Very significantly, as Mr White submits, that is precisely what Mr Boylan did in taking along Mr Fenwick, of whom the Respondent had no material knowledge whatsoever prior to these proceedings.

52. Mr White also places significant reliance on the fact that, like every certified bailiff, Mr Boylan had to provide a personal bond of £10,000 into court. This was required by the regulatory framework and was nothing to do with the Respondent (see the evidence of Ms Eva, at p.2 of the transcript, lines 8-15). The purpose of the bond is to serve as security against which individuals who feels they have been wronged by Mr Boylan may recover. Furthermore, Mr Boylan maintained his own relevant indemnity insurance for his business.

53. It is also of significance that Mr Boylan worked for other clients. As Mr White submits, it is telling that there was no reason in principle why Mr Boylan could not have been engaged directly by the London Borough of Wandsworth to enforce the council tax debt in question. In that sense it could be said that he was more a potential competitor to the Respondent than someone "integrated" within its business.

54. Finally, as Mr White submits, there was not in the present case even "that vestigial degree of control" to which Lord Reed made reference at para. 21 of *Cox*.

55. In that context I agree that Mr White can derive some assistance from the decision of this Court in *Biffa Waste Services Ltd and Another v Maschienenfabrik Ernst Hese GmbH and others* [2008] EWCA Civ 1257; [2009] QB 725, at para. 60, where Stanley Burnton LJ said:

> "Last, what to our mind is decisive is the fact that Pickfords supplied not the two welders contracted for by OT, but four. This is a factor that the judge did not address. We can see no basis on which it could be said that OT was vicariously liable for employees for whose work they did not contract. There was no evidence, and certainly no finding, that OT knew that four men were to be supplied. We ask, rhetorically, which of the

[1] By coincidence Mr Fenwick was engaged by the Respondent on unrelated sub-contracts prior to these proceedings: see p. 4 of the transcript of Ms Eva's evidence, lines 3-15. However, that is not material in the present case.

> four were OT entitled to control, and for which of the four were they liable? What basis is there for distinguishing between the vicarious liability for two of them and the vicarious liability for the other two? Our answer is: none."

56. In all the circumstances of this case, it is clear, in my view, that this is not one of those cases in which the relationship between the Respondent and the two bailiffs, Mr Boylan and Mr Fenwick, can be regarded as being "akin" to a relationship of employment. Indeed, in the case of Mr Fenwick, there was no contractual relationship with the Respondent at all, as the District Judge found, at para. 12 of her judgment (see also the evidence of Ms Eva, at p.2 of the transcript, at lines 19-23).

57. The Respondent was not vicariously liable for the acts of the bailiffs and the claim was rightly dismissed.

Conclusion

58. For the reasons I have given I would dismiss this appeal.

Costs

59. The Respondent has applied for its costs. It has also asked for those costs to be summarily assessed in the sum of £5, 298 (inclusive of VAT). The Appellant resists that application. He submits that Mr White "spent most of his time taking spurious procedural points rather than dealing with the substance of the issues. More specifically, he insisted that we [had not raised] the alternative 'akin' point and [Singh LJ] himself stated we had in paragraph 3 of [the Particulars of Claim]."

60. In my view, the Respondent should recover its costs. The normal rule is that costs follow the event. I can see no good reason to depart from the normal rule in this case. I disagree that Mr White took spurious points. He dealt with the issues in full and in a way which has assisted the Court in reaching its decision. I also disagree that the "akin to employment" point was taken from the outset: see paras. 43-47 above.

61. As to the amount of costs claimed, they seem to me to be both reasonable and proportionate. I note that no specific objection has been taken to the figures claimed. I also note that, in view of the fact that this appeal was conducted under the direct access rules, the only costs claimed relate to counsel's fees. I would therefore grant the Respondent's application for the costs claimed in full.

Lord Justice Irwin :

62. I agree.

Lord Justice Underhill :

63. I also agree.