Neutral Citation Number: [2021] EWCA Civ 1352

Case No: B3/2020/0903

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
MR JUSTICE GRIFFITHS
[2020] EWHC 595 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 September 2021

Before:

LADY JUSTICE MACUR
LORD JUSTICE STUART-SMITH
and
SIR STEPHEN RICHARDS

- -

Between:

BLACKPOOL FOOTBALL CLUB LIMITED

Appellant

- and -

DSN

Respondent

- -
- -

Michael Kent QC and Nick Fewtrell (instructed by **Keoghs LLP**) for the **Appellant**
James Counsell QC and Benjamin Bradley (instructed by **Bolt Burdon Kemp**) for the **Respondent**

Hearing dates: 21, 22 July 2021

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Approved Judgment

Lord Justice Stuart-Smith

Introduction

1. This judgment refers to people whose names have been anonymised and who allege that they were the victims of sexual offences committed by Mr Frank Roper. The provisions of the Sexual Offences (Amendment) Act 1992 apply to those offences. No matter relating to a victim whose identity has been anonymised in this judgment shall, during their lifetime, be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

2. In June 1987, while on a footballing tour for young boys to New Zealand which also visited Thailand on the way home, the Claimant was sexually abused by Mr Roper, who was in charge of the tour and was the only adult leading the trip. Mr Roper was a convicted sex offender, having convictions for indecent assaults on males contrary to s. 15 of the Sexual Offences Act 1956 recorded in 1960, 1961, 1965 and 1984.

3. The Claimant was 13 years old when he was abused by Mr Roper. These proceedings were issued on 19 January 2018, over thirty years later. After a trial lasting four days in January 2020 the trial Judge, Griffiths J, delivered a detailed and carefully crafted judgment on 13 March 2020 which led to an order made on 20 March 2020. By his judgment the Judge held that the applicable primary limitation period should be disapplied and the action be permitted to proceed pursuant to the discretion conferred on the Judge by s. 33 of the Limitation Act 1980; and he held that the Defendant, Blackpool Football Club Ltd ["Blackpool FC"], was vicariously liable for the acts of Mr Roper when he abused the Claimant.

4. Blackpool FC appeals against those rulings. Simler LJ gave permission for Blackpool FC to pursue four grounds of appeal, others being refused. Two of the grounds (Grounds 2 and 4) challenge the Judge's ruling on limitation while the other two (Grounds 7 and 8) challenge the Judge's conclusion on vicarious liability. The grounds are:

    i) Ground 2: the decision that section 11 of the Limitation Act 1980 should not apply to this action was founded on a perverse conclusion that there was no real possibility of significant prejudice to the Defendant from the delay.

    ii) Ground 4: the learned judge misdirected himself as to the significance of the evidence said to be consistent in supporting the Claimant's case on vicarious liability.

    iii) Ground 7: the learned judge was wrong on the facts and in law to hold that Frank Roper was at any material time in a relationship with the Defendant that was capable of imposing vicarious liability on the Defendant for his torts.

    iv) Ground 8: the learned judge was wrong in law and in fact to hold that there was a sufficient connection between the Claimant's assault and any relationship between Frank Roper and the Defendant.

    I propose to reverse the order and to deal with vicarious liability before limitation.

5. Upon the hearing of the appeal, Blackpool FC was represented by Mr Michael Kent QC and Mr Nicholas Fewtrell; the Claimant was represented by Mr James Counsell QC and Mr Benjamin Bradley. I am grateful to all Counsel and those who have supported them in their various legal teams for the clarity of their submissions.

The factual and procedural background

6. Much of the background is uncontroversial. What follows is largely drawn from the judgment. I understand it to be uncontroversial save where I indicate to the contrary.

7. Blackpool FC is and has at all material times been a professional football club. At the end of the 1986/1987 season it was placed 9th in the third division, that being before the institution of the Premier League and at a time when English professional football was headed by four divisions, from the first to the fourth. Its ground was at Bloomfield Road and its club colours were tangerine. Opposite its ground it ran a social club called the Tangerine Club. Blackpool is in the middle of the Fylde coast of Lancashire, which stretches over the 13 miles from Fleetwood in the north to Lytham St Annes in the south.

8. The manager of Blackpool FC between 1982 and 1989 was Mr Sam Ellis. The Chairman between 1981 and 1990 was Mr Kenneth Chadwick. The club and company secretary between 1980 and 1988/1989 was Mr David Johnson. At the relevant time Blackpool FC's financial situation was dire and, as a result it could only afford to employ a minimum number of staff. Non-playing staff did not have formal contracts of employment, though some were undoubtedly in an employer/employee relationship.

9. Mr Ellis was ultimately responsible for all footballing matters at Blackpool FC. The youth team set up (to which I refer below) was run by Mr Jack Chapman, who was employed by the club as Head of Youth Development throughout the 1980s. Anyone who assisted Mr Chapman in that role did so on a purely voluntary basis. As a result, the club was dependent upon volunteers for functions which might, in a bigger or better-funded club, have been performed by paid employees. Among such volunteers was Mr William Hurst who worked for Blackpool FC from 1978 until 1990 as a part time youth scout, physio and coach. He was not paid, had no contract or formal terms, and was not an employee. He fitted what he did for the club around his full-time job for the Ambulance Service. The Judge described what he did as "part of the essential running of a professional football club in the 1980s and of Blackpool FC in particular."

