Neutral Citation Number: [2024] EWCA Civ 436

Case No: CA-2023-001269

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
Mr Anthony Metzer KC, sitting as a Deputy High Court Judge
KB-2022-003234

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/05/2024

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE NUGEE
and
LORD JUSTICE EDIS

- -

Between :

ABEER MOHAMMAD SHAMSAN	**Appellant**
- and -	
44-49 LOWNDES SQUARE MANAGEMENT COMPANY LIMITED	**Respondent**

- -
- -

Paul Mitchell KC and **Adam Richardson** (instructed by **Freeman Harris**) for the **Appellant**
Nathaniel Duckworth (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Respondent**

Hearing date : 26 March 2024

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JUDGMENT

Lord Justice Edis: -

Introduction

1. This is an appeal against the decision of Mr. Anthony Metzer KC, sitting as a Deputy High Court Judge ("the judge"), to grant summary judgment in favour of 44-49 Lowndes Square Management Company Limited ("Lowndes") which was the defendant to the claim. The principal question is whether a duty of care in tort arose in a situation where the parties' relationship arose in the context of a set of complex contractual documents. The judge decided that Lowndes did not owe the appellant such a duty and dismissed the claim.

2. The issue is whether the relationship between Lowndes and the appellant was such that Lowndes owed her a duty of care which renders it liable for losses she allegedly sustained which were caused by the negligence of an independent contractor. The independent contractor was providing services under a contract with Lowndes which Lowndes was required to enter into under a covenant in a lease to which it, but not the appellant, was a party. She had no contract with Lowndes.

3. The suggested liability is a novel one. This is not because the liability of the independent contractor to the appellant is novel. It is because the attempt to hold Lowndes also liable to her requires the recognition of a duty of a novel kind. Lowndes is not said to have said or done anything itself apart from to perform its contractual obligation to appoint the independent contractor to provide property management services as its agent. The appellant contends that in entering into its contractual obligations with others and then in performing those obligations Lowndes assumed a responsibility to her such that it is liable for the negligent provision of services by its agent. This is not a case of negligent misstatement. Neither is it a case

where the appellant can be said to have been dependent on Lowndes in a broader sense, as where a child is in the care of a local authority or being educated at a school. It is not suggested that the circumstances give rise to a non-delegable duty of care. It is not a case where any of the actors is said to have professed any relevant professional skill. In short, this case does not include key factors most commonly present in the cases where assumptions of responsibility have resulted in the recognition of duties of care. Now that it is clear that novel duties are primarily identified by incremental analogy with established duty situations, this is not a promising start for the appellant.

4. In such cases it may be useful to start with a dictum of Lord Goff of Chieveley in *Henderson v. Merrett Syndicates Ltd.* [1995] 2 AC 145 at 193B. He said this:-

> "Yet the law of tort is the general law, out of which the parties can, if they wish, contract: and, as Oliver J demonstrated, the same assumption of responsibility may, and frequently does, occur in a contractual context."

5. It has been well established since, at the latest, *Henderson* that where parties enter into a contract with each other, the law may also impose concurrent duties in tort. Although such obligations may overlap, they are conceptually different. That difference must be particularly attended to in a case such as the present where there was no contractual relationship between the appellant and Lowndes. The contractual relationships involving Lowndes and other parties which did exist were the context within which Lowndes and the appellant dealt with each other, to the extent that they did.

The facts giving rise to the claim

6. The appellant was the tenant of Flat 9, 48 Lowndes Square, London ("Flat 9") under an assured shorthold tenancy agreement granted by Senora Holdings Limited ("Senora") on 7 September 2018. As its name suggests, Lowndes is the management company which exists to procure services on behalf of the tenants of 44-49 Lowndes Square under leases which are called "the Flat Leases" in the documents. The tenant of Flat 9 under the Flat Lease for Flat 9 was Senora. Lowndes became the lessor under the Flat Leases, having acquired a long leasehold interest from the freeholder. The procurement of property management services was one of Lowndes' obligations under the Flat Leases. These services are intended to benefit those who live in the flats, but also the freeholder and anyone else who holds any other interest in the land.

7. 44-49 Lowndes Square is a large block of flats in Belgravia. I shall call it "the Building" when I refer to the whole block. The shares in Lowndes are owned by the head lessor and the leaseholders of the flats, Senora in the case of Flat 9. It is important to one of the issues in the case to record that Senora did not assign its interest to the appellant but granted her a different interest. The Flat Leases expire by effluxion of time on 14 June 2149. Her assured shorthold tenancy was for a two year term from 14 September 2018. The rent payable by Senora was different from the £2,700 per week which the appellant was liable to pay under her tenancy.

8. The appellant claims that she sustained loss when one or more unknown criminals entered Flat 9 in her absence using keys which had been negligently made available to them by a porter. She says that she lost jewellery and other property worth around £7m in that burglary. For the purposes of this summary judgment application it was accepted that she had suffered loss as a result of the breach of a duty of care by the

porter in carelessly allowing the criminals to have access to her keys. In fact, it appears that the porters provided the keys to a person pretending to be a cleaner on 11 December 2019 and then, after the locks had been changed, provided the new keys to the burglars who entered Flat 9 on the evening of 12 December 2019 and stole the property of the appellant. The Amended Particulars of Claim says:-

> "The burglars did not have to force entry into Flat 9; it is averred that the burglars must have gained entry using keys, including the new key."

9. It is necessary to say a little about how and why the porters came to hold the appellant's keys. Essentially, these are the facts which are said to give rise to the duty of care in tort.

10. Lowndes was the tenant of the Building under a head lease which comprised two leases, described as the Original Concurrent Lease and the Concurrent Lease. I will call these agreements together "the Head Lease". The Original Concurrent Lease was dated 29 September 1992 and the Concurrent Lease was dated 10 December 1998. The lessor was a company known as Sun Life Assurance plc in 1998. The Flat Leases had been granted by the lessor prior to 29 September 1992. In the case of Flat 9 that was effected by a lease dated 5 September 1984, and a further lease dated 3 June 1999.

11. The terms of the Head Lease obliged Lowndes to provide certain services for the benefit of those living in the flats situated in 44-49 Lowndes Square. Lowndes was obliged under the Head Lease to contract a specified agent, Messrs Farebrother, to fulfil its management obligations to its landlord. Those obligations were actually defined in the Flat Leases, of which the leasehold interest acquired by Senora was one.

12. The contracts with Lowndes do not impose a direct obligation to procure porterage, in particular to procure key holding services, from Farebrother. However, there are some provisions concerning the employment of porters and for recovering costs of porterage as part of the service charge. Such services were in fact provided at the Building and one of the things the porters did was to hold keys. Lowndes contracted with Farebrother that the latter, acting as its agent, would provide services. Farebrother's duties in this respect were non-delegable; but it was permitted to supply the porterage services by means of sub-contractors if it so wished.

