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# Welcome

Welcome to the second newsletter from our Professional and Financial Risks team.

In this edition we have five articles looking at some of the most important issues in our market – cladding claims; peer-to-peer lending; preserving privilege and non-party costs orders.

We hope you find this an informative read.





# Preserving Privilege

**An update on two recent decisions from the High Court and the Court of Appeal, which provided further guidance on the application of legal professional privilege.**

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At the end of 2019 the High Court handed down its decision in *SL Claimants v Tesco plc*[1] which considered the discrete point of whether a party can claim privilege over a document, part of which has been read aloud and discussed in other unrelated proceedings. In January 2020, the Court of Appeal in *Civil Aviation Authority v R* (on application from Jet2.Com Limited)[2] endorsed the 'dominant purpose test' when considering whether email communications attracted legal advice privilege.

## SL Claimants v Tesco plc

In *Tesco* (which centred around a dispute between the supermarket giant and shareholders, who alleged that they had made significant investments based on false information), Hildyard J had to consider an application by the SL Claimants for disclosure of a meeting note between Tesco's in-house and external lawyers (the "Note").

It was not disputed that the Note was privileged. However, the SL Claimants argued that Counsel for Tesco had, in unrelated criminal proceedings, summarised the Note, read part of it aloud in open court and discussed it extensively in legal argument. They argued that the Note was no longer confidential and that privilege could not be maintained in these proceedings. They relied on the principle of "open justice", which gives a right of access to evidence placed before the Court and referred to during a hearing.[3]

Tesco sought to distinguish between information contained in a document and the document itself. They argued that reference to a document in open court might cause a loss of confidentiality in the information referred to in the document, but not in the document itself.

The Court accepted Tesco's argument. It was held that whether public reference to the content of a document constituted sufficient exposure to the public, such that confidentiality in the document was lost, is a matter of degree. In the present case, references to the Note in the criminal proceedings, in terms of both detail and extent, did not amount to a loss of confidentiality in the document itself. Accordingly, Tesco was not required to disclose the Note.

## Civil Aviation Authority v R (on application from Jet2.Com Limited)

The Court of Appeal has considered whether drafts of a press release and communications about the drafts were disclosable in judicial review proceedings.

The circumstances of the case were that Jet2 refused to join an ADR scheme aimed at assisting consumers obtain compensation for flight disruptions. In a press release, the Civil Aviation Authority ("CAA") publicly criticised Jet2 for not joining the scheme. Jet2 and the CAA then exchanged private correspondence about Jet2's reasons for not joining the scheme, including a letter from the CAA to Jet2 dated 1 February 2018.

Subsequently, the CAA provided copies of its correspondence with Jet2 to the Daily Mail, who published a story on the subject, headed "In a leaked letter, Jet2 boss reveals why it won't join new flight delay compensation scheme...Too many customers will win their money back!"

Jet2 commenced judicial review proceedings and sought disclosure of drafts, and any discussion relating to drafts, of the CAA's letter of 1 February 2018. The CAA confirmed that drafts of the letter did exist, but argued that the drafts, and communications surrounding them, were protected by legal advice privilege ("LAP"). The CAA contended that, as its in-house lawyers were copied into emails which attached the various drafts and discussed the content of the drafts generally, those emails and the drafts were privileged.

The High Court found against the CAA. The emails and drafts of the relevant letter were not created for the 'dominant purpose' of obtaining legal advice. On appeal, the CAA argued that the dominant purpose test does not apply to LAP.

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1. [2019] EWHC 3315 (CH)
2. [2020] EWCA Civ 35
3. SmithKline Beecham Biologicals SA v Connaught Laboratories Inc [1994] 4 All ER 498 at 512e-f.

The Court of Appeal had to consider whether, in circumstances where communications had more than one purpose, it was sufficient for the privilege to attach if just one purpose of the communication was to seek legal advice, or whether that had to be the 'appreciable, dominant or even sole purpose.'

In finding that the dominant purpose test did apply to LAP, the Court stated that while litigation privilege and LAP have some differing characteristics, they are limbs of the same privilege, namely legal professional privilege. In circumstances where it is uncontroversial that the dominant purpose test applied to litigation privilege[4], Hickinbottom LJ saw no compelling reason to depart from that position with respect to LAP.