10. The role of recruitment is central to this appeal and I therefore set out in full the Judge's [95]:

> "The recruitment of talent was important. It was important because Blackpool FC needed players; it was important because Blackpool FC, like any club, needed the best players it could get in order to perform as competitively as it could in professional football; and it was important because it was competing for players, even locally, with clubs which were more successful both in footballing terms and financially, both of which placed handicaps on Blackpool FC in the market for players. It was also, in this club and at this time, important because Blackpool FC had been financially rescued by two particularly lucrative transfer

> deals. In March 1987 (very shortly before the 1987 New Zealand trip) it sold 22-year old Paul Stewart to Manchester City for a record-breaking £200,000. In 1983 it had sold 19-year old David Bardsley to Watford for £150,000. The evidence of the Manager, Mr Ellis, was "When we sold those two players it was probably the saving of the club". The Chairman, Mr Chadwick, agreed that it was "no exaggeration" that these two sales "saved the Club." Both players had been introduced to the Club by Roper. Identifying, recruiting and retaining the allegiance of promising young footballers was, on the evidence before me, part of the core business of the club. Apart from performance on the pitch by the first team, it appears to have been more important than anything else, and it also contributed to performance on the pitch to the extent that it provided the best players. (Both Stewart and Bardsley were first-team players before they were sold.) But the evidence also shows that it could not be, and was not, done by Mr Chapman alone. He had to have help from the work of others. And, because of the Club's "dire" financial situation, that work had to be done by unpaid volunteers."

I shall consider the significance of recruitment being part of the "core business of the club" when addressing the issue of vicarious liability. For present purposes the Judge's general description is unchallenged.

11. The process of recruitment had to take into account the Football League's rules to which professional clubs were subject. At the age of 11, boys could attend a licensed "Centre of Excellence" run by a club (in this case Blackpool FC) with the approval of the Football Association "for training and coaching". At the age of 14, the club could register the boy as an "Associated Schoolboy", commonly referred to as "signing schoolboy forms". The rules provided that "Boys under the age of 14 years are not eligible to become Associated Schoolboys and must not attend a Club for regular training or coaching". Once signed as an Associated Schoolboy, the boy was exclusive to the club and was not free to join another club without consent or going through an appeals process. Other clubs were banned from direct or indirect approaches to an Associated Schoolboy. When an Associated Schoolboy completed his full-time education, his club had first refusal on him becoming a Trainee or a Contract Player and no other club could sign him without paying his club a transfer fee. Trainees were sometimes referred to as apprentices and would be 16- or 17-year-olds who were not in full time education. Boys could be signed as a professional Contract Player from the age of 17. A club would have first refusal on whether to sign its Trainees as Contract Players. As the Judge put it, although a club could start its interest in a boy earlier, it could not lock them in until they were 14 and able to sign schoolboy forms.

12. The evidence, which the Judge accepted, was that neither the Chairman nor the Company Secretary were directly involved with the process of recruiting young players or knew how it operated. He appears to have accepted that Mr Ellis, as manager, delegated the youth footballing side to Mr Chapman and gave him "quite a free rein". It was not clear when the Blackpool School of Excellence first came into being. Mr Ellis did not remember its existence and evidence was given that it did not exist in the

early 1980s. It must therefore have come into existence between the early 1980s and November 1985 when the Claimant was registered with it.

13. Mr Roper had and ran a sports clothing shop called "Nova Sports and Leisure" in Lytham Road in Blackpool. He also acted as an unpaid "scout" for Blackpool FC. There was evidence that he mainly covered the Stockport/South Manchester area while Mr Hurst operated more locally in the Blackpool and Fylde area. The term "scout" has no defined meaning other than the very general implication that he would try to find talented players and put them in Blackpool FC's way. It will be necessary to examine Mr Roper's relationship with Blackpool FC in detail later in this judgment. For present purposes it is sufficient to record that he ran his own youth football teams. There were two of them, both called "Nova Juniors". The first in time operated in the Stockport area and came to an end before the 1987 New Zealand trip, probably because a generation of young players had worked their way through and had outgrown youth football. It played in a local competitive league. Mr Roper started the second Nova Juniors team after the return from the 1987 trip. It was the Claimant's evidence that the second Nova Juniors team operated in the Blackpool area. The Judge described Mr Roper's youth side as being "informally associated" with Blackpool FC. For present purposes it is sufficient to record that, while Nova Juniors was widely regarded as a "feeder" team for Blackpool FC (that being another term that has no defined meaning), boys who played for Nova Juniors could set their sights on and join other clubs – and some did so. The same was true of boys who played for other "feeder" teams. The Judge's general description was that Mr Roper had "a particular role in spotting promising players below the minimum schoolboy signing age of 14, taking them under his wing, coaching and watching them, particularly at … "Nova Juniors", and encouraging them to form an allegiance to Blackpool FC before the time came when they might (if good enough) be formally signed up."

14. The Claimant was born in 1974. He went to secondary school in September 1985. On 11 November 1985 he was registered with Blackpool FC's School of Excellence for the 1985-86 season. While attending the Blackpool FC School of Excellence for training and coaching, he played for his school teams, a local YMCA team, and (in 1987) for the Lancashire Boys' Club Under 14 team. His evidence was that his parents would take him to training at the Blackpool FC School of Excellence and that they would train at Blackpool FC's training ground for approximately an hour on each occasion. Putting all his footballing commitments together he would be training between two and as much as seven nights a week.

15. The 1987 trip was not the first that Mr Roper had organised but was the first on which the Claimant had gone. Previous trips organised by Mr Roper had been to the United States, Thailand and New Zealand. There had been about 8 in all before the 1987 trip. The 1987 trip was not billed as a Blackpool FC trip. A contemporaneous New Zealand newspaper article referred to "Frank Roper and his squad of youngsters from Blackpool"; according to the Claimant they were known as a Blackpool representative side from England and that was how they referred to themselves. A British Airways travel docket referred to "Mr Frank Roper's Football Tour" and a tour group photograph showed the boys wearing Everton colours. The Claimant said that they also wore England white kit at times: but there was no tangerine strip on the tour. Although it was the Claimant's evidence that Mr Roper organised the trip for the boys playing in the Blackpool School of Excellence, it is now accepted that, apart from the Claimant,

only one or possibly two of the boys who went had been at the Blackpool School of Excellence – on Blackpool FC's case, the Claimant was the only one. Four Blackpool FC apprentices went on the trip to help Mr Roper, but it was out of season for them. They had all previously played for Nova Juniors. Subject to a financial contribution of £500 from Blackpool FC, Mr Roper carried the entire cost of the tour, estimated to be in the region of £25,000 or rather more. There is no evidence that Blackpool FC as such had any involvement in the planning, running, administration or financing of the trip other than the contribution of £500. It is plain that, although Mr Ellis attended various meetings in advance of the tour, he did so in his role as a parent of one of the boys who was to be on the trip and not in his role as manager of Blackpool. That does not detract from the fact that his influence as a parent was likely to be (and, on the evidence, was) increased by the fact that he was manager of the local professional football club; but that fact does not convert what he said into endorsement by Blackpool FC. Subject only to the £500, there is no evidence that Blackpool FC as such endorsed (still less adopted) the 1987 tour, any more than it had Mr Roper's previous tours.

