SUPREME COURT OF SOUTH AUSTRALIA

(Magistrates Appeals: Civil)

COSENZA & ANOR v ROY MORGAN INTERVIEWING SERVICES PTY LTD

[2020] SASC 65

Judgment of The Honourable Justice Livesey

17 April 2020

EMPLOYMENT LAW - RIGHTS AND LIABILITIES AS BETWEEN EMPLOYER AND THIRD PARTIES

MAGISTRATES - APPEAL AND REVIEW - SOUTH AUSTRALIA - APPEAL TO SUPREME COURT

TORTS - TRESPASS - TRESPASS TO LAND AND RIGHTS OF REAL PROPERTY

The appellants filed a claim for trespass to land against the respondent in the Magistrates Court. It was alleged that two individuals, one of whom was an employee of the respondent, trespassed on the appellants' property and that the respondent was vicariously liable. The appellants filed an application seeking an order for summary judgment in favour of the appellants against the respondent and relied upon r 8 of the Magistrates Court (Civil) Rules 2013 (SA). The Magistrate dismissed the application.

The first appellant had served a Notice to Admit on the respondent which was designed to extract an admission that their employee had come onto the appellants' property without permission. The respondent's first response to the Notice to Admit did not comply with the rules of court, but a further response put the relevant facts and documents into issue. On appeal in this Court, the appellants contended that because the first response was not in accord with the rules, they should have had the benefit of deemed admissions which would have been sufficient to prove their case of trespass to land.

On Appeal from MAGISTRATES COURT OF SOUTH AUSTRALIA (MAGISTRATE FOLEY) PADCI-18-139

First Appellant: DEAN COSENZA Counsel: MR A LAZAREVICH - Solicitor: GROPE HAMILTON LAWYERS

Second Appellant: ELEONORA COSENZA Counsel: MR A LAZAREVICH - Solicitor: GROPE HAMILTON LAWYERS

Respondent: ROY MORGAN INTERVIEWING SERVICES PTY LTD Counsel: MR J CATLIN - Solicitor: MR J YEATMAN

Hearing Date/s: 08/04/2020

File No/s: SCCIV-20-170

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In an earlier hearing the respondent was found to have had a bona fide intention of defending the claim and advancing a genuine defence. Nevertheless, on appeal the appellants submitted that this was irrelevant and there was no admissible evidence from the respondent in opposition to their application for summary judgment. As a consequence, the appellants submitted, their claim ought to have succeeded and the Magistrate was wrong to find otherwise.

Held, dismissing the appeal; the Magistrate made no error in refusing summary judgment. A reasonable basis exists to defend the appellants' claim for trespass to land.

Magistrates Court Act 1991 (SA) s 40; *Magistrates Court (Civil) Rules 2013* (SA) r 3, r 8, r 10, r 87; *Supreme Court Civil Rules 2006* (SA) r 232, referred to.
Ceneavenue Pty Ltd v Martin (2008) 106 SASR 1; *Collins v Djunaedi* [2016] SASCFC 48; *Cosenza v Roy Morgan Interviewing Services Pty Ltd* [2019] SASC 95; *Davies v Minister for Urban Development and Planning* (2011) 109 SASR 518; *Jackamarra v Krakouer* (1998) 195 CLR 516; *O'Brien v Cowie* [2020] SASC 22; *Plenty v Dillon* (1991) 171 CLR 635; *Spencer v The Commonwealth* (2010) 241 CLR 118; *Trade Practices Commission v TNT Management Pty Ltd* (1985) 6 FCR 1, considered.

COSENZA & ANOR v ROY MORGAN INTERVIEWING SERVICES PTY LTD
[2020] SASC 65

Magistrates Appeal: Civil

LIVESEY J:

Introduction

1 The appellants have appealed against a Magistrate's decision dismissing their application for summary judgment pursuant to r 8 of the *Magistrates Court (Civil) Rules 2013* (SA).[1]

2 The summary judgment application dated 18 July 2019 sought the following orders:

> …
>
> 2. A declaration that [Mr] Jay Thumar (employee) for the defendant trespassed on the property at [address] on **11 February 2017**;
>
> …
>
> 5. An order for summary judgment in favour of the plaintiffs against the defendant for trespass to land;
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> (Emphasis in original.)