Hickinbottom LJ agreed with the High Court that the drafts and emails were unlikely to be privileged because their dominant purpose was not for obtaining legal advice, notwithstanding that they were copied to the CAA's in-house lawyer.

The Court of Appeal also dealt with multi-addressee communications between both lawyers and non-lawyers. Having confirmed the dominant purpose test above, Hickinbottom LJ went on to find that, if the dominant purpose of the communication is to seek legal advice from the lawyer addressee, then that communication will be covered by LAP. That will be the case even if the communication is part of a rolling series of communications, so long as the dominant purpose of those communications is instructing a lawyer. Conversely, if the dominant purpose is to obtain the commercial views of a non-lawyer, then the communication is unlikely to be privileged, even if there is a subsidiary purpose of obtaining legal advice from the lawyer.

4. Grant v Downs (1976) CLR 674.

## Comments

The decision in Tesco highlights the fine line that parties walk when referring to privileged material in open Court. Parties should, therefore, exercise extreme caution when referring to privileged documents in Court (or in the public, generally).

Lawyers, both in-house and external, are providing advice and information to clients. The decision in Jet2 affirms that it will not be enough for clients to assert privilege over communications unless the dominant purpose of those communications is to obtain legal advice from a lawyer. Privilege will not attach where the clear purpose of the communication is commercial rather than legal advice.

The judgments have generally preserved the principle that legal professional privilege is an integral and fundamental part of the legal system. The Courts are reluctant to make decisions that might narrow the scope of privilege as it relates to both litigation privilege and LAP.




# Cladding Claims

Following the Grenfell Tower fire on 14 June 2017, construction professionals and their insurers have been inundated with claims from developers, contractors, freeholders and leaseholders, alleging that they have acted in breach of contract, negligently and/or in breach of their duties under the Defective Premises Act 1972, by specifying, approving or permitting the use of particular cladding systems on buildings with a storey 18m or more above ground level.

There have also been 'spin off' claims relating to other fire safety issues. These claims are usually multi-party, multi-million pound claims, with claimants typically seeking the cost of extensive remedial works to the cladding, together with the cost of interim measures to make the building safe until the remedial works are completed. There can also be significant claims for business interruption and/or alternative accommodation.

Jonathan Anslow takes a look at some of the recent key developments, starting with a recap of how we got here.

Click here to view the full article

# Peer-to-Peer:

## A new wave of lender claims?

As the peer-to-peer (P2P) lending sector grows rapidly, we are seeing an increasing number of claims against surveyors and other professionals.

**Rachel Blair**
Senior Associate

**Heather Banner**
Senior Associate





P2P lending involves lending money to individuals or businesses through online platforms, effectively cutting out traditional financial institutions. P2P lending companies connect borrowers directly to lenders, with lenders each funding a portion of a loan, or group of loans, in exchange for a prorated share of the loan(s) and interest repayments. Investors are lured by potential returns of up to 12% per year and borrowers who may have previously found it difficult to obtain credit are provided with an alternative means of doing so.

The Financial Conduct Authority (FCA) estimates that 275,000 people have cash in P2P lending platforms, investing more than £5bn across 68 providers. Property is often an appealing investment and property lending accounts for approximately 20% of the P2P market. There are a number of financing models, including short-term bridging loans and construction and development loans. For example, a development finance loan might be taken out by a property developer seeking to fund the construction of a new property. The loan will be secured and a surveyor will carry out a valuation.