16. The trip started in New Zealand on 1 June 1987 and continued to 19 June, when it proceeded to Bangkok. The party remained in Thailand until 30 June 1987, when it returned to England. The Judge found, and it is now accepted, that Mr Roper sexually abused the Claimant during the New Zealand leg of the tour. He provided the Claimant's account, which he accepted "without qualification or reservation" at [75]-[76] of the judgment. It is not necessary to repeat it here. It was, the Judge accepted, a terrifying experience with lasting consequences.

17. Apart from rehearsing the Claimant's evidence about his personal dealings with Mr Roper when in Thailand (which he accepted) the Judge dealt lightly with what the tour party did on that leg of the trip. He recorded the evidence of one witness (Mark Bradshaw, one of the Blackpool FC apprentices) who remembered Mr Roper "doing business with sportswear manufacturers during the Thailand stage of the trip …"; and that "the boys were allowed to bring back Lacoste labels which they sold on their own account when they were back at school in England." The witness had also said that the result of Mr Roper's business was that he would "bring back a massive container of sports clothing back with him from Thailand. Once in … England, I believe [Mr] Roper would then take these clothes to his warehouse …": the clear implication of this evidence was that either the or a primary purpose of the Thailand leg of the trip was for Mr Roper to recoup his outlay by purchasing counterfeit sports goods which he would then sell in England.

18. Mark Bradshaw also said that he went on three international trips with Mr Roper "as part of Nova Juniors", one being to America and the other two to New Zealand. On each New Zealand trip they had stopped off in Thailand so that Mr Roper could do business. This was consistent with the oral evidence of another witness (CFS) who had been on an earlier trip to America when Mr Roper had gone to the border of Mexico and bought "skips" of goods, which he then imported into England. That trip had been in 1980, when CFS was only 10 ½, with just two other boys of similar age, ostensibly "to train". Further corroboration that this was how Mr Roper operated came from Mr Ellis, who knew that Mr Roper would stop off in Thailand and bring gear back from the trips. Mr Hurst gave evidence to like effect.

19. After the tour, the Claimant stopped going to the Blackpool FC Centre of Excellence. Mr Roper asked him to join his new Nova Juniors team but he refused. He went from

school to university, graduating in 1995. In 1997 he began his relationship with the person who is now his wife. He was then 23 years old. They were married in 2002 and have 3 children.

20. The primary limitation period expired in 1995, three years after the Claimant achieved the age of 18.

21. Mr Roper died on 13 September 2005. Mr Chapman died on 14 May 2012.

22. The Jimmy Savile scandal and publicity encouraged the Claimant to disclose Mr Roper's abuse, but only to his wife, in 2013. His mental health was seriously affected by the disclosure. In November 2016 he contacted the NSPCC about the abuse and also made a statement to the police. Shortly after, in December 2016, he was prescribed mirtazapine by his GP to address anxiety and sleeping problems. In 2017 he received counselling. In April 2017 he instructed solicitors. The letter before claim is dated 13 July 2017. A protocol response was sent by Blackpool FC on 15 December 2017. These proceedings were brought on 19 January 2018.

23. The Judge found that "there was a clear barrier to him making a disclosure, which was a pre-requisite to making a claim, which was that it would require him to disinter toxic memories from the place where he had buried them. The effect of disclosure, when he did disclose, was damaging to his mental health and to his life in various ways." He also found that "it was for practical purposes impossible for the Claimant to disclose the abuse before he did, or to raise a legal claim before he did"; and that "he was for practical purposes disabled from commencing proceedings, initially by the trauma of what he had suffered and his reaction to it, and then by the mental health challenges he faced when disclosing even to his wife and no-one else."

The pleaded case

24. The Amended Particulars of Claim allege at [1] that the claim is for damages for personal injury, loss and damage arising out of the sexual and emotional abuse and assaults to which he was subjected "in June 1987 by Mr Frank Roper, a football scout working for the Defendant during a football tour to New Zealand … ." [2] of the Amended Particulars of Claim alleges that Blackpool FC is vicariously liable for the tortious acts of Mr Roper "by reason of Mr Roper's employment by and/or connection with the Defendant." It is alleged in [3] that Blackpool FC allowed Mr Roper to hold himself out as working for the club as a scout; and that "in that capacity, Mr Roper was in a position to offer young boys a place in the School of Excellence, an opportunity that was seen as a stepping-stone to the Defendant's youth team." [4] alleges that for two years after Mr Roper "scouted him to play for the School of Excellence", the Claimant attended training sessions there with Mr Roper and other young boys, together with members of the Defendant's youth team, as well as members of the adult team and members of the club's football management. He also attended social evenings, mostly on Saturday nights which were arranged and paid for by Mr Roper at a seafood restaurant and at the Tangerine Club. Mr Roper would, it is alleged, give boys money for the fruit machines.

25. [6] refers to a meeting for parents and boys attended by Mr Roper, Mr Chapman and also Mr Ellis. It is alleged that "the parents were offered the opportunity to allow their sons to join the trip, billed as the "opportunity of a lifetime" and a chance to further

their prospects of playing for the Defendant club. The trip was paid for by Mr Roper but was endorsed by the Defendant: the son of Sam Ellis, its manager, was one of the boys who went and members of the Defendant's youth team accompanied the group to help out."