13. At the time of the events giving rise to the current claim, the porters which Farebrother supplied to the Building were of two types: day porters who were employed by a sub-contractor of Farebrother called Farebrother Services Limited; and night porters who were employed by a separate sub-contractor of Farebrother called Abbatt Property Services Limited. For the purposes of this judgment I shall not further distinguish between these entities and will use the name Farebrother to refer to them all. Their individual positions may no doubt be different, but that does not fall for consideration in this judgment.

14. The porters had a key safe containing copies of the keys to all the flats in the building including those to Flat 9. According to the Amended Particulars of Claim, "it was the practice of the porters to require that each person permanently resident" in a flat provide to the porters a copy set of keys to permit the porters to have access to the flat.

15. On 11 December 2009, it is alleged, the porters gave the keys to Flat 9 to a person who claimed to be a cleaner; she gained entry to Flat 9 but disturbed the appellant's son and then left. The appellant caused the locks of Flat 9 to be changed on 12

December 2009, and spares of the new keys were once again left with the porters. Later on 12 December 2009, while the appellant and her son were out, persons unknown gained access to Flat 9 using a key and stole the appellant's jewellery.

16. The porters were not employed by Lowndes. The appellant abandoned a claim that Lowndes was vicariously liable for their negligence at the hearing before the judge. She has nevertheless elected in these proceedings to sue Lowndes rather than the porters or their employers. Lowndes contends that it owed her no duty of care and the judge agreed. The claim was also advanced originally in bailment on the basis that the porters had been bailees of her keys. The judge dismissed this claim. Popplewell LJ granted permission to appeal in respect of four grounds relating to the way the judge dealt with the tort claim, but refused leave to appeal on a ground which attacked the decision on the claim in bailment. I will return to this below.

The contractual scheme for porterage services

17. It is not necessary to explain exhaustively the complex series of leases and sub-leases which give rise to the following contractual provisions. Their effect is set out below.

18. In the Head Lease Lowndes as lessee covenanted with the freeholder as lessor as follows:-

> "(j) At all times during the ….term to perform and fulfil all the obligations of the Lessor under the Flat Leases and to save harmless the Lessor in respect of the same save that the Lessee shall not be responsible for [some insuring obligations which are not material]."
>
> "(u) At all times to employ Messrs. Farebrother of 7/9 Breams Buildings [address] or some other firm of reputable surveyors [with Lessor's approval] to act as managing agents for the Building and in relation to the provision of the services and the carrying out of the other matters referred to in the Third Schedule to the Flat Leases."

19. By the Flat Lease, Senora covenanted among other things to pay the service charge to Lowndes:-

> "…to the intent that [Lowndes] shall be fully indemnified paid and reimbursed in respect of all costs expenses payments and liabilities incurred by [Lowndes] in connection with the state and condition of the Building and the provision of services to the tenants thereof…"

20. The Third Schedule to the Flat Lease listed the services whose cost could be included in the service charge. The service charge was not reserved as rent.

21. There was a provision for a Certificate to be produced annually to support the calculation of the service charge which:-

> "…shall contain a fair summary of the expenses and outgoings and other heads of expenditure set out in the Third Schedule…"

22. The Third Schedule contains provisions which describe costs which may appear in the Certificate, including these:-

> "5. (1) the cost of employing a caretaker a porter or other staff including the wages of all such staff and National Insurance contributions and providing for clothing uniforms and the payment of gratuities bonuses pensions annuities redundancy payments and any other payments of a similar nature to the staff employed from time to time at the Building
>
> "(2) the cost of providing and maintaining accommodation and staff quarters (in the Building or elsewhere) for a caretaker or porter or other employee and without prejudice to the generality of the foregoing the amount of the rent foregone in respect of the accommodation provided and all rates taxes assessments expenses of lighting heating telephone and other outgoings thereto relating"

23. Other paragraphs in the Third Schedule permit Lowndes to include in the Certificate its proper fees for the general management of the Building including any proper charge or fee of any other Managing Agents; and the cost of doing all acts matters and things as shall be necessary or advisable for the proper maintenance and administration or inspection of the Building.

24. Among other things, Lowndes covenanted in clause 7 of the Flat Lease:-

> "(i) For the purpose of performing the covenants on the part of [Lowndes] herein contained at its absolute discretion to employ on such terms and conditions as [Lowndes] shall think fit one or more caretakers porters maintenance staff cleaners or such other persons as [Lowndes] may from time to time in its absolute discretion consider necessary"

25. In addition to the covenants, the Flat Leases contained clause 8 which set out some further agreements, not described as covenants, introduced with the words "Provided always and it is hereby agreed as follows:-" Two of these agreements were in these terms:-

> "(c) Except in so far as any such liability may be covered by insurance effected by the Lessor pursuant to the provisions of Clause 7(f) hereof **the Lessor** its servants caretakers other employees or contractors or any of them **shall not be liable to the Lessee** or his family licensees servants or others or any of them **whether as bailee or otherwise in tort** or by virtue of this lease or otherwise howsoever **for**
>
> (i) **any loss** injury accident damage expense or inconvenience which may at any time during the term be incurred suffered done or occasioned by or to any of them or **to** the Flat or **any chattels effects and personal goods** of or belonging to any of them **by reason** or arising out **of** any act omission **negligence** or default of any other tenants in or occupiers of the Building or any part thereof or **of the lessor its servants caretakers other employees or contractors** or any of them or by any defect in the Building or by reason of the defective working stoppage or breakage or breakdown of any fixtures conduits staircases heating and hot water systems pipes wires telephone cables or machinery or the lighting in or apparatus of the Building or any part thereof or by any interruption of any of the services referred to in Clause 7 hereof **but reasonable care will be taken** to avoid such defective working stoppage breakage breakdown or interruption and **in the engagement of servants caretakers other employees or contractors of the Lessor**
>
> (ii) any loss or damage or interference or annoyance suffered by the Lessee during the carrying out of repairs decorations additions alterations or other works which may be necessary or desirable to the Flat or the Building provided the same are carried out with proper skill and care"
>
> "(k) No caretakers porters maintenance staff or other persons employed by [Lowndes] shall be under any obligation to furnish

> attendance or make available their services to [Senora] and in the event of any such person employed as aforesaid rendering any services to [Senora] such person shall be deemed to be the servant of [Senora] for all purposes and [Lowndes] shall not be responsible for the manner in which such services are performed nor for any damage to [Lowndes] or other persons arising therefrom"

26. Clause 8(c) is quite a complex provision in which I have put the most material parts in bold to assist rapid comprehension. It allocates liability for losses caused by the negligence of caretakers as between Lowndes and Senora so that it falls on Senora in respect of losses suffered by it or its "licensees servants or others". Lowndes retains three obligations or liabilities:-

i) To take reasonable care to avoid defective working, stoppage, breakdown or interruption of fixtures and other apparatus described;

ii) To take reasonable care in the engagement of caretakers and contractors;

iii) By (c)(ii) Lowndes may be liable for damage suffered during decorations additions alterations or other works which may be necessary or desirable to the Flat or the Building if they are not carried out with proper skill and care.