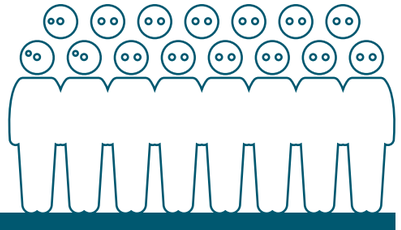
The Royal Institution of Chartered Surveyors (RICS) offers the following guidance to surveyors undertaking valuations in P2P lending in its note 'Risk, liability and insurance in valuation work' (2nd edition, January 2018):

> As of the date of publication of this guidance note, the use of valuations in crowdfunding and peer to peer lending is undeveloped. However, the preliminary view of RICS is that the risks can be similar to the risks entailed in public offerings, because the valuer may not know who the investors are who wish to rely upon the valuation, and is unlikely to be able to agree contractual terms with each of them. The arranger of the crowdfunding or peer to peer lending may be content for the valuation report to be provided to potential investors for their information only, on a 'non-reliance' basis, which will reduce the risk for the valuer. If so, members should ensure that both their engagement letters and valuation reports make this basis clear, and should ask the arranger also to include a note on any website to which the valuation report is uploaded, expressly recording this basis for the valuation. RICS recommends that until the principles affecting the use of valuations in these situations become clear, members should take specialist legal advice if asked to provide a valuation for use in crowdfunding or peer to peer lending.
>
> **B6 Crowdfunding and peer-to-peer lending**

P2P lending is higher risk than traditional lending. Investors are usually clearly warned that they may lose some or all of their capital investment. In May 2019 the property lender Lendy went into administration owing 9,000 lenders some £152m, having been crowd-sourcing funds from retail investors to lend to property developers in 2014. In October P2P pawnbroker Funding Secure collapsed after an increasing number of borrowers failed to repay their loans and following litigation against one of its major borrowers.

When P2P lending companies fail, or when loans are not repaid in full, in the case of property loans, lenders will look to the security to cover the outstanding debt. If the security is inadequate, they will look at the surveyors that carried out valuations to see whether they can bring a claim in negligence. Surveyors and their insurers may be concerned that an issue with one loan could trigger multiple claims from individual investors. Surveying firms may have PII policies which require them to pay one excess or deductible 'per claimant'.

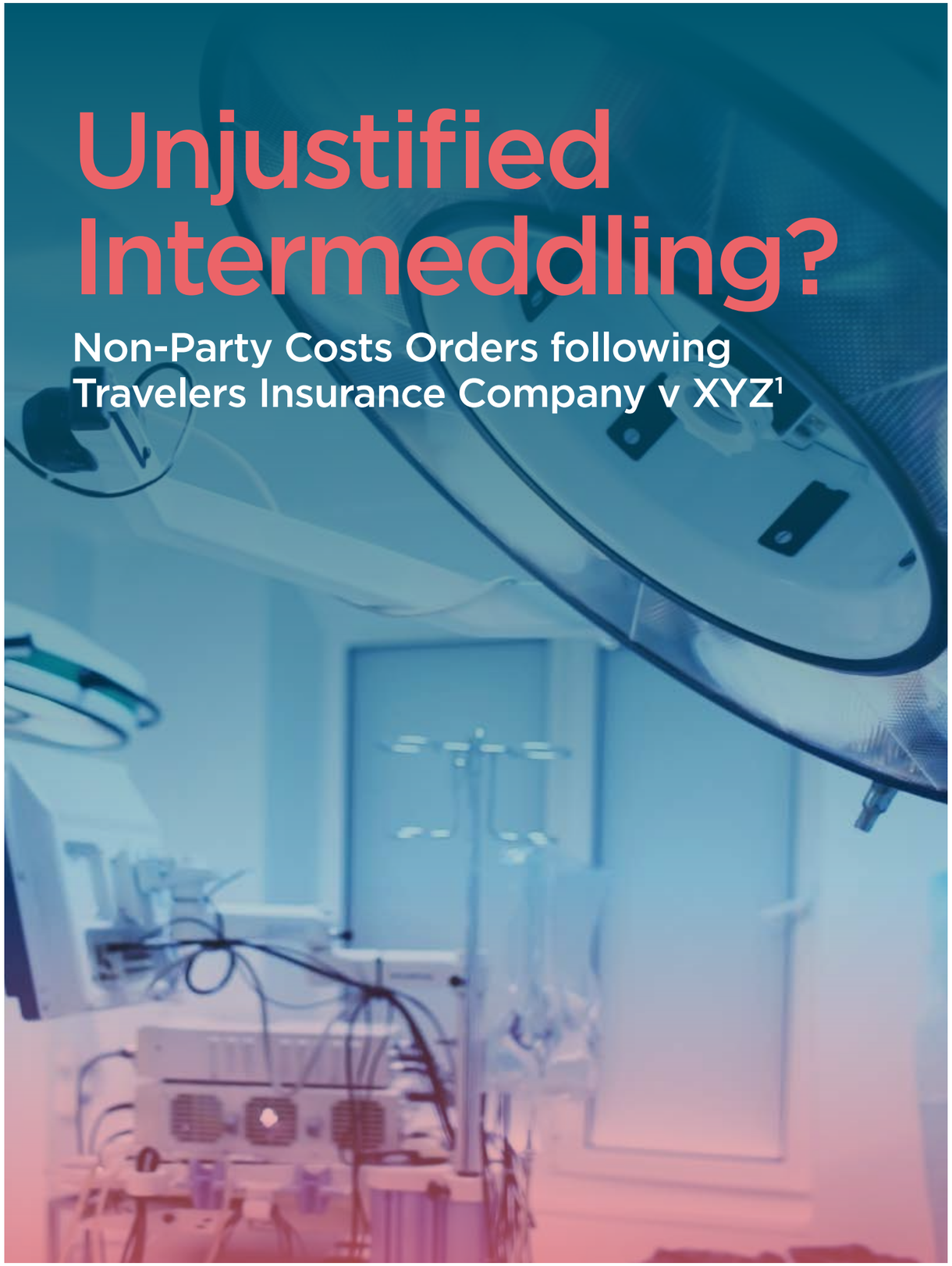
**275k**
**have cash in P2P lending platforms**