26. The case on vicarious liability is pleaded at [15]. It is alleged that Mr Roper worked for the Defendant as a scout "and was, at all times, acting in the course of his duties for the Defendant." If he was not a paid employee then it is alleged that the Defendant's "relationship with Mr Roper was akin to employment because the Defendant caused or permitted Mr Roper to hold himself out as being a representative of the Defendant club and derived benefit from that relationship by using Mr Roper as a source of young footballing talent for the club". The abuse committed by Mr Roper is alleged to be so closely connected to the discharge of his employment by and/or connection with the Defendant as to give rise to vicarious liability because his role (a) necessarily involved him in close contact with the boys in the School of Excellence and gave him unrestricted access to them; (b) permitted him to host social evenings for the boys and to arrange the trip abroad at which he was the only adult without such events attracting suspicion and concern; (c) generated a level of authority, trust and respect in the eyes of the boys and allowed Mr Roper to take advantage of that trust, authority and respect to commit acts of abuse; and (d) enhanced the risk that he would abuse boys in his charge. It is alleged that he was only able to arrange for the boys to accompany him to New Zealand because of his position and status as a scout and representative of the Defendant; and that Blackpool FC endorsed the trip to New Zealand and encouraged the parents to send their sons on a tour in which Mr Roper would be the sole responsible adult on the basis that it would be likely to improve their prospects with the club. It is alleged that the Claimant and his parents agreed that the Claimant should go on the trip "because of his enhanced position and status as a scout for the Defendant football club and the authority which that position generated"; and that by employing or allowing Mr Roper to work and/or hold himself out as its scout/couch, the Defendant created the risk that Mr Roper would take advantage of the opportunity afforded by his employment to abuse the Claimant."

The judgment below

27. After a brief introduction and outline chronology, the Judge addressed the evidence before turning to the substantive issues in detail. He said that he had heard evidence from 18 witnesses of fact, though one of them (JKL) did not attend for cross-examination and the Claimant's wife, though she attended, was in the event not cross-examined. Two expert psychiatric witnesses gave evidence by way of reports and a joint statement. The documents included "some redacted and anonymised statements obtained in the course of a police enquiry. However, since they were anonymous, incomplete, and could not be tested, and since the matters they dealt with were more reliably and directly addressed by a number of witnesses before [him, the Judge did] not place weight upon them." He heard from Mr Ellis, Mr Chadwick and Mr Johnson, and Mr Hurst; and from Mr Frank Sharp, who was the manager of an under 13s team in Blackpool called Poulton Youth, whose son went on the 1987 trip. Four boys from the Poulton Youth team, who had no connection with Blackpool FC or the Blackpool School of Excellence, went on the 1987 trip in circumstances I shall outline later; so did Mr Ellis' son.

28. Ten live witnesses (including the Claimant) were people who had been school-age footballers who had contact with Mr Roper in the 1980s. Five, including the Claimant, gave evidence that they had been sexually abused by Mr Roper. As recorded by the Judge, four played for Nova Juniors of whom one (CFS) signed schoolboy and apprentice forms with Blackpool FC and one other (ANF) signed schoolboy forms with a better club than Blackpool FC. Of the 10 school-age footballer witnesses, five had gone on to sign for Blackpool FC at various levels from schoolboy forms to full professional contracts. Of those five, four (Mark Bradshaw, Colin Greenall, Michael Davies and Stephen Harrison) ended up signing full professional contracts, while CFS signed schoolboy forms and as an apprentice. An eleventh school-age footballer was not called: he played occasionally for Nova Juniors, had a trial for Blackpool FC and gave evidence that he was sexually abused by Mr Roper.

29. The Judge dealt with extending the limitation period at [23]-[68]. I deal with that section specifically when addressing Grounds 2 and 4 below. At [69]-[77] he addressed the question whether the Claimant had been sexually abused by Mr Roper and the extent of the assault. There is no challenge to the Judge's finding that the Claimant was abused as alleged by the Claimant.

30. The Judge then dealt with vicarious liability from [78]-[175]. I deal with the issues arising under Grounds 7 and 8 in detail below; but it is convenient to summarise the Judge's approach to the evidence at this stage. The balance of the judgment dealt with (a) causation and (b) the effect of the Claimant's psychiatric diagnoses and the quantum of damages, neither of which is now in issue and neither of which requires detailed consideration.

31. The Judge summarised the evidence specifically relating to the relationship between Mr Roper and Blackpool FC at [91]-[158]. After dealing with background matters he summarised the evidence of the school-age footballer witnesses at [102]-[139]. As recorded by the Judge their evidence was a mixture of factual and impressionistic evidence: factual in their recollections of what Mr Roper did and impressionistic in their understanding of his relationship with Blackpool FC. Although in this appeal Blackpool FC criticised the Judge's reliance upon the more impressionistic evidence, I would hold that it was admissible and that the Judge was entitled to have regard to it provided suitable caution was exercised.

32. As recorded by the Judge there was a consistent thread of evidence that Mr Roper was both appreciated and welcomed by Blackpool FC because of the recognition that he had introduced players to the club successfully; and that his cachet had been significantly boosted by the fact that he had introduced Paul Stewart and David Bardsley, whose transfers to Manchester City and Watford respectively had been the saving of the club. Features of the evidence recorded by the Judge (with witnesses indicated) were:

    i) Mr Roper was known to be a scout for the club and would bring players from South Manchester to the club and to watch first-team games (Steven Harrison, Graham Wright, LDX, Colin Greenall, ANF, Mark Bradshaw, Michael Davies, Claimant.). ANF's evidence was that Mr Roper was scouting for Blackpool FC, not Nova Juniors. The Claimant's evidence was that it appeared to be both Mr Roper and Mr Chapman who recruited in his area, not just Mr Chapman.

ii) Mr Roper appeared to be able to offer boys a place at the Blackpool FC School of Excellence, which was regarded as a stepping stone to joining the youth team at Blackpool (Claimant). It was clear that Mr Roper could open doors for a boy at Blackpool and help them pursue a professional career there (Claimant).

iii) Nova Juniors was known or believed to be a feeder team for Blackpool FC (LDX, ANF, Michael Davies, David Erhardt). ANF described Nova Juniors as Blackpool FC's "nursery team". On occasions Mr Roper would arrange for people from Blackpool FC to come and watch them playing (David Erhardt). Mr Roper would make promises such as that, if a boy joined Nova Juniors he would get them a trial with Blackpool FC (LDX, David Erhardt). Others believed that playing for Nova Juniors would be a good opportunity and might lead to a chance of joining Blackpool FC (CFS). When signing ANF up for Nova Juniors, Mr Roper said he wanted to introduce him to Blackpool FC and, in particular, wanted him to meet Mr Chapman, which he did the following Saturday.