27. The appellant does not allege that Lowndes is liable to her in this case by reason of any of these three obligations or liabilities.

28. Clause 8(k) makes employees of Lowndes servants of Senora if they provide services to it. This may have no relevance in this case because the porters were not employees of Lowndes by the time the loss was sustained. They had been at the time of the 1984 Lease in which these terms appear, but by reason of the 2000 management agreement, see [30] below, the porters were thereafter to be employed by Farebrother.

29. Management agreements were concluded with Farebrother in 1997 and 2000. They appointed Farebrother as managing agents of Lowndes in respect of the Building. Farebrother agreed to carry out the management services diligently and protect and promote the best interests of Lowndes, and to use its best endeavours in the provision of the management services to comply with Lowndes' obligations under the Head Lease the Flat Leases, common law and statutory requirements.

30. There was specific provision in the management agreements about porterage staff. Initially they were to be employees of Lowndes, engaged on its behalf by Farebrother. The purpose of the second management agreement in 2000 was to deal with the transfer of the employment of the porters from Lowndes to Farebrother. From the date of the 2000 agreement, the management services included these obligations in relation to porterage staff:-

> "10 To engage such porterage staff as shall be necessary for the performance by the Agent of its obligations under this Agreement and to comply with all necessary employment and other legislative requirements in respect of porterage staff and in relation to resident porters to arrange that their licence to occupy any Porter's Flat ceases on termination of their employment
>
> 11. To liaise with and supervise the porterage staff in the performance of their duties"

31. The appellant's assured shorthold tenancy refers to the relevant Flat Lease as the "Superior Lease" by virtue of which Senora held Flat 9. Clause 10 says:-

> "10. Superior Lease
>
> The Tenant shall perform and observe the tenant's covenants in the Superior Lease (other than the covenant to pay rents)."

32. I have already explained that the agreements in clause 8 of the Flat Lease were not tenant's covenants, and the service charge was not reserved as rent. Payment of the service charge was a tenant's covenant.

The claim

33. The claim is formulated in an Amended Particulars of Claim. Mr. Nathaniel Duckworth, on behalf of Lowndes, has made serious criticisms of this document and it is necessary to describe it in a little detail.

34. The pleading first sets out the contractual arrangements and the alleged facts of the loss. In relation to the handling of the keys, this appears:-

> "6A. At all material times, it was the practice of the porters in the Building (and hence, the practice of the Defendant) to require that each person permanently resident in a Flat within the Building provide to the porters a copy set of keys to permit the porters to have access to each resident's said Flat.
>
> 6B. Further and alternatively, the porters, acting within the scope of their ostensible authority, requested of the Claimant when she moved into Flat 9 that she provide to them a set of keys to Flat 9 and she, acting reasonably, acceded to the said request. At all material times the porters held a set of the keys to Flat 9."

35. It is then alleged that Lowndes was obliged to provide services for the benefit of the appellant (called "the Relevant Services") which included, so it is said, the provision, selection and supervision of staff to keep the Building secure. These services are described in the pleading, but not in any contractual document, as follows:-

> " a. The provision of such staff and equipment as were reasonably necessary to ensure that the Building was secure against the reasonably foreseeable risks of entry into the Building of trespassers and/ or persons with unknown intentions, alternatively persons intent upon burglary or theft within the Building or within any of the Flats in the Building;
>
> b. The selection and supervision of such staff as were reasonably competent to ensure that the Building was secure against the reasonably foreseeable risks of entry into the Building of trespassers and/ or persons with unknown intentions, alternatively persons intent upon burglary or theft within the Building or within any of the Flats in the Building."

36. In fact, as we have seen, the contractual scheme required Lowndes not to do these things, but instead to enter into a contract with Farebrother for the provision of this kind of service.

37. The duty of care which Lowndes is alleged to have owed to the appellant is framed in these terms:-

> "As a matter of law, in providing the Relevant Services for the benefit of the tenants of the Building, including the Claimant, the Defendant owed the tenants, including the Claimant, a duty to take reasonable care."

38. The duty had, therefore, three parts. A duty to take reasonable care in (1) the *provision* of such staff as were reasonably necessary to keep Flat 9 secure; (2) the *selection* and (3) the *supervision* of staff who were reasonably competent to undertake that task.

39. It is then said that the appellant reasonably relied upon the porters to exercise reasonable care and skill to keep the building secure, and that in so relying she was relying on Lowndes. There is no explanation of what the concept of "reliance" means in the context of a duty to provide services as opposed to a case based on negligent misstatement. The pleading continues: "Further or alternatively, [Lowndes] is vicariously liable for the acts of its agents, the porters". That claim was abandoned, see [16] above.

40. The Amended Particulars of Claim alleges these breaches of the duty of care owed to the appellant:-

> (a) Giving copies of the keys to Flat 9 to [one of the criminals] and permitting her to gain access to Flat 9 during her first visit and to thereby gather intelligence as to the layout of Flat 9 and the potential location of valuables.

> (b) Permitting [one of the criminals] to enter No 48 on the pretence that she was providing cleaning services to the Claimant despite the Claimant consistently utilising the services of the same cleaner.
>
> (c) Permitting persons unknown (i.e., the burglars) to enter the Building between 21:23 and 22:30 on 12 December 2019 without ascertaining their identity.
>
> (d) Providing the said persons unknown with the keys alternatively a key to the front door of Flat 9.
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> (e) Failing to observe the burglars exiting Flat 9 with stolen goods.
>
> (f) Failing to investigate the presence of the burglars in the Building alternatively at Flat 9.
>
> (g) Failing to keep the keys of Flat 9 safe such that they could not be taken by unauthorised persons who had gained access to the Building.

41. There is no allegation of breach of the pleaded duty to provide, supervise or select staff. The appellant's real case is that the breaches pleaded are negligent acts or omissions by the porters which are said to be breaches of the duty of care owed by them for which Lowndes is liable because the porters are its agents. In essence, the claim is based on two allegedly negligent acts, namely (1) the provision of keys to a criminal pretending to be a cleaner on the first visit; and (2) the provision of the new key or keys to the burglars on the occasion of the burglary. Further, it is alleged that the porters were negligent in failing to observe or investigate the burglars. It is perhaps helpful to record at this point that these duties and their alleged breaches constitute an allegation that the porters caused harm to the appellant (made things worse for her), as opposed to failed to confer a benefit on her (not making things better for her) for the purposes of the distinction in the judgment of Lord Reed JSC in *N and another v. Poole Borough Council* [2019] UKSC 25; [2020] AC 780 at [28]. This court cannot, of course, decide whether any claim against the porters and anyone vicariously liable for their negligence is well-founded. It is, though, appropriate to

record that it has not been contended by either party that it would not be a perfectly conventional tort claim based on principles which are well-settled.

42. For the purposes of the summary judgment application, it was therefore appropriate to assume that the porters were negligent in the respects pleaded. If so, they would be liable to her for her loss, and their employers would be vicariously liable for their breach of duty. It is not now alleged that Lowndes was vicariously liable, as I have recorded at [16] above.