Given the nature of P2P lending and notwithstanding RICS' guidance, when dealing with claims against surveyors, the answers to the following questions may not be straightforward:

+ For whom did the surveyor act and to whom does it owe a duty of care? Who has standing to bring a claim against the surveyor?
+ Was the surveyor aware of the purpose of the valuation? Who relied on the valuation report?
+ Who has suffered a loss (the lending companies or the individual investors)? What loss have they suffered?

To date, lending companies have been reluctant to provide relevant disclosure. However, we anticipate that given the potential quantum, a significant number of claims will ultimately be pursued and when disclosure is provided, consideration will need to be given to these key issues.



# Unjustified Intermeddling?

## Non-Party Costs Orders following Travelers Insurance Company v XYZ[1]



The Supreme Court has recently confirmed the principles where non-party cost orders should be made under section 51 Senior Courts Act 1981. The first arises where a non-party (typically an insurer) takes control of a claim and runs it for their own benefit. The second is where a party is responsible for 'unjustified intermeddling' in a claim.

## Background

A group litigation order was made in relation to about 1,000 claims arising from defective silicone breast implants. 636 of the claims were against Transform Medical Group ('Transform'), which operated a clinic supplying and fitting implants in the UK.

Travelers Insurance Company ("Travelers") provided product liability insurance to Transform between 2007/11, which covered bodily injury occurring in the policy period. 197 of the 636 claims against Transform were covered by the product liability policy. The rest of the claims were uninsured. However, Travelers were obliged to fund the defence of all the claims under the terms of the policy because they all involved similar issues and allegations.

Four claims were identified and pursued as test cases against Transform. By chance, two of these were insured and two were uninsured. Transform had wanted to disclose the insurance situation, but the lawyers for Travelers and Transform advised that the claimants should not be informed that some of the claims were not covered by insurance. It was only in June 2014 that the insurance provisions were disclosed to the claimants. By that time it was apparent that Transform was unable to meet its liabilities.

The claimants succeeded on the test-case issues. The insured claims were settled at a mediation in June 2015, by which time Transform was in administration. Travelers then ceased to provide further funding. The claimants obtained judgment in default on the uninsured claims and applied for a non-party costs order against Travelers.

At first instance, Travelers were ordered to pay the costs of the uninsured claims because (it was held) Transform would have disclosed the lack of insurance but for Travelers' interest in the claims; and if this had been disclosed, the uninsured claims would not have been pursued and costs would not have been incurred. This decision was upheld in the Court of Appeal.