iv) Some thought that Nova Juniors was "affiliated" with Blackpool FC (LDX). At its highest CFS said that once he was playing for Nova Juniors he was "basically considered to be part of Blackpool and to have signed schoolboy forms" though still too young to do so. Nova Juniors sometimes played in Blackpool tangerine kit (Graham Wright). CFS said that this was when playing trial games at the Blackpool FC training ground at Squires Gate and that at such games they were representing Blackpool FC. Mr Chapman would attend these games (CFS).

v) On one occasion 7 out of a core Nova Juniors team of 9 or 10 signed schoolboy forms for Blackpool FC (CFS/Judgment [111]);

vi) The Claimant understood that the new Nova Juniors was based in the Blackpool area for people who had been on the 1987 tour. When he refused to join, his parents told him that he was not asked to play for the Blackpool FC School of Excellence any more. This is to be contrasted with the evidence of JKL, who refused to join Nova Juniors because he was already playing for a better team but who did sign schoolboy forms with Blackpool FC.

vii) Mr Roper would attend training sessions for junior players on Tuesday and Thursday evenings during the 1970s (Steven Harrison) and in the 1980s (Claimant). Mr Roper would assist Mr Chapman as the schoolboy coach in the 1970s (Steven Harrison) – but there was other evidence that he did not get involved in coaching, at least later (Colin Greenall, Claimant). Mr Roper would observe and occasionally make comments (Claimant). Mr Roper would frequently be around the club during training and home games (Colin Greenall, Michael Davies).

viii) Mr Roper was well known to people at Blackpool FC and would have "the run of the place" (ANF, Mark Bradshaw, JKL), being given access to the "inner sanctuary" (Michael Davies). He had access to the players' tunnel (Colin Greenall) or a particular area of the stands (Colin Greenall) or a private box (CFS, ANF, Mark Bradshaw). Mr Roper would be treated like staff and was able to access any part of the ground he wanted to. Boys who were at the Blackpool FC School of Excellence would get in free (Mark Bradshaw,

Claimant). After the match, he would take the boys to socialise with the players, their families, Mr Chapman and Mr Ellis in the players' suite under one of the stands (CFS, ANF).

ix) At one point Mr Roper was given his own room in the Bloomfield Road stadium "so that he could entertain young boys who had signed with or who were considering signing with Blackpool and their families" (Mark Bradshaw). During training sessions Mr Roper had free rein including access to the shower and sauna area (Claimant).

x) Mr Roper would arrange nights out, mainly on Saturdays, which the Claimant would attend along with other boys from the Blackpool FC School of Excellence. Professional players and management would be there. Mr Roper would pay for anything that boys wanted from the menu at the venue, which was normally Blackpool FC's Tangerine Club (Claimant). He would produce rolls of cash and give large sums to the boys to spend in the arcades in Blackpool (Mark Bradshaw, Claimant).

xi) Mr Roper himself would advertise that he was associated with and a representative of Blackpool FC (LDX, CFS). On his first visit he told ANF's parents that he was "working for Blackpool Football Club". According to Mark Bradshaw Mr Roper did not use the word "scout" but said he had an association with Blackpool FC. David Erhardt's evidence was that Mr Roper approached his parents and told them he was a football scout for Blackpool FC.

xii) The Claimant had the impression that Mr Roper was "very powerful and was an intrinsic part of Blackpool Football Club; he had the capacity to influence the managers … ." It appeared to him that Mr Roper had more power in the club than Mr Chapman.

33. The Judge considered the evidence of the adult witnesses from [140]-[158]. He considered their evidence as in some ways less important because, apart from Mr Hurst, they were less focussed on the youth set up than the boys; but he regarded their evidence as instructive and as a cross-check on the evidence given by the boys.

34. Mr Ellis confirmed that Mr Roper was a scout for Blackpool FC who had been running a feeder team for a number of years. He had a reputation for bringing good quality players to the club. Mr Ellis was not involved with the youth set up, which he left to Mr Chapman, who had wide-ranging contacts including Mr Roper with whom Mr Chapman was "closely associated in terms of producing youth players for the club." He thought that Mr Roper did not introduce players to other clubs (though there was clear evidence that some boys signed for other clubs for a number of reasons). Mr Ellis confirmed that Blackpool FC relied "on people like Frank Roper running feeder teams like Nova Juniors for recruitment of schoolboy footballers who could then go on and sign schoolboys and hopefully when they were older as apprentices and then full-time professional footballers." He also confirmed that when Mr Roper brought players to the club "he was basically given the freedom of the place …" and would attend training sessions with Mr Chapman.

35. Mr Ellis referred to Mr Roper having an "aura" because the local players they had were good but the ones he brought in were better. Elsewhere Mr Ellis said that Mr Roper was

held in high esteem and that everybody knew him. Although he was concerned with the first team and not the youth set up, Mr Ellis "had the feeling the Club was pleased to be associated with him because of the players he brought, he only wanted to bring the best players to Blackpool so they had first choice." He described the youth system as being "dependant on [Mr] Roper without a doubt. … He was treated as a big fish."

36. Mr Frank Sharp ran his own youth team in Blackpool, called Poulton Youth. The Judge found him to be an impressive witness. He described how, during one of his team's games in 1986, Mr Roper approached him with Mr Chapman and Mr Hurst, who he knew to be Blackpool FC scouts. [Though not mentioned in the judgment, Mr Sharp's evidence was that, on this occasion Mr Roper told him that he was "interested in taking a select team of boys from the Fylde area to New Zealand." He understood that all of the players going on the trip were from teams in the Fylde Youth Alliance League. His oral evidence was that what Mr Roper wanted was "a representative team from the Fylde coast."] Mr Sharp's opinion, as recorded by the Judge, was that Mr Chapman and Mr Hurst were there "to give credibility" to Mr Roper. [Also not mentioned in the judgment, it was Mr Sharp's oral evidence that Mr Roper did not represent himself as being from Blackpool FC.] Some of Mr Sharp's Poulton Youth team went on to Nova Juniors and then to sign Blackpool schoolboy forms. Before the 1987 trip, Mr Roper persuaded Mr Sharp to help him get families onside for the trip – a point to which I will return later. He said that the new Nova Juniors was set up in the Fylde area and was based around the boys who had been on the 1987 trip.