The judgment below

43. The judge heard extensive argument and gave an oral judgment after adjourning for a short time to allow him to formulate it. The way in which he approached the issues was heavily influenced by the way in which the case was argued before him by Mr. Paul Mitchell KC, leading Mr. Adam Richardson for the appellant, and Mr. Duckworth for Lowndes.

44. The judge began by recording that he had allowed an application for permission to amend the Particulars of Claim into the form from which I have quoted extracts above. Often a judge will determine whether the amendments have any prospect of success before allowing them. On this occasion the application for permission to amend was granted without any determination that the amended pleading raised a case in negligence or bailment which had a real prospect of success. That was the issue which the judge determined in favour of Lowndes subsequently.

45. The judge also noted the overlap between the causes of action in negligence and bailment, quoting Mr. Mitchell as advancing the case in bailment as a "belt and

braces" argument because he accepted that it would be unlikely that the appellant could succeed in bailment having lost in the tort claim.

46. The judge correctly directed himself about the test to be applied when dealing with applications under CPR Part 24 for summary judgment and no criticism is made of that.

47. At paragraph 21 the judge made some observations which have been the subject of criticism. He said:-

> "It is accepted that the most obvious route to recover for substantial loss is not available to the Claimant, namely an insurance claim. It is noted in the bundle provided to me that various different potential defendants were identified and pre-action letters were sent to the claimant's landlord, Senora Holdings Limited, on 25 March 2020, to Tandem Property Asset Management Limited, a management agency, on 9 November 2020, to which there was a response on 9 February 2021, to Aviva Life and Pensions UK Limited, the freeholder, on the same date, 9 November 2020, to which there was a response on 5 May 2021, and to Farebrother, who are the managing agents, on 9 November 2020, as well as, more belatedly, the Defendant, to which the pre-action letter was sent on 23 December 2021."

48. It is not clear why an insurance claim would be the most obvious route to recovery. If the appellant were insured for the loss, her insurers would indemnify her and then recover their outlay by making a subrogated claim relying on any causes of action available to their insured. The issues would be precisely the same in any such claim, and the reference to the lack of insurance appears to be a reference to an irrelevant matter. The other letters of claim are also irrelevant. The issue for the judge was whether the claim against Lowndes had a real prospect of success. How her solicitors may have formulated other claims against other parties was not likely to illuminate that. No doubt some forensic use was made of the approach of the appellant's lawyers in the way they advanced her claim, but it was not likely to be helpful.

49. The judge then explained the legal principles he would apply to the claim in tort, referring to:-

> "….the three requirements in the well-known case of *Caparo Industries plc v Dickman* [1990] 2 AC 605, namely reasonable foreseeability of loss, sufficient in relation to proximity and fairness of imposing a duty of care or, alternatively, a claim on an assumption of responsibility by the defendant to the claimant."

50. The judge considered the concept of assumption of responsibility in the context of establishing liability for the consequences of the deliberate wrongdoing of others against a party who was innocent of that deliberate wrongdoing by reference to the speech of Lord Goff in *Smith v. Littlewoods Organisation* [1987] UKHL 18, *Stansbie v. Troman* [1948] 2 KB 48 and *Rushbond plc v. The JS Design Partnership LLP* [2021] EWCA Civ 1889.

51. The diligence of the parties had identified a first instance High Court decision which bore some factual similarity to the present case, *Nahhas v. Pier House (Cheyne Walk) Management Limited* [1984] 1 EGLR 160, a decision of Mr. Denis Henry QC sitting as a deputy judge of the Queen's Bench Division. The headnote reads:-

> "Claim against flats management company and against firm of surveyors acting as managing agents for negligence resulting in the theft of jewellery, worth £23,250, from plaintiff's leasehold flat - Theft of jewellery by porter, actually a professional thief with 33 convictions and 11 prison sentences - Duties and liabilities of management company and agents - Allegations of negligence related both to the system for dealing with tenants' keys and to recruitment procedure for the employment of porters - Judge rejected the criticisms of the system for dealing with keys, but found negligence proved in relation to the. recruitment procedures - Not enough was done to find out the full details of the past history of the porter, who turned out to have been a professional thief with a bad criminal record, or to check information given by him as to his antecedents - Alternatively, the flats management company were vicariously liable, on the *Lloyd v Grace Smith* principle, for the theft carried out by their servant - Authorities on vicarious liability reviewed - Defence of contributory negligence rejected - Plaintiff's claim not defeated by voluntary payment made by

> insurance brokers – Judgment for £23,250 - A cautionary tale for flats management and agents"

52. At this point the judge, having observed that Senora would not have been able to sue Lowndes for the negligence of the porters because of the terms in Clause 8(c) and (k) of the Flat Lease, [22] above, went on to consider whether the suggested duty of care would have been inconsistent with the underlying contractual scheme. He cited a passage from Lord Goff's opinion in *Henderson v. Merrett* at 195G-196E:-

> "I wish however to add that I strongly suspect that the situation which arises in the present case is most unusual; and that in many cases in which a contractual chain comparable to that in the present case is constructed it may well prove to be inconsistent with an assumption of responsibility which has the effect of, so to speak, short circuiting the contractual structure so put in place by the parties. It cannot therefore be inferred from the present case that other sub-agents will be held directly liable to the agent's principal in tort. Let me take the analogy of the common case of an ordinary building contract, under which main contractors contract with the building owner for the construction of the relevant building, and the main contractor sub-contracts with sub-contractors or suppliers (often nominated by the building owner) for the performance of work or the supply of materials in accordance with standards and subject to terms established in the sub-contract. I put on one side cases in which the sub-contractor causes physical damage to property of the building owner, where the claim does not depend on an assumption of responsibility by the sub-contractor to the building owner; though the sub-contractor may be protected from liability by a contractual exemption clause authorised by the building owner. But if the subcontracted work or materials do not in the result conform to the required standard, it will not ordinarily be open to the building owner to sue the sub-contractor or supplier direct under the *Hedley Byrne* principle, claiming damages from him on the basis that he has been negligent in relation to the performance of his functions. For there is generally no assumption of responsibility by the sub-contractor or supplier direct to the building owner, the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility. This was the conclusion of the Court of Appeal in *Simaan General Contracting Co. v. Pilkington Glass Ltd. (No. 2)* [1988] Q.B. 758. As Bingham L.J. put it, at p. 781:
>
> > 'I do not, however, see any basis on which [the nominated suppliers] could be said to have assumed a direct responsibility for the quality of the goods to [the building owners]: such a responsibility is, I think, inconsistent with the structure of the contract the parties have chosen to make'."