On appeal to the Supreme Court, Travelers argued that the courts below had departed from the decision in *TGA Chapman Ltd*[2], exposing Travelers to unexpected and unforeseeable liability for costs which went above and beyond Travelers' obligations under its insurance policy. Travelers argued that its own conduct had not been exceptional and that there was no good reason why a non-party costs order should be made.

## Decision

Travelers' appeal was upheld. It was held that 'exceptionality' was not an appropriate test. The Supreme Court identified two separate principles where an insurer might become exposed to non-party costs orders:

1. The real defendant test; and
2. Unjustified intermeddling

The "real defendant" test requires a non-party to control the litigation and to fund and conduct the defence so as to protect their own interests, rather than those of the defendant. That was not the case here. In *XYZ*, the key issue was whether Travelers intermeddled unjustifiably and illegitimately, thereby causing the claimants to incur costs.

It was held that the failure to disclose the insurance position earlier was a legitimate stance for Travelers to take. Parties to litigation are not obliged to disclose their insurance arrangements and Travelers were simply protecting their position on the insured claims. That was 'justified'. The fact that liability had been conceded had no impact upon the decision to litigate the uninsured claims. That decision was taken when the claimants knew about the insurance position and with a view to pursuing the non-party costs order.

The Supreme Court recognised that there may be inextricable links between insured and uninsured claims which gave rise to the legitimate involvement of insurers, such as the obligation to fund the defence of both insured and uninsured claims.

It was held that Travelers had a legitimate and justified interest in defending the claim. The non-party costs order was set aside.

## Comment

The decision provides welcome clarity on the liability of insurers and other third parties for non-party costs orders. The facts in this case were unusual and complex. However, we now have clear guidance on the circumstances in which such orders will be made.

The Court retains a wide discretion to make awards where a third party, such as an insurer, takes over control and conduct of a claim; or conducts 'unjustified intermeddling'. However, there is no automatic right to an order simply because an insurer chooses to support a policyholder's liability defence. The Court should only intervene if it constitutes unjustifiable and illegitimate interference; and must exercise its discretion justly.

The decision is broadly favourable to insurers and recognises the difficulties they face when involved in claims which are partly insured and partly uninsured, especially when they are obliged to fund the entire defence costs. However, insurers must remain alive to the need to exercise their control legitimately and be able to justify their conduct because the possibility of non-party costs orders remains. We can advise clients in relation to policy wording and how they should conduct themselves in handling claims, especially in areas which fall outside coverage under the policy.

**Chris Stanton**
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**Amie Coudis**
**Associate Solicitor**

1. XYZ v Travelers Insurance Company Limited [2019] UKSC 48

2. TGA Chapman Ltd v Christopher [1998] 1WLR 12

# Morrisons v Various Claimants

## More reasons for employers (and insurers) to be happy

Graham Taylor
Senior Associate

In our previous newsletter I provided an overview of the Court of Appeal's decision in *WM Morrison Supermarkets Plc v Various Claimants [2018] EWCA Civ 2339*, in which it was held that Morrisons was vicariously liable for data breaches by an employee, even though those data breaches were designed to damage Morrisons. As indicated at the end of the article, Morrisons appealed to the Supreme Court. That appeal was heard in November 2019 and judgment was handed down on 1 April 2020.

### Recap

Andrew Skelton was a senior IT internal auditor employed by Morrisons. Having developed a grudge against Morrisons following disciplinary proceedings against him, he committed various data breaches by posting the personal data of almost 100,000 Morrisons staff members on the internet and sent them to newspapers ("the disclosure"). He was sentenced to eight years in prison.

Over 5,000 current or former Morrisons employees commenced proceedings against Morrisons seeking damages for misuse of private information, breach of confidence and breaches of statutory duty owed under the Data Protection Act 1998 ("DPA") (together "the Causes of Action"). By the time the matter reached the Supreme Court the number of Claimants had increased to over 9,000). The claim that Morrisons was directly liable in respect of the disclosure was dismissed by the High Court. However, the High Court, and later the Court of Appeal, held that Morrisons was vicariously liable for Skelton's conduct.