3 The summary judgment application was supported by an affidavit which said merely that there would be a "further affidavit before the hearing … along with any other further material in support".[2] There was no further admissible affidavit, rather, the appellants tried to rely on a Notice to Admit.

What happened on 11 February 2017?

4 It is helpful to set out what may have occurred on 11 February 2017. These are not factual findings. The parties dispute these facts and the facts have not been found. One of the issues arising on this appeal is whether the apparent existence of disputes of fact and law between these parties is sufficient reason to allow the matter to go to trial.

5 On 11 February 2017 Mr Thumar was an employee of the respondent, and his duties necessitated entering various properties so as to conduct surveys of the occupiers. Whilst there is a dispute about it, and Mr Thumar has not always been consistent about this, the respondent says that Mr Thumar did not ever go onto

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1 The appeal is as of right, *Magistrates Court Act 1991* (SA), s 40.
2 Affidavit sworn 13 July 2019.

the appellants' property, only his wife did so. At one time, the first appellant seems to have been of the same view. I was told on the hearing of this appeal that the first appellant (who was in Court during the appeal) did not ever see Mr Thumar on the property.

6 On 11 February 2017 Mrs Thumar was apparently helping Mr Thumar with his work. Mrs Thumar is said to have been using a badge which was made to look like the badge that the respondent had given to Mr Thumar, but which was not a badge from the respondent. The respondent says that the use of this "fake" badge, and allowing Mrs Thumar to assist with surveys, involved a serious breach by Mr Thumar of his employment obligations and his employment was later terminated.

7 The appellants say that there was a large sign at the entrance to their property on the day which said:[3]

> WARNING: ENTRY IS FORBIDDEN: ENTER BY EXPRESS INVITATION ONLY: High Court decision: *Plenty v Dillon* [1991] HCA 5

8 When the first appellant confronted Mrs Thumar at his doorstep, she showed him her badge, and when she was challenged about that, voices were raised. She fled the property, apparently chased by the first appellant. They apparently ran to where Mr Thumar and his car were waiting. There was then a discussion, and it may be that various "admissions" were made by the Thumars.

9 As I have warned, these are not factual findings, and the parties are in dispute about what happened.

The Notice to Admit issue

10 By an affidavit sworn 23 December 2019 the first appellant then exhibited a Notice to Admit which he said was served on the respondent on 23 September 2019. For present purposes, it is not necessary to set out the assertions contained in 14 separate paragraphs or the three documents attached to it. It was designed to extract the admission that an employee of the respondent came onto the appellants' land without permission. It seeks to achieve this by seeking formal admissions to facts which the appellants know are in issue.[4] Those facts include whether Mr Thumar ever went onto the appellants' land and whether Mrs Thumar was acting with the permission or authority of the respondent.

11 The first response to the Notice to Admit comprised mere denials. The appellants say that this response was not in accord with the rules and the Notice

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[3] Whilst I have no evidence of it, and have heard no submissions about it, similar signs are apparently available for purchase from a website, "http://lawinaction.com.au/order". I draw no inference from this. It does not assist in the resolution of this appeal and I do not associate the appellants with the website.

[4] See the reference to those facts in the decision of Parker J in *Cosenza v Roy Morgan Interviewing Services Pty Ltd* [2019] SASC 95, [42]-[43]. The decision was published on 6 June 2019 and involved the same parties.

was, accordingly, not answered. The further response, apparently served by the respondent on the appellants on 22 January 2020, put the relevant facts and documents into issue. It has not been suggested that the further response is deficient.