37. Mr Sharp confirmed that Nova Juniors would play some of their games at Blackpool's Squires Gate training ground and said that Mr Roper would poach the best players from other teams. He also confirmed the evidence that Mr Roper would take Nova Juniors players to watch Blackpool's first team; and that he was defensive if coaches from other youth teams were seen nearby. On the basis of an incident where Mr Chapman tried to persuade Mr Sharp's son to sign schoolboy forms while still underage, Mr Sharp said his "feeling was that [Mr] Roper controlled [Mr] Chapman and not the other way round." He described boys who joined Nova Juniors as "cocooned" to keep other clubs away from them; and he described Mr Roper as "charismatic".

38. The Judge did not find Mr Hurst a convincing witness, concluding that he had a limited involvement in and awareness of the youth set up despite his having been a scout for the club for twelve years.

39. Mr Chadwick had a more limited recollection of Mr Roper's having "the run of the club, his own room and so forth." The Judge took this as demonstrating how remote Mr Chadwick was from the youth operation. The Judge concluded that Mr Chadwick was not in a position to gainsay the evidence he had summarised about Mr Roper's close connection with the club and, to the extent that he did so, the Judge found his evidence to be unreliable. However, the Judge accepted his evidence that the board would always have a report on the footballing side and that "Frank Roper's name would be mentioned in despatches as someone who brought people to the club."

40. For similar reasons, the Judge found that Mr Johnson did not know enough about the youth set up or Mr Roper to give useful evidence about either; he was also "not confident that his evidence was candid or impartial." However, he recorded (and appears to have accepted) that anyone who assisted Mr Chapman was unpaid and purely voluntary. There were two specific areas of evidence covered by Mr Johnson to which

the Judge referred. First, Mr Johnson said that, if a complaint about Mr Roper's behaviour had been made, Mr Ellis, Mr Chapman and the board would have taken it extremely seriously. The Judge rejected this evidence because he accepted evidence from CFS that he had told Mr Chapman about Mr Roper's sexual abuse of him and other boys in 1984 or 1985 and that Mr Chapman had merely spoken to Mr Roper about it. Second, Mr Johnson's evidence was that the 1987 trip and any other trips organised by Mr Roper were completely independent of Blackpool FC; but he remembered an occasion when the board was asked to make a one-off donation to the cost of a trip that Mr Roper was organising "for the Nova team." Mr Johnson did not remember which trip the donation was for but said he had thought it was a trip to the Far East until the club's solicitors said that it was New Zealand and that the Board approved it because Mr Roper had brought in Paul Stewart and David Bardsley. There was no surviving documentary evidence about the contribution. The Judge held that it was for the 1987 trip and that it was made because of a reference to Paul Stewart having been sold, which happened in March 1987. The sale provided much-needed funds to Blackpool FC and opened a narrow window before Mr Roper disappeared from the scene soon after the 1987 trip.

41. Having reviewed the evidence that I have summarised, the Judge discussed it and drew his conclusions on the relationship between Mr Roper and Blackpool FC at [159]-[162] of his judgment, to which I will return when addressing Ground 7.

42. The Judge then addressed the evidence of the connection between Mr Roper's relationship with Blackpool FC and his sexual abuse of the Claimant during the 1987 trip at [161]-[174]. He identified four witnesses who gave evidence about the 1987 trip, each of whom he found to be credible witnesses who gave plausible evidence that was consistent between them and whose accounts he accepted. They were the Claimant, Mr Ellis and Mr Sharp (each of whom had sons who went on the trip) and Mr Bradshaw (who went as one of the four apprentices helping Mr Roper).

43. The Claimant's evidence was that the trip was "for the boys playing in the Blackpool School of Excellence" and that, for him, it was "the opportunity of a lifetime" and "a chance to further our prospects of a career playing for Blackpool Football Club." (As already noted, the Claimant was wrong to describe the trip as simply being for boys playing in the Blackpool School of Excellence. On one view only one or two had participated in the Blackpool School of Excellence. On any view, the majority had not.). His evidence was that the team on tour was known as a Blackpool representative side from England and that was how they referred to themselves. They played in a variety of kit supplied by Mr Roper from his shop. There was a programme of training and matches against local New Zealand sides. The boys (including the apprentices) stuck together for training and meals in the evening, after which they would go back to their host families to sleep, all of which was organised by Mr Roper.

44. Mr Roper raised the question of the 1987 trip on his first meeting with Mr Sharp when he, accompanied by Mr Chapman and Mr Hurst, attended a game being played by Mr Sharp's team. Mr Roper wanted to take four boys from Mr Sharp's team, including Mr Sharp's son. When Mr Sharp asked Mr Roper what the cost would be, Mr Roper said there would be no cost to the boys, except their personal spending money. This "set alarm bells ringing" with Mr Sharp, who did not understand why Mr Roper would fund a trip for these boys of 12 and 13 years old. He said he would speak to the boys' parents. The parents had "a lot of questions" for Mr Sharp. When the father of one of the boys

(who was himself an ex-Blackpool FC player) asked about Mr Roper, Mr Sharp said he did not know who Mr Roper was but that "he had two scouts from Blackpool with him" (Mr Hurst and Mr Chapman). The parent said he would phone Mr Ellis. He rang Mr Sharp back and told him that Mr Ellis was sending his own son on Mr Roper's trip. Mr Sharp said that "in my mind, this made the trip legitimate and reassured me that the trip was endorsed by Blackpool FC".