### The Supreme Court decision

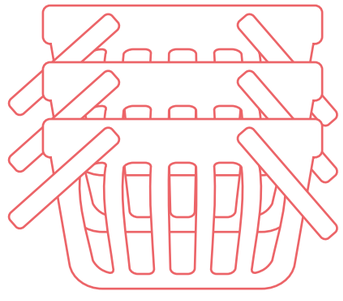
In what is a very welcome decision for employers and insurers generally, the Supreme Court unanimously allowed Morrisons' appeal. There were two issues in the appeal:

1. Was Morrisons vicariously liable for Mr Skelton's conduct?
2. Does the DPA exclude the imposition of vicarious liability in respect of the Causes of Action?

### Was Morrisons vicariously liable for Mr Skelton's conduct?

The Supreme Court noted that the the High Court and the Court of Appeal had applied what they understood to be the Supreme Court's reasoning in *Mohamud ([2016] UKSC 11)*, in particular the references to the connection between the employee's conduct and his employment ("an unbroken sequence of events" or a "seamless episode") and the employee's motive being irrelevant. This was referred to in the High Court as a "broad and evaluative approach". In *Mohamud* (another case involving Morrisons), the employee petrol station attendant assaulted a motorist following an argument which commenced at the sales kiosk and continued when the motorist got back in his car. Morrisons was found vicariously liable for the employee's conduct.

Whilst the lower courts' decisions in Morrisons suggested that the Mohamud decision effected a change in the law on vicarious liability, the Supreme Court in Morrisons rejected this. It confirmed the relevant test remains the 'close connection' test enunciated in *Lister v Hesley Hall Limited [2001] UKHL 22* and *Dubai Aluminium Co Limited v Salaam [2002] UKHL 48*: in a case concerned with vicarious liability arising out of a relationship of employment,



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the court generally has to decide whether the wrongful conduct was so closely connected with acts the employee was authorised to do that, for the purposes of the liability of the employer, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of employment.

In *Morrisons* the Supreme Court held that the lower courts had misunderstood the principles governing vicarious liability in a number of respects, in particular:

+ The disclosure of data on the internet did not form part of Skelton's functions or field of activities: it was not an act he was authorised to do;
+ The fact that the five factors listed in *Various Claimants v Catholic Child Welfare Society [2012] UKSC 56* (paragraph 35) were present was "nothing to the point": those factors were not concerned with the 'close connection' test, they were concerned with vicarious liability involving non-employees;
+ Whilst there was a close temporal link and an unbroken chain of causation linking Morrisons' provision of the data to Skelton for transmission to its auditors and the disclosure, a temporal or causal connection does not in itself satisfy the 'close connection' test; and
+ The reason why Mr Skelton acted wrongfully was not irrelevant: whether he was acting on Morrisons' business or for purely personal reasons was highly material.

Considering the question of Morrisons' vicarious liability afresh, the Supreme Court held that the 'close connection' test was not satisfied. The mere fact that Mr Skelton's employment gave him the opportunity to commit the disclosure was not sufficient to warrant the imposition of vicarious liability. There did not appear to be any previous case in which it had been argued that an employer might be vicariously liable for conduct which was designed specifically to harm the employer. The cases most closely comparable are those concerning vicarious liability for deliberate wrongdoing intended to inflict harm on a third party for personal reasons of the employee (leaving aside sexual abuse cases). The distinction to be drawn is whether the employee was engaged, however misguidedly, in furthering his employer's business, or whether the employee is engaged in pursuing his own interests: on a 'frolic of his own'. It was abundantly clear that Skelton was not furthering Morrisons' business when he made the disclosure.

## Does the DPA exclude the imposition of vicarious liability in respect of the Causes of Action?

Having concluded that Morrisons was not vicariously liable it was not strictly necessary for the Supreme Court to consider this issue, but as the issue had been fully argued it decided to express a view.

Morrisons relied on the domestic principles of statutory interpretation in support of its case that vicarious liability is excluded. As the House of Lords held in *Majrowski v Guy's and St Thomas's NHS Trust [2006 UKHL 34*: "Unless the statute expressly or impliedly indicates otherwise, the principle of vicarious liability is applicable where an employee commits a breach of a statutory obligation in damages whilst acting in the course of his employment."