12 The appellants complain that the Magistrate did not allow them to rely on the Notice to Admit. The appellants say that because the first response was not in accord with the rules, they should have had the benefit of deemed admissions. This, they say, is sufficient to prove their case and the matter should simply proceed as an assessment of damages, presently claimed at $100,000.

13 The Magistrate appears not to have addressed this issue at all. Whilst that is unfortunate, it has occasioned no unfairness, still less any miscarriage of justice.

14 Whilst it might be thought obvious, it is just as well to state explicitly that this argument seeks the triumph of form over substance, and I reject it. On the hearing of this appeal, the appellants' counsel properly acknowledged that, whatever the explanation for the late service of the further response (for which no affidavit or other evidence is required), it was open to the Magistrate to rely on it, if necessary after granting an extension of time.[5]

15 In my opinion, the Notice to Admit must be treated as having been answered and it does not obviate proof of the facts and matters on which the appellants' trespass case depends. Indeed, it may well be doubted whether any Notice to Admit was properly served in circumstances where the appellants knew by June 2019 that many of the facts were genuinely disputed and the matter was, subject to the summary judgment application, likely to go to trial. There is, increasingly, a tendency to recognise that a Notice to Admit does not facilitate the proper resolution of the issues, especially where it is directed to matters that are likely to be the subject of evidence at a trial in any event.[6] Notices to Admit should not, it seems to me, be viewed as equipment for use in connection with any "sporting theory of justice".[7] The rules of court:[8]

> … are not prescribed for the purpose of implementing what Roscoe Pound referred to more than ninety years ago as the "sporting theory of justice".[9] They are prescribed as

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5 See *Magistrates Court (Civil) Rules 2013* (SA), rr 3 and 10.
6 *O'Brien v Cowie* [2020] SASC 22 (Bampton J).
7 *Jackamarra v Krakouer* (1998) 195 CLR 516, [30] (Gummow and Hayne JJ).
8 *Jackamarra v Krakouer* (1988) 195 CLR 516, [30] (Gummow and Hayne JJ).
9 Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice", reproduced in Glenn R Winters (ed), *Handbook for Judges* (1975) 280, at p 288: "It [the 'sporting theory of justice'] creates vested rights in errors of procedure, of the benefit whereof parties are not to be deprived … The inquiry is not, What do substantive law and justice require? Instead, the inquiry is, Have the rules of the game been carried out strictly? If any material infraction is discovered, just as the football rules put back the offending team five or ten or fifteen yards, as the case may be, our sporting theory of justice awards new trials, or reverse judgments, or sustains demurrers in the interest of regular play."

> aids to the attainment of justice. Just as case management is not an end in itself, but an aid to the prompt and efficient disposal of litigation[10] …

16 Earlier in this case the respondent failed to file a defence, the plaintiffs signed default judgment and the respondents applied to set aside that default judgment pursuant to r 87(2) of the *Magistrates Court (Civil) Rules 2013* (SA). That application was granted by a Magistrate and that decision was appealed to this Court. In reasons delivered on 6 June 2019, Parker J held that there were proper grounds to conclude that there was an arguable defence on the merits:[11]

> In this light, I consider that the Magistrate had proper grounds to be satisfied that the requirement in r 87(2)(a) had been met. It is apparent from the material which was before the Magistrate that there is a significant unresolved factual dispute as to whether or not Mr Thumar entered the appellant's property. It was not necessary for the Magistrate to resolve that issue and nor is it necessary to do so on this appeal. An inquiry as to whether there is an arguable defence on the merits is not to be turned into a trial on the affidavits.[12]
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> The material before the Magistrate also established that the respondent had an arguable case that it was not vicariously liable for any trespass committed by Mrs Thumar on the basis that she was not its employee, it had no prior knowledge of her existence and it had not authorised her to act on its behalf.[13]

17 There was no appeal against that decision.

The other appeal grounds

18 Notwithstanding the finding that the respondent had a *bona fide* intention of defending the claim on the merits, and was advancing a genuine defence, the appellants pressed for summary judgment, relying upon r 8 of the *Magistrates Court (Civil) Rules 2013* (SA).