53. The judge then moved to his decisions. He said this about the claim in tort:-

> "65 I consider that significant and important position in law [the conflict between the suggested duty and the conflict with the contractual scheme] as being central to the matters that I need to consider. There are both the general exclusion of liability and the specific exclusion of liability in relation to porters, as set out under those subclauses of the lease, by which the porters are deemed to be agents of Senora, who is the claimant's landlord. The Claimant derives the rights and title from her own contractual arrangements with both the freeholder and Senora and covenants in the sublease, which is enforceable by Senora and not by any sub-undertenant of the licensee or the flat.
>
> 66 The Claimant is Senora's subtenant or tenant and covenants to comply with the terms of the sublease. In the circumstances, I find the Claimant is bound by the deeming provision in the sublease which is in accordance with the decision in *Greer v Kettle* [1938] AC 156, in which Lord Maugham said:
>
> > 'Estoppel by deed is a rule of evidence founded on the principle that a solemn and unambiguous statement or engagement in a deed must be taken as binding between parties and privies and therefore as not admitting any contradictory proof.'
>
> 67 I find, having considered *Hopgood v Brown* [1955] 1 WLR 213 *per* Evershed MR [225], the privies will include anyone who derives their title from the representor, and that the Claimant is therefore one of Senora's privies. It cannot be right, in my judgment, that the Claimant will be placed in a better position to sue the Defendant in tort than her own landlord, who cannot do so. The sub-underlease does set out the covenant to provide porterage services, and it would be wrong for the Defendant to be liable in circumstances in which the Defendant was not willing to assume responsibilities in relation to liabilities that the Claimant seeks now. In those circumstances, I find that the position in *Nahhas* is not applicable to the present case, for the reasons I have set out in relation to the nature of the relationship between the parties, and what, in reality, the position is that the Claimant, sits at the bottom of a contractual structure in which the parties from which she derives her own rights and titles have made specific provision for the nature and scope of the Defendant's liabilities, which means that those parties have expressly agreed and acknowledged that the defendant's covenants in the sublease will be enforceable by Senora but not by any sub-undertenant or licensee of the flat, and that in the circumstances, given the general exclusion of liability under clause 8(c) for both contractual and tortious claims, and the specific exclusion of liability for negligent performance of the porters' duties in clause 8(k), and noting the provision deeming the porters to act as the agents of Senora, that the Claimant is bound by those deeming provisions as one of Senora's privies.

> 68 In those circumstances, I do not find that the Defendant owes a common law duty of care to the Claimant to permit a tortious claim to be brought, which I find would wholly undercut the contractual scheme that was set out under her relationship with Senora and the separate relationship Senora entered into under the lease.
>
> 69 Further or alternatively, I find, if necessary, that the relationship between the Claimant and the Defendant is not sufficiently close one of proximity such that it would be fair, just and reasonable to impose a duty of care upon the Defendant. The Defendant is not the Claimant's landlord. I note that the claim is not being brought against Farebrother, who were the professional managing agents, and also that the porters' employers are FSL, again, who are closer, of course, to the porters themselves, as their actual employer, and the claim is not brought against the porters themselves, and it cannot be contended that the porter is the Defendant's employee.
>
> 70 In those circumstances there is not the necessary nexus, in my judgment, in relation to those intermediate parties being ones, as independent contractors, to whom it would be appropriate to place a duty upon the Defendant, irrespective of the arguments I have already addressed in relation to the contractual scheme as set out above and the fact that the Claimant, in my judgment, should not be placed in a better position to sue in tort than her own landlord. In those circumstances, I find there is no arguable basis that the Defendant made representations or statements assuming a duty of care towards the Claimant."

54. The judge then also dismissed the claim in bailment giving reasons for doing so.

The Grounds of Appeal

55. The appellant's grounds were settled by Mr. Mitchell in these terms:-

> "1. The learned Deputy Judge erred in law in holding that the Appellant, qua sub-undertenant pursuant to an assured shorthold tenancy, was as a matter of law bound by clauses in a sub-lease concluded between her landlord (qua tenant) and the Respondent (qua landlord) ("the Sub-Lease") but to which the Appellant was not a party.
>
> 2. The learned Deputy judge erred in law in holding that the Appellant was the privy of her landlord such that she had no better rights against the Defendant than her own landlord had against the Respondent under the Sub-Lease
>
> 3. The learned Deputy Judge erred in law in holding that the Respondent owed the Appellant no duty of care at common law to the Appellant.

> 4. The learned Deputy Judge erred in law in deciding that the porters of the block of flats in which the flat demised to the Appellant was situated were not arguably agents of the Respondent for the purposes of the law of bailment.
>
> 5. The learned Deputy Judge erred in law in determining the question whether the Respondent owed the Appellant a duty of care before being in possession of the full facts as would have been present at trial."

The decision on permission

56. Popplewell LJ gave permission to appeal on grounds 1, 2, 3, and 5 and refused permission on ground 4. He said this:-

> "The Judge gave three reasons for rejecting the existence of a duty of care in tort.
>
> The first at [64]-[65] is that the existence of a duty was inconsistent with the contractual structure of the leases/subleases, relying on *Henderson v Merrett, Pacific Associates v Baxter* and *Architype Projects*. The relevant principle is that where there is a chain of contracts, a voluntary assumption of responsibility will not be implied where such implication would be inconsistent with the mutual intention of the participants in the chain that claims for compensation between them should only be advanced sequentially as between direct contracting parties. This has typically been applied in the construction industry, which was the example given by Lord Goff in *Henderson v Merrett*. *Pacific Associates* and *Architype* were also both construction cases. The principle is not so obviously applicable to the contractual structure in the present case, where a porterage service involving custody of spare keys was made available to the tenants as occupiers, and that was a service in fact provided by the defendant performing a building management role, notwithstanding that under the terms of its own lease there was no obligation to do so. It is arguable that the contractual structure did not prevent an assumption of responsibility, which is the subject matter of ground 3.
>
> The Judge's second reason, at [66], was that because the claimant agreed by clause 10 of her 2018 tenancy to perform Senora's covenants under the 1984 sublease, she was estopped by deed from escaping the effect of the exclusions in clause 8(c) and (k) of that sublease, even though not a party to it. That is at least arguably mistaken for the reasons advanced under ground 1.
>
> The Judge's third reason, at [67], was that the Claimant was bound by clauses 8(c) and (k) of the 1984 sub-lease as Senora's privy. That is arguably wrong for the reasons advanced under ground 2.

> Ground 5 seeks to argue that a summary decision on duty of care should have awaited findings of fact at trial. I am doubtful whether this is a sufficiently arguable independent ground but I have given permission because it is to some extent bound up with the arguments on grounds 1-3.
>
> I can see no arguable merit in Ground 4 which concerns the claim in bailment. The bailment of the spare keys was to the porters into whose custody they were given. Absent any viable claim for vicarious liability, the fact that for the purposes of the Defendant fulfilling its obligations under the head lease the porters were the Defendant's sub-contractors, and were acting for those purposes as the Defendant's sub agents, cannot impose a liability in bailment. The spare keys were not bailed to the Defendant."