45. Mr Ellis's evidence was influential for the Judge and I set out the Judge's account from [170] of the judgment:

> "He said that some of the parents were still concerned about the trip, so he personally addressed a meeting to reassure them. The meeting was at the Tangerine Club opposite the Blackpool FC stadium. It was not an official meeting, and Ellis said he went "as a father and not as the manager of the Club" but it is obvious, and he accepted, that "being manager of the Club it is more likely that people took advice from what I said." Both the parents and the boys were at this meeting, so far as Ellis could recall. He "stood up and addressed the rest of the room. [He] said that it was a good opportunity for the boys, that they seemed to get on well, the group that they had, and [he] was quite happy for [his] lad to go and have the experience." I am satisfied on the evidence that, had Ellis not endorsed the trip, the parents would not have allowed their boys to go to the other side of the world with Roper, a man they did not know, accompanied by no other adult. They were concerned, but they were reassured and persuaded by the connection with Blackpool FC. It was not an official trip, but it had the backing of the Blackpool FC manager and, had it not been for that, Roper would not have persuaded the parents to entrust the boys to his care."

46. The Judge found that there were further meetings that were attended by the apprentices as well as by parents and boys, Mr Roper and Mr and Mrs Ellis. He held that this would have reinforced the impression "that this was a Blackpool FC venture in spirit" although Mr Roper was running it and paying for it (or most of it). Mr Sharp asked the apprentices about Mr Roper; they told him that he was "sound" and not to worry.

47. The Judge found Mr Sharp to be an exceptionally impressive and convincing witness who was clearly suspicious of Mr Roper and his motives. He expressly accepted all of Mr Sharp's evidence in the following passage (which he set out at [172] of the judgment):

> "The impression I had from attending the meetings at the Tangerine Club was that the parents were looking to Blackpool Football Club for reassurance about Roper and wanted to ensure that the trip was supported and endorsed by them. Roper seemed to know everyone affiliated with the club. Roper… bragged about having introduced Alan Wright, Paul Stewart, Trevor Sinclair and David Bardsley as well as the existing apprentices, Mark Bradshaw and Simon Rooney to Blackpool Football Club.

> I believe Roper said this to highlight his connection with Blackpool Football Club and show the influence he had there.
>
> Knowing that Ellis' son would be going on the trip meant I was satisfied that it was legitimate and I believed that Roper was a recruitment agent or scout for Blackpool Football Club. This settled any concerns that I had regarding Roper and I was conscious that all of the older boys that were going on the trip had signed for Blackpool and they were going to help Roper with looking after the younger players. If Blackpool had been taken out of the equation, as far as I am concerned, none of the parents would have agreed to their children going on the trip. The involvement and support provided by Blackpool Football Club made the trip legitimate, especially as the first team manager's son would also be on the trip.
>
> …I spoke to other parents about the trip and we settled on the purpose of the trip being that Roper had organised the trip with a view to the boys going on to sign for Blackpool."

48. Mr Bradshaw was 17 or 18 at the time of the 1987 trip. He was one of four signed Blackpool FC apprentices who went on the trip. It was out of season so that it was not a problem (i.e. they were not missing any of their Blackpool FC duties as apprentices). They were allowed to bring back and sell Lacoste (counterfeit) labels on their own account but, the Judge found, "that does not … detract from the fact that this was, as the travel documentation described it, "Mr Roper's Football Tour".

49. Having reviewed all the evidence that I have summarised, the Judge discussed it and drew his conclusions on the relationship between Mr Roper and Blackpool FC at [175] of his judgment, to which I will return when addressing Ground 8.

Vicarious liability: the applicable principles

50. The origins and historical development of the common law doctrine of vicarious liability have been reviewed by others in the recent past and it is not necessary to repeat that exercise here: see *E v English Province of our Lady of Charity* [2012] EWCA Civ 938, [2013] QB 722 at [19]-[21] per Ward LJ ["*the English Province case*"]; *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 660 at [10]-[38] ["*Mohamud's case*"].

51. By the second half of the last century, the question of vicarious liability arose predominantly where there was a conventional relationship of employer and employee, with vicarious liability being imposed on the employer for the torts of his employee in circumstances where a claimant was not in a position to show fault on the part of the employer. In the present case, with one exception, it is not necessary to give separate consideration to authorities involving agency or partnership. Thus, "in a case about vicarious liability, the focus was on two stages: (1) was there a true relationship of employer/employee between D2 and D1? (2) was D1 acting in the course of his employment when he committed the tortious act?": *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1 ["*the Christian Brothers' case*"] at [19]. I would add that it was and remains established that "if the employer has

employed an independent contractor to do work on his behalf, the general rule is that the employer is not responsible for any tort committed by the contractor in the course of the execution of the work. Furthermore, since the employees of the contractor, whilst acting as such, stand in the same position as their employer, it is equally the case that the employer of the contractor is not liable for the torts committed by the contractor's employees.": see *Clerk & Lindsell on Torts*, 22nd Edition, 6-62 et seq.

52. During the second half of the last century and the first decade of this, the courts:

> "… developed the law of vicarious liability by establishing the following propositions. (i) It is possible for an unincorporated association to be vicariously liable for the tortious acts of one or more of its members: ... . (ii) D2 may be vicariously liable for the tortious act of D1 even though the act in question constitutes a violation of the duty owed to D2 by D1 and even if the act in question is a criminal offence: ... . (iii) Vicarious liability can even extend to liability for a criminal act of sexual assault: … . (iv) It is possible for two different defendants, D2 and D3, each to be vicariously liable for the single tortious act of D1: …": *The Christian Brothers' case* at [20].

53. We have been referred to five decisions of the Supreme Court and one of this Court since 2012 that have taken this development of the doctrine of vicarious liability further. Since, on any view, Mr Roper was not in a conventional employer/employee relationship with Blackpool FC, it is convenient to divide those decisions into ones in which the relationship between the tortfeasor and the defendant was a conventional employer/employee relationship and those in which it was not. The Supreme Court decisions in the first category are *Mohamud's case*, and *Various Claimants v Wm Morrison Supermarkets plc* [2020] UKSC 12, [2020] AC 989 ["*Morrison 2*"]. Those in the latter category are *The Christian Brothers' case*, *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 ["*Cox's case*"], *Various Claimants v Barclays Bank plc* [2020] UKSC 13, [2020] AC 973 ["*Barclays' case*"]. In addition, we were referred to the recent decision of this court in *BXB v Watch Tower and Bible Tract Society of Pennsylvania and anor* [2021] EWCA Civ 356, [2021] 4 WLR 42 ["*BXB's case*"], which was not a conventional employer/employee case.