19 I was told on the hearing of the appeal that both sides regarded the decision of the Full Court of this Court in *Ceneavenue Pty Ltd v Martin* (***Ceneavenue***), a decision on r 232 of the *Supreme Court Civil Rules 2006* (SA), as relevant to the test set out in r 8 of the *Magistrates Court (Civil) Rules* 2013 (SA).[14] Rule 8 provides:

> 8. (1) Where a party wishes to obtain –
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> (a) summary judgment in, or the disposal of the whole or part of, an action; or
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> (b) immediate relief,

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[10] *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146, 154 (Dawson, Gaudron and McHugh JJ).
[11] *Cosenza v Roy Morgan Interviewing Services Pty Ltd* [2019] SASC 95, [42]-[43].
[12] *Skorpos v Georgiadis* [2013] SASC 165, [21] (David J); *Battiste v Mulvaney* (Unreported, Supreme Court of South Australia, Doyle CJ, 7 November 1997, S6419); *Watson v Anderson* (1976) 13 SASR 329, 334 (Bray CJ).
[13] *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161.
[14] (2008) 106 SASR 1.

> he or she may do so on interlocutory application accompanied by an affidavit specifying –
>
> (c) that there is no reasonable basis for the action or defence.
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> (2) The Court may –
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> (a) enter judgment accordingly;
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> (b) grant the whole or part of the relief sought, and order that the action continue in relation to the part not disposed of;
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> (c) make an order for an early trial; or
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> (d) make any other order.
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> (3) The Court may enter a summary judgment based on an Enforceable Payment Agreement verified by an affidavit.

20 On the hearing of the appeal the appellants contended that, whether there was an arguable defence on the merits did not determine whether there existed any "reasonable basis" for defending the claim.

21 In particular, the appellants highlighted the absence of admissible evidence from the respondent regarding its defence and, in addition, the fact that there were deemed admissions to its Notice to Admit. I have already addressed the Notice to Admit point. Apart from the Notice to Admit, the evidence before the Magistrate was the same as that which was before Parker J last year.

22 As the appellants put it in argument, whilst hearsay evidence can be led in opposition to an application to set aside a default judgment,[15] because summary judgment is a "final judgment" and not an interlocutory judgment, the hearsay evidence before Parker J could not be used by the respondent.[16]

23 There being no admissible evidence from the respondent in opposition to the application, the appellants contend that they must succeed and the Magistrate was wrong to find otherwise.

Disposition of the appeal

24 In my opinion, the two key contentions upon which the appellants relied must be rejected. This is a clear case requiring disposition at a trial.

1 Whether under r 8 of the *Magistrates Court (Civil) Rules 2013* (SA) or r 232 of the *Supreme Court Civil Rules 2006* (SA) there is no necessary requirement that a respondent is confined to evidence which is adduced by it and which would be admissible at a trial. To the extent that Judge Burley

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[15] As has occurred previously, see *Cosenza v Origin Energy Ltd* [2017] SASC 145, [34], [83] (Blue J); *Cosenza v Roy Morgan Interviewing Services Pty Ltd* [2019] SASC 95, [40] (Parker J).

[16] Relying upon rr 2 and 19 of the *Magistrates Court (Civil) Rules 2013* (SA).

appears to have suggested otherwise by way of *obiter dictum* in *Colonial Mutual Life Assurance Society Ltd v Glazier*,[17] that decision is neither binding on me nor persuasive in circumstances where the Master appeared to be acting upon a concession, apparently properly made in the circumstances of that case. In any event, and as was found by Parker J, the appellants' own evidence demonstrated the existence of a number of disputed questions of fact and law.