Morrisons argued that the DPA impliedly excluded the vicarious liability of an employer. It relied on section 13, which imposed liability on data controllers only where they had acted without reasonable care. It said that the statutory scheme was inconsistent with the imposition of strict liability on the employer of a data controller for any of the Causes of Action. In other words, as Morrisons performed the obligations incumbent on them as the data controller, and Skelton was a data controller in his own right, Morrisons could not be vicariously liable for Skelton's breach of the duties incumbent on him.

The Supreme Court did not consider the imposition of statutory liability on a data controller to be inconsistent with the imposition of a common law vicarious liability upon his employer for the Causes of Action. There is nothing anomalous about the contrast between the fault-based liability of the primary tortfeasor under the DPA and the strict vicarious liability of the employer. The same applies in the common law, for example negligence, where fault lies with the employee but the employer is vicariously liable.

Applying the orthodox principles of statutory interpretation explained in Majrowski, since the DPA neither expressly nor impliedly indicates otherwise, the principle of vicarious liability applies to the breach of the obligations it imposes, and the other Causes of Action, committed by an employee who is a data controller in the course of his employment.

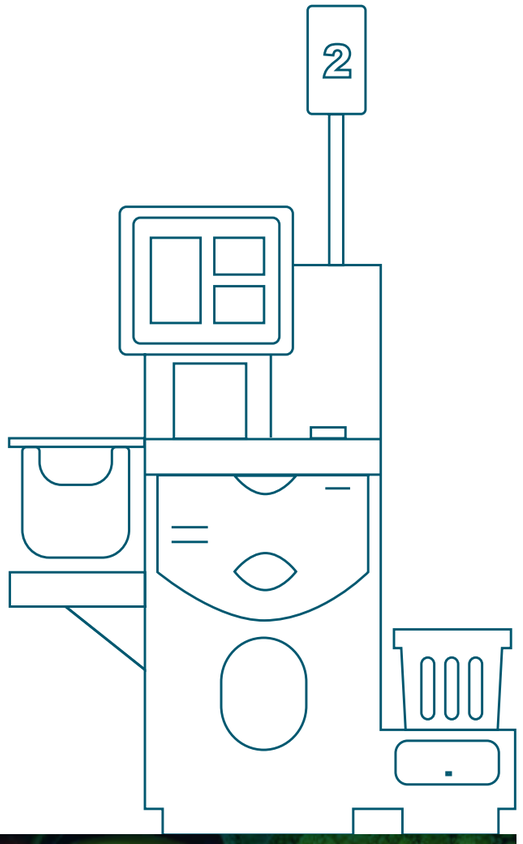


## Comment

The Supreme Court's rejection of the lower courts' approach to vicarious liability will bring considerable comfort to all employers and their insurers. However, as the Supreme Court made clear, vicarious liability is based on the application to the case before the Court of the 'close connection' test, and in light of the guidance to be derived from decided cases. In some cases the answer may be clear, in others it may not. It is, however, difficult to envisage vicarious liability being imposed where the employee's conduct was designed to damage the employer.

With regard to the data protection issue, it should be noted that *Morrisons* concerned the DPA, which has been repealed and replaced by the Data Protection Act 2018 and the General Data Protection Regulation ("GDPR"). The analysis under the 2018 Act and GDPR is unlikely to be different, however.

Whilst employers and insurers can take comfort from the status quo being maintained with regard to the scope of vicarious liability, it is not all good news. The Supreme Court's ruling on the imposition of vicarious liability in respect of the Causes of Action, whilst technically obiter and therefore not binding, is likely to be treated as such. Therefore, the threat of class actions arising from data breaches by employees remains, and employers need to consider their insurance arrangements in light of this. Of course, employers still need to ensure they comply with their data protection obligations, otherwise they will be exposed to direct liability for any breaches relevant to any unlawful processing by employees. Vicarious liability only became an issue in *Morrisons* as the claimants failed in their claim that *Morrisons* was directly liable.

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