Discussion

57. In my judgment the judge was right to dismiss the claim in tort, but I would not adopt all of his reasoning. The very complex arrangements made between the freeholder, Lowndes, and the sub-tenants holding long sub-leases under the Flat Leases were central to the arguments advanced before him and influenced his reasoning, but they are not central to the proper analysis of the position in tort which is "the general law, out of which the parties can, if they wish, contract". They were instead the context in which the duty of care is said to have arisen.

58. This does not mean that the judge was wrong in the part of his reasoning where I have doubts, only that it is sufficiently arguable that he was that summary judgment should not have been given for those reasons. I will first explain why, in my judgment, summary judgment should have been granted in favour of Lowndes and then explain more briefly why I am not persuaded by the judge's chain of reasoning.

Why Lowndes was entitled to summary judgment on the claim in tort

59. For present purposes it is appropriate to assume that the porters were negligent, in that they owed the appellant a duty to take care of her keys and to comply with her

instructions before giving them to anyone else, and breached that duty. On this assumption, they would be liable to the appellant for such loss as she has sustained, and their employers would be vicariously liable.

60. It is not necessary in these proceedings to decide whether Farebrother owes a duty of care directly to the occupants of the flats, but such a claim would appear to be arguable if, as seems likely, *Nahhas* is correctly decided. If so, they may also be directly liable if the loss was caused by a failure by them to select or supervise the porters or to put in place suitable management systems for the protection of the Flats from unlawful entry and burglary.

61. It is conceded that Lowndes is not vicariously liable for the negligence of the porters, and no claim has ever been advanced that it may be vicariously liable for any breach by Farebrother of any direct duty of care it may owe to the occupiers of the flats. Neither is it suggested that Lowndes owes the appellant any non-delegable duty. It is helpful to reflect on the consequences of that position. Farebrother was very clearly an independent contractor and not an employee of Lowndes. Since 2000 the porters have been employees of Farebrother and not Lowndes. There are no facts pleaded which show any level of control by Lowndes over what the porters did or how they did it. Lowndes contracts with Farebrother for the provision of services, and collects the cost of those services by way of service charge and then pays for them. It is a limited liability company. Each of the sub-tenants is required (under clause 8(j) of the Flat Leases) to hold one ordinary "A" share in Lowndes for each flat owned. Some of Lowndes' "A" shares and all of its "B" shares are held by the freeholder. Apart from its execution of contracts, including the management agreements, there is no evidence that Lowndes ever did anything. It may be inferred that it was involved in the annual

certification of the service charge and in levying it, but that is as far as the evidence goes. There is certainly no evidence that it ever made any representations to the appellant, or offered to do anything on her behalf.

62. In recent years the nature of the relationship between a tortfeasor and a person who is said to be vicariously liable for the torts committed has been widened to include a relationship which is "akin to employment". However, Lady Hale JSC said in *Barclays Bank plc v. Various Claimants* [2020] UKSC 13; [2020] AC 973 at [24]:-

> "… there is nothing … to suggest that the classic distinction between employment and relationships akin or analogous to employment, on the one hand, and the relationship with an independent contractor, on the other hand, has been eroded."

63. At [27] Lady Hale expressed her conclusion in these terms:-

> "The question therefore is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant. In doubtful cases, the five 'incidents' identified by Lord Phillips may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. Although they were enunciated in the context of non-commercial enterprises, they may be relevant in deciding whether workers who may be technically self-employed or agency workers are effectively part and parcel of the employer's business. But the key, as it was in *Christian Brothers* [2013] 2 AC 1, *Cox* [2016] AC 660 and *Armes* [2018] AC 355, will usually lie in understanding the details of the relationship. Where it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents."

64. Lord Phillips JSC in *Various Claimants v. Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 had explained the policy behind vicarious liability, saying:-

> "…the policy objective underlying vicarious liability ….[namely] to ensure in so far as it is fair, just and reasonable, that liability for tortious wrong is borne by a defendant with the means to compensate the victim." See [34].

65. He then, at [35], set out the five "incidents" to be weighed when determining whether it is fair just and reasonable to impose a vicarious liability in a particular case. The concession that vicarious liability cannot be established against Lowndes means that it is accepted that, having regard to these considerations, it is not fair just and reasonable to impose such a liability on Lowndes for the negligence of the porters. That is because the relationship between the porters and their employers on the one hand and Lowndes on the other is not of such a kind as to justify imposing liability on Lowndes for their tortious acts or omissions.

66. It may not be entirely easy to reconcile the application of the "fair just and reasonable" test in the context of vicarious liability with the proper approach to it when determining whether the law imposes a duty of care at all, explained by Lord Reed JSC in *Robinson v. Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] AC 736 at [21] and [27], and again in *Poole Borough Council* cited at [41] above. Perhaps the policy on which vicarious liability rests depends on concepts of fairness, justice and reason. Holt C.J. in *Hern v Nichols* (1708) 1 Salk. 289 at 289; 91 E.R. 256 at 256 explained it by reference to reason:

> "for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in a deceiver should be a loser, than a stranger."

67. McLachlan J. in *Bazley v Curry* (1999) 174 D.L.R. (4th) 45 at 60 emphasises fairness and justice:

> "The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organisation that creates the enterprise and hence the risk should bear the loss. This accords with the notion that it is right and just that the person who creates a risk bear the loss when the risk ripens into harm."

68. Even given the modern approach to the relevance of the "fair just and reasonable" test in the recognition of duties in novel situations, it would be a novelty to find a liability being imposed on an innocent party when it was *not* fair just and reasonable that it should be.

69. What other form of liability could there be? Reliance was placed by Mr. Mitchell on a passage in Bowstead on Agency 23rd Edition at 8-176. The concept of agency features prominently in the Amended Particulars of Claim, see [28] and [32]-[34] above. The references there are to "ostensible authority" and "agents". The passage in Bowstead begins with a statement of the usual view:-

> "The primary application of the principles of agency is in the fields of contract, dispositions of property and the law of restitution. The law of tort, in general, uses different techniques. Anyone considering the application of agency principles in the law of tort is initially faced with the fact that when that branch of the law deals with liability of one person for the acts of another, the question normally turns not on the authority of the person who committed the tort, but on whether the tortfeasor was the servant (or employee) of the person sought to be held liable, or an independent contractor. An agent may be either (or indeed, in some situations, such as the case of a gratuitous agent, neither). A very rough summary of the usual view would be to say that people are liable for torts committed by another which they specifically instigate or authorise, or which are committed by their servants acting within the course of employment, or which involve a breach of a non-delegable duty owed by them, though the acts leading to such breach were actually performed by another (usually an independent contractor)."

70. This may be a "very rough summary" but it does capture the classic ways in which a party may be held liable for the torts of someone else. The next paragraph says this:-

> "However, the law of agency appears to be important in the operation of some torts, especially those involving liability for statements, including deceit, negligent misstatement and, more doubtfully, defamation. It may also be relevant to tortious claims for negligent performance of services, where, as with negligent misstatement, the underlying explanation is, arguably anyway, the near-contractual one of assumption of responsibility."