2 The finding that the respondent had a *bona fide* intention of defending the claim on the merits, and was advancing a genuine defence which was supported by evidence (including the appellants' evidence), was incompatible with the proposition that there was no "reasonable basis" for defending the claim. This is not a case where the existence of various, genuine disputes is in any doubt, and, in consequence, there was a "reasonable basis" for defending the claim.

25 I shall explain these conclusions.

26 The starting point is the nature of the test for summary judgment, and what is required for a finding that there is "no reasonable basis" for a defence. In *Ceneavenue* Debelle J, with whom Duggan and Anderson JJ agreed, held:[18]

> The test in r 232(2) requires the court first to identify the issues to be tried and then to assess whether the claim or defence has reasonable prospects of success. In the case of an application for summary judgment by a plaintiff against a defendant, it is doubtful, therefore, whether there is a material difference between that test and the former test as it had been expressed in *Fancourt*. That is because the question whether there is a real question to be tried denoted that the task for the court was to determine whether the issues at the trial are real or fanciful and have reasonable prospects of success.
>
> The question whether there is no reasonable basis for the claim or defence must be determined in a summary way. It is entirely inappropriate for there to be a mini trial on that question. It must, therefore, be evident or obvious that the party defending the application for summary judgment has no reasonable basis for the claim or the defence. While adversarial argument will assist in the determination of that question, the question should be capable of ready resolution without prolonged argument. A prolonged argument might suggest that there is a reasonable basis for the claim or the defence.

27 Later, following an extensive review of the approaches taken to summary determination interstate, federally and overseas, Debelle J concluded:[19]

> … r 232(2)(a) does not represent a significant departure from the previous practice in relation to an application for summary judgment by a plaintiff on the ground that the defendant has no arguable defence. On an application for summary judgment by a plaintiff, the court will examine whether the asserted defence is real or fanciful. It will consider whether the defence is bona fide. It will assess whether the respondent has a real

[17] (1993) 173 LSJS 265.
[18] (2008) 106 SASR 1, 21 [81]-[82].
[19] *Ceneavenue Pty Ltd v Martin* (2008) 106 SASR 1, [92] (Debelle J, with whom Duggan and Anderson JJ agreed).

> as opposed to a fanciful case. It will have regard to the injunction in *Fancourt* which is in similar terms to that in *Agar v Hyde*. The applicant for summary judgment must show that it is clear that the other party has no arguable case. The test does not require the court to determine whether the defendant will succeed. Instead, the court must consider only whether the ground or grounds relied on by the defendant are reasonably arguable. The test in r 232(2)(a) is not, I think, materially different from the test whether there is a real question to be tried.

28 Following *Ceneavenue* there has been some doubt expressed about whether the Full Court was correct to find that there has been no "material difference" and, particularly, no "substantial relaxation of the test that had been prescribed by r 25.04 of the 1987 Rules".[20] In *Davies v Minister for Urban Development and Planning*[21] (***Davies***) Bleby J doubted whether the Full Court had given proper effect to the words used in r 232, but found in any event that the decision in *Ceneavenue* had, in effect, been overtaken by the decision of the plurality in *Spencer v The Commonwealth*.[22] Bleby J said:[23]

> Notwithstanding the decision of the Full Court of this Court in *Ceneavenue Pty Ltd v Martin*, I regard the later decision of the plurality of the High Court in *Spencer* as binding authority on this Court and I propose to follow it. The Full Court in *Ceneavenue* has been shown by the plurality to have been wrong in substituting a meaning for the text of r 232(2) which it does not bear.
>
> (Citation omitted.)

29 Subsequently, this difference of opinion has been noted, but not resolved.[24] More recently, in *Collins v Djunaedi* Kourakis CJ explained:[25]

> In the case of a summary judgment application, there is a reasonable basis for a claim, or a positively pleaded defence, when there is an evidential foundation for facts upon which arguable propositions of law would result in judgment for the plaintiff or the defendant as the case may be. In cases in which the defendant merely denies the claim, there must be reasonable grounds on which to contend that the plaintiff will not discharge its onus of proof or make good the propositions of law on which it relies. In the case of a SCR 232 application, the evidential basis or grounds must at least be pleaded.

30 As the difference of opinion between *Ceneavenue* and *Davies* was not argued before me, it is not appropriate to attempt to resolve it, particularly when sitting as a single Judge. It is sufficient to observe that, whatever the approach, the respondent satisfied the test because the matters on which it relied to show a

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[20] (2008) 106 SASR 1, [93] (Debelle J) cf *JT Nominees Pty Ltd v Macks* (2007) 97 SASR 471, [86] (Bleby J).
[21] (2011) 109 SASR 518.
[22] (2010) 241 CLR 118.
[23] *Davies v Minister for Urban Development and Planning* (2011) 109 SASR 518, [43], citing *Spencer v The Commonwealth* (2010) 241 CLR 118, [58]-[60]: "full weight must be given to the expression as a whole".
[24] *Kleentex (Thailand) Co Ltd v Corporate IM Pty Ltd* [2012] SASC 71, [19] (White J); *G, RE v Department of Correctional Services* [2017] SASC 96, [25]-[26] (Judge Roder).
[25] [2016] SASCFC 48, [17] (Kourakis CJ, Stanley and Parker JJ agreeing).

"reasonable basis" were either pleaded, or clearly addressed in the decision of Parker J, and available to it on the appellants' own evidence (as Parker J found).

31 Three examples demonstrate that, on any view, there arises a "reasonable basis" to defend the appellants' claim so as to defeat an application for summary judgment. As will be seen, these are in some respects merely supplementary to the matters addressed by Parker J last year.

32 The first example concerns whether Mr Thumar entered the appellants' property notwithstanding that he was warned that any implied licence was revoked by the sign earlier mentioned. Whilst apparently a straightforward issue, it actually involves questions of both fact and law. The questions of fact include whether Mr Thumar did come onto the property. There is a dispute about that. A further question of fact is whether the sign was at the entrance to the property, and whether it could be clearly seen so as to give reasonable notice of the revocation of the implied licence to enter. The parties are in dispute about whether there was a sign, and if there was, whether it was positioned at a place and in a manner that enabled it to be clearly seen before entry. Finally, though there is no need to decide the point, there might well be room reasonably to question, in a manner that is far from fanciful, whether the appellant's sign actually had the effect of revoking the implied leave or licence to enter the property. That issue was not addressed, let alone decided, by *Plenty v Dillon*.[26]

33 The second example concerns the issue whether Mr Thumar made admissions that are capable of binding the respondent. The issue arises because the first appellant says that he can rely on what Mr Thumar said to him, using his statements against the respondent. However, it has long been recognised that whether an admission can be used against a party first depends on whether it was made by the party, and if not, whether it was made by a person whose conduct binds that party.[27] In *Trade Practices Commission v TNT Management Pty Ltd* whether and to what extent various statements made by employees were admissible against their employers was addressed in some detail.[28] For present purposes three issues addressed in that case demonstrate the unsuitability of acting on admissions for the purposes of a summary judgment application. The

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[26] In *Plenty v Dillon* (1991) 171 CLR 635 a majority of the Full Court had found on the facts that "Mr. Plenty had expressly revoked any implied consent given to any police constable to enter upon his farm" (638) and later, in "earlier statements and correspondence, he had made it plain that, if the summons was to be served, it had to be served by post" (646). The decision of the High Court is therefore authority for the proposition that, assuming a common law trespass, the service by the police of a summons to appear was not justified at common law or by any of the legislation considered by the High Court. At 647 Gaudron and McHugh JJ explained that "[c]onsent to an entry is implied if the person enters for a lawful purpose … This implied licence extends to the driveway … However, the licence may be withdrawn by giving notice of its withdrawal. A person who enters or remains on property after the withdrawal of the licence is a trespasser". Their Honours did not address, because it was not relevant, what words or conduct comprised an effective withdrawal.