71. This is why the concept of assumption of responsibility has been prominent in argument in this case, although it is not mentioned in the Amended Particulars of Claim.

72. The recognition of a duty of care which would impose liability on Lowndes for the negligence of an agent where there is no vicarious liability because the agent was an independent contractor would be novel. Bowstead at 8-177 formulates a set of rules, called "Article 90" covering the situation.

> **"Liability of Principal for Torts Committed By Agent**
>
> (1) In general, if an agent is an employee or director of the principal, the principal is liable for loss, damage or injury caused by the wrongful act of the agent when acting in the course of employment. Partners are similarly liable for wrongful acts of one another.
>
> (2) A principal is liable in tort for loss or injury caused by an agent, whether or not an employee, and if not an employee, whether or not the agent can be called an independent contractor, in the following cases:
>
> (a) if the wrongful act was specifically instigated, authorised or ratified by the principal.
>
> (b) (*semble*) in the case of a statement made in the course of representing the principal within the actual or apparent authority of the agent: and for such a statement the principal may be liable notwithstanding that it was made for the benefit of the agent alone and not for that of the principal.
>
> (c) where the principal can be taken to have assumed a responsibility for the actions of the agent.
>
> (3) In some circumstances, the owner of a business or organisation may owe duties of care, usually in relation to the personal safety and wellbeing of others, that apply whether or not the owner performs the services personally or through employees, or by engaging independent contractors. Such duties are termed "non-delegable". These duties do not necessarily invoke agency concepts.
>
> (4) Where principal and agent are both liable for a wrongful act committed by the agent they are joint tortfeasors.

> (5) In this Article, save where the context requires, *act* includes "omission"."

73. Rule 2(c) deals with assumption of responsibility. The other rules are not relied on in this case, and it is to 8-185 that the reader is directed for further elucidation. That passage does not offer any thoughts about what an assumption of responsibility for wrongs committed by an agent might actually be where:-

i) It is insufficient to attract any direct liability either in contract or tort to the person said to be assuming responsibility;

ii) The case does not relate to negligent misrepresentation; and

iii) The tortfeasor is an independent contractor supplying services.

74. The analysis of the relevant authorities in *Benyatov v. Credit Suisse (Securities) Europe Limited* [2023] EWCA Civ 140; [2023] ICR 534 at [41]-[56] by Underhill LJ, with whom Bean and Singh LJJ agreed, is, in my judgment, very helpful in explaining the true role of the concept of an assumption of responsibility. In particular, the court considered the apparently expansive observations about it in *NRAM Ltd v. Steel* [2018] UKSC 13; [2018] 1 WLR 1190, and *Playboy Club London Ltd v. Banca Nationale del Lavoro SpA* [2018] UKSC 43; [2018] 1 WLR 4041. These should be read as being limited to cases of negligent misrepresentation, see [45], and [49]-[51]. Underhill LJ expressed his conclusion following his analysis as follows:-

> "55 In the light of those authorities it seems to me that the position is as follows. The correct course for a court which has to decide whether a duty of care should be recognised in a novel situation is to take the incremental approach endorsed in *Robinson*. That will in principle involve consideration of the three '*Caparo* factors' to the extent that they are in issue. It may be a useful analytical tool, particularly in considering the factors of proximity and/or 'fairness, justice and reasonableness', to ask whether the defendant can be regarded as having assumed a responsibility to take care to protect the claimant

> against a loss of the kind claimed; but its usefulness will depend on the issues in the particular case."

75. The concept of assumption of responsibility remains an important one, if one which sometimes tends towards opacity, and which can also be used to mean different things. Professor Steele in *The Regulatory Potential of Tort Law* in *Taking Law Seriously, Essays in Honour of Peter Cane* (2021) ed. Goudkamp, Lunney and McDonald, at p.225 says this when assessing the impact of *Robinson* and *Poole*:-

> "The differentiation between actions causing harm and 'failures to benefit', and the identification of 'assumptions of responsibility' as a guiding idea for exceptional cases, are designed to be the focus of future deliberation and to give a sense of 'coherence'. While the first of these appears to be simplifying, carving out some 'easy' cases which lie on either side of the line – the second remains a deeply evasive notion. Some of the reasons for this are related to the wide range of the relationships which are dealt with by the law of tort. 'Assumption of responsibility' is a fragile notion, but it draws consideration to the relationship in hand."

76. It is at this point in the analysis that it is necessary to consider the contractual context. This is because there is no act or representation by Lowndes which is relied upon as constituting or demonstrating an assumption of responsibility. This is not merely a matter of pleading. The parties have exchanged witness statements for the purposes of the summary judgment application, and there is no evidence of anything other than the contractual scheme which might justify a court concluding that Lowndes had assumed responsibility to the appellant for the negligent acts of the porters. Therefore, the assumption of responsibility either arises out of the contracts or does not exist.

77. The following components of the contractual scheme seem to me to be relevant.

i) Lowndes is required by the Head Lease to fulfil the relevant functions of the lessor under the Flat Lease, and to save the lessor under the Flat Lease

harmless in respect of the same. It is also required to employ Farebrother to provide management services. There is provision to appoint another firm of surveyors with the approval of the freeholder who, therefore controls and dictates the choice of contractor and requires Lowndes to provide those services by means of a contractor.

ii) The management services which were to be so contracted out were those services identified in the Third Schedule to the Flat Lease. This schedule identified the services the cost of which could be included in the service charge. It included the cost of employing porters.

iii) As from 2000 the porters were no longer employed by Lowndes but were employed by Farebrother. Farebrother agreed to engage such porterage as shall be necessary for the performance by the agent of its obligations and to supervise them in the performance of their duties.

iv) As between Lowndes and Senora it was agreed that Senora could not sue Lowndes for any negligence on the part of the porters. Any porters providing any service to Senora were deemed to be acting on its behalf, rather than as agents for Lowndes. This provision came into existence at a time when Lowndes did employ the porters. By the date with which we are concerned part of it may arguably have become redundant since Lowndes would not in any event be liable to Senora for the negligent acts of an employee of an independent contractor. Perhaps the reservation of the three obligations or liabilities to Lowndes identified at [26] above may continue to be of potential significance.

v) Senora did not assign its interest in Flat 9 but granted the appellant a much more limited interest under the assured shorthold tenancy. That required her to perform and observe Senora's covenants under the Flat Lease. The agreements in Clause 8 of the Flat Lease are not tenant's covenants.

vi) Lowndes entered into no contract with the appellant of any kind.

78. In concluding its contractual arrangements Lowndes therefore went to some trouble to ensure that it did not assume any responsibility for the adequacy of the porterage services. In my judgment it is simply not possible to read these documents, taken together, as giving rise to any such liability to the appellant.