[27] David Byrne QC and D Heydon, *Cross on Evidence* (Butterworths, 3rd ed, 1986), [17.89]-[17.90].

[28] (1985) 6 FCR 1, 18 (Franki J).

first is that whether an admission is binding depends on the nature of the agent's authority:[29]

> But there are some agents who derive from their employment an implied authority of a sufficiently wide nature to make their admissions admissible against the principal even with respect to past transactions, provided that, at the time the admissions are made, they are still in the employment of their principal. This is because their employment is such that they must be presumed to have authority to give information with respect to such transactions, so that it is given in the course of an act they are authorized to do.

34 The second issue is that there must be a further finding about whether what was said was in accord with that authority, or as it has been said, "incidental to the carrying on of … [the] business in the ordinary way".[30] The third issue is whether what was said was thereby incidental to employment, or merely an admission about past events, which cannot bind the principal.[31] As might be obvious, these three issues depend not merely upon proof of what was said, but proof of any authority with which it was said, and whether one may conclude that the statement was incidental to that authority and not merely about past events. In the circumstances, it is not hard to see how the respondent in this case may resist use of any so-called admission by Mr Thumar in a summary judgment application on the ground that it is not a statement binding on the respondent.

35 The third and final example concerns the issue whether the wrongdoing of either or both of Mr or Mrs Thumar was conduct for which the respondent is vicariously liable. The question of vicarious liability arises whether the entrant was Mr Thumar, or Mrs Thumar, or both of them. Whether an employer is vicariously liable for the wrongdoing of an employee or contractor, particularly where it involves criminal wrongdoing, is not straightforward. Vicarious liability often arises in connection with the conduct of employees, rarely contractors,[32] and more rarely still where there is no contractual or other recognised relationship, such as agency.[33]

36 In the case of employers and employees, vicarious liability is a conclusion that usually depends upon a precise statement of the duties given by the employer to the employee, coupled with an assessment of the degree of connection between those employment duties and the wrongful act.[34] It is not merely a

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29 *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100, 134 (Williams J). See also *Trade Practices Commission v Allied Mills Industries Pty Ltd (No 3)* (1981) 55 FLR 174, 178 (Sheppard J); *Trade Practices Commission v Queensland Aggregates Pty Ltd (No 3)* (1982) 61 FLR 52, 58-59, 63 (Morling J).

30 *Ex parte Gerard & Co Pty Ltd; Re Craig* (1944) 44 SR (NSW) 370, 377 (Jordan CJ). See also *Barrett v Steel Products Distributing Co Pty Ltd* [1962] NSWR 981, 986 (Walsh J); *Victorian Railways Commissioners v Lord* [1968] 2 NSWR 327, 334 (Wallace P), 338 (Walker JA).

31 *NSW Country Press Co-operative Co Ltd v Stewart* (1911) 12 CLR 481, 491-492 (Griffith CJ); *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100, 113 (Latham CJ), 134 (Williams J).

32 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161.

33 *Scott v Davis* (2000) 204 CLR 333.

34 *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, [80]-[82] (French CJ, Kiefel, Bell, Keane and Nettle JJ), [131] (Gageler and Gordon JJ). See also the recent decisions of the Supreme Court in *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12 (no vicarious liability for an

question of fact, but one of raising normative considerations. That is not an exercise that can be easily undertaken in a summary way, and little is required to demonstrate that there is a genuine issue, particularly if the only unlawful entrant turns out to be Mrs Thumar.

Conclusion

37 In these circumstances, it is my opinion that the Magistrate made no error in refusing summary judgment. The appeal is dismissed.

38 After hearing the parties, I make an order for costs in favour of the respondent, fixed at $5,500, which the appellants accepted was not an unreasonable amount.

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employee); *Barclays Bank plc v Various Claimants* [2020] UKSC 13 (no vicarious liability for an independent contractor).