79. It is perhaps surprising to see a judge applying the three-stage test which was thought to be mandated by the House of Lords in *Caparo Industries plc v. Dickman* [1990] 2 AC 605 without reference to *Robinson* and *Poole Borough Council.* Because he decided the case on the basis of the suggested inconsistency with the contractual scheme and estoppel by deed, coming to the principled tort analysis only in the alternative, the judge did not squarely address the appellant's case in this regard. He held that there was insufficient proximity between the parties to render it fair just and reasonable to impose the duty. In respect of assumption of responsibility, he said that there was no "arguable basis that the Defendant made representations or statements assuming a duty of care towards the Claimant." He did not start, as he should have done, by seeking any established category of liability which was analogous to the present alleged duty to determine whether that duty could now be recognised by incremental reasoning. Although he had cited a number of authorities about assumption of responsibility earlier in the judgment, he did not separately address that in his conclusions. The appellant did not suggest that Lowndes had ever "made

representations or statements assuming a duty of care". The judge did make a reference to proximity and assumption of responsibility has been described as an "allegory of proximity", see the *Playboy Club London Ltd* case at [13] in the judgment of Lord Sumption JSC. To that extent, he did have in mind the importance of examining the relationship between the parties when evaluating a claim based on assumption of responsibility.

80. Although we have been shown a large number of authorities, we have not seen any in which a duty of care was imposed on a company in the position of Lowndes in this case. Adopting the incremental approach to the recognition of duties of care in novel situations, there is no material here to justify such a step.

81. There are, of course, a number of authorities which would support a duty of care on the porters. The helpful analysis of Coulson LJ in *Rushbond plc v. JS Design Partnership LLP* [2021] EWCA Civ 1889; [2022] P.N.L.R. 9 is such a case, and contains a thorough examination of earlier authorities in which courts have dealt with the attribution of a duty of care to a person who has engaged in conduct which causes another to sustain damage to their property by unlawful acts of third parties. In our case the liability of the porters is not in issue.

82. *John Innes Foundation v. Vertiv Infrastructure Ltd* [2020] EWHC 19 was a first instance decision in a case where claimants whose property had been damaged by fire sought to attribute a duty of care to a negligent contractor who failed to maintain the emergency lighting system properly. The claimants had no contractual relationship with the contractor and their claim failed. They did not make a claim against the managing agents who had retained the contractor and this decision is also of no relevance to the present case where a claim of that type is advanced.

83. *Nahhas v. Pier House (Cheyne Walk) Management Limited* is another first instance decision cited by the judge, see [51] above. This contradicts the existence of the suggested duty of Lowndes in this case, while accepting that such a claim might be advanced against managing agents who negligently appointed an evidently dishonest porter. Clause 8(c) of the Flat Lease contained a warranty that "reasonable care will be taken ….in the engagement of servants caretakers other employees or contractors of [Lowndes]." This case does not involve any allegation of a breach of such a duty and *Nahhas* militates against the imposition of the duty which is alleged.

84. Accordingly, a review of the decisions which have been cited does not suggest that a duty should be imposed on Lowndes by incremental reasoning from other decided cases. Assumption of responsibility, even if it may be a separate basis on which a duty may rest, is not sustainable on the facts, and this militates against the imposition of the suggested duty applying the approach in *Robinson* as explained in *Benyatov* at [55], set out at [74] above.

85. I would therefore dismiss ground 3, and with it this appeal. I do not think it necessary to deal separately with ground 5. This is a case where it was reasonable for the judge to entertain and decide a summary judgment application. It is highly unlikely that facts justifying an assumption of responsibility by Lowndes to the appellant could emerge.

86. I would not uphold the judge's decision on the basis of the suggested defects in the pleading of the appellant's case. There is merit in those suggestions and the pleading is not an entirely satisfactory document, but if that were the only problem the remedy would be a direction that the appellant further amend her pleading, together with an appropriate order for costs.

Duty inconsistent with contract as a separate reason for rejecting it

87. I would not have granted summary judgment on the separate basis that a duty is legally unsustainable because it would undermine or negate the contractual arrangements in this case. The judge rehearsed that submission and referred to the authorities in support of it, but it is not clear that it played a separate part in his decision, which appears mainly to depend upon estoppel and, in the alternative, his application of the test he identified as:-

> "….the three requirements in the well-known case of *Caparo Industries plc v Dickman* [1990] 2 AC 605, namely reasonable foreseeability of loss, sufficient in relation to proximity and fairness of imposing a duty of care or, alternatively, a claim on an assumption of responsibility by the defendant to the claimant."

88. I agree with Popplewell LJ that care is required in transposing a consideration which is obviously a relevant feature of building contract litigation into a principle of law which is of general application. That area of work involves complex contractual structures often using industry standard terms of contract. They also very commonly involve the provision of professional advice and services. The parties often reach agreements about liability for losses which are fully incorporated into the contractual scheme and although it is common to find concurrent duties in contract and tort, it would be much less common to find a duty in tort which was inconsistent with the contractual scheme.

Estoppel

89. I would not have granted summary judgment on the basis of this argument based on *Taylor v. Needham* and *Hopgood v. Brown*, see [46] above. The terms of the Flat Lease by which the appellant was held to be bound were 8(c) and (k), see [22] above. These were neither tenant's covenants, nor terms affecting the extent of Senora's

interest in the land. The appellant was not an assignee of the Flat Lease. They were provisions designed to prevent Senora from recovering damages from Lowndes in the event that it suffered loss caused by negligence by the porters who were, at the time of the Flat Lease, employees of Lowndes. It is strongly arguable that the way in which the superior landlords chose to allocate liability for losses as between themselves does not create any estoppel binding a stranger to those arrangements merely because she is granted a valid tenancy by one of them.

Conclusion

90. I would therefore accept grounds 1 and 2 of the appeal, but would reject ground 3 and thus dismiss the appeal.

Nugee LJ

91. I agree.

Underhill LJ:

92. I agree that this appeal should be dismissed for the reasons given by Edis LJ in his comprehensive judgment. I respectfully agree with his observation at para. 57 above that the complex web of contractual relationships which form the background to the claim may have tended to obscure the correct analysis, which seems to me ultimately straightforward and not to involve any novel issues. It was Lowndes' contractual responsibility to engage managing agents for the building, who would provide such porterage services as were considered appropriate. The managing agents engaged pursuant to that obligation were Farebrother, and they duly supplied porterage services as envisaged. It was not Lowndes' contractual responsibility to provide those services itself. Since Farebrother were plainly independent contractors, Lowndes

could not, on established principles, be vicariously liable for any negligence on their part. That seems to me to be the end of the matter. As Lady Hale emphasised in the passage from her judgment in the *Barclays Bank* case quoted by Edis LJ at para. 61, recent developments in the law of vicarious liability do not undermine the "classic" distinction between liability for the acts of an employee (or someone in an analogous relationship) and liability for the acts of an independent contractor. I see no justification for the Appellant's attempt in this case to sidestep that well-established distinction by seeking (quite contrary to the message of *Robinson*) to apply the threefold test in *Caparo* or by relying on a supposed assumption of responsibility for the careful provision of services which it was Farebrother's job to provide.