54. The single judgment in the *Christian Brothers' case* was delivered by Lord Phillips, with whom the other Justices agreed. The issue was whether the Christian Brothers, an unincorporated association, should be held vicariously liable for the torts of individual brothers working at a residential school in Market Weighton. The Claimants sued two groups of Defendants. The first group, known as "the Middlesbrough defendants", managed the school and entered into contracts of employment with individual brothers who worked there. The second group, known as "the De La Salle defendants", represented the institute to which individual brothers belonged. The De La Salle defendants did not enter into contracts of employment with the individual brothers who worked at the school but were bound to them (and vice versa) by the institute's rules, which imposed ties of loyalty and obedience that were even tighter than those imposed by a contract of employment: see [18], [58], [89].

55. The De La Salle defendants contended that because there were no contracts of employment entered into between the institute and individual brothers, and because the

Middlesbrough defendants managed and controlled both the school and the brothers, vicarious liability should not be imposed on the institute. The Middlesbrough defendants submitted that the existence of an employer/employee relationship was not an essential prerequisite to the imposition of vicarious liability and that the closeness of the relationship between brothers and the institute, the fact that the brothers were sent out to further the object of the institute, namely to teach boys, and the fact that this created a risk of sexual abuse of boys by the brothers, sufficed to render the institute vicariously liable for the abuse committed by the brothers.

56. At [21] Lord Phillips identified the test for the imposition of vicarious liability as involving a synthesis of two stages. Stage 1 is to consider the relationship between D1 and D2 to see whether it is one that is capable of giving rise to vicarious liability. Stage 2 requires examination of the connection that links the relationship between D1 and D2 and the tortious act or omission of D1. It has become conventional to approach the issue adopting this two-stage test, recognising that resolution of the issue involves a synthesis of the two stages.

57. Lord Phillips addressed stage 1 at [34]-[61]. He dealt with legal policy and reasons that may make it fair just and reasonable to impose vicarious liability at [34]-[35] as follows:

> "34. … The policy objective underlying vicarious liability is 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. Such defendants can usually be expected to insure against the risk of such liability, so that this risk is more widely spread. It is for the court to identify the policy reasons why it is fair, just and reasonable to impose vicarious liability and to lay down the criteria that must be shown to be satisfied in order to establish vicarious liability. Where the criteria are satisfied the policy reasons for imposing the liability should apply. As Lord Hobhouse of Woodborough pointed out in [*Lister v Hesley Hall* [2002] 1 AC 2015], para 60, the policy reasons are not the same as the criteria. One cannot, however, consider the one without the other and the two sometimes overlap.
>
> 35. The relationship that gives rise to vicarious liability is in the vast majority of cases that of employer and employee under a contract of employment. The employer will be vicariously liable when the employee commits a tort in the course of his employment. There is no difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied: (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;

> (v) the employee will, to a greater or lesser degree, have been under the control of the employer."

58. The five policy reasons listed in [35] were, at this stage, identified as being criteria that make it fair just and reasonable to impose vicarious liability upon D2 when there is a relationship of employer/employee with D1. However, developing the significance of "control", identified above as a constituent part of criterion (v), Lord Phillips said at [36] that:

> "Today it is not realistic to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee. … Thus the significance of control today is that the employer can direct what the employee does, not how he does it."

59. This broadening of the notion of control led to a discussion of control and the transfer of vicarious liability from [37]-[46], with the endorsement of the approach of Rix LJ in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151, [2006] QB 510. Rix LJ's starting point had been that the basis of vicarious liability was, generally speaking, that those who set in motion and profit from the activities of their employees should compensate those who are injured by such activities, even when performed negligently. He considered that what one was looking for when considering whether there should be a transfer of, or possible dual vicarious liability, was:

> "a situation where the employee in question, at any rate for relevant purposes is so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence."

It will be noted that Rix LJ's approach tended towards what others have called the creation of "enterprise risk"; but he explained the circumstances in which liability might be imposed using phrases such as "an integral part of [the employer's] business" or "embedded in [the employer's] organisation": see [80]. In the words of Professor Bell in his case note "*The basis of vicarious liability*" (2013) 72 CLJ 17, 18, in such circumstances "the employer took the burden of an organisational relationship which he had undertaken for his own benefit."

60. Referring back to [35] of his judgment, Lord Phillips then said at [47] that:

> "Where the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the ground that it is "akin to that between an employer and an employee"."

61. Having reviewed the decision of the Court of Appeal in *the English Province case*, where Ward LJ had based his decision on the conclusion that the relationship between a Catholic Priest and his Bishop was "akin to employment", Lord Phillips concluded his section on Stage 1 as follows:

> "56. In the context of vicarious liability the relationship between the teaching brothers and the institute had many of the elements, and all the essential elements, of the relationship between employer and employees. (i) The institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body. (ii) The teaching activity of the brothers was undertaken because the provincial directed the brothers to undertake it. True it is that the brothers entered into contracts of employment with the Middlesbrough defendants, but they did so because the provincial required them to do so. (iii) The teaching activity undertaken by the brothers was in furtherance of the objective, or mission, of the institute. (iv) The manner in which the brother teachers were obliged to conduct themselves as teachers was dictated by the institute's rules.
>
> 57. The relationship between the teacher brothers and the institute differed from that of the relationship between employer and employee in that: (i) The brothers were bound to the institute not by contract, but by their vows. (ii) Far from the institute paying the brothers, the brothers entered into deeds under which they were obliged to transfer all their earnings to the institute. The institute catered for their needs from these funds.
>
> 58. Neither of these differences is material. Indeed they rendered the relationship between the brothers and the institute closer than that of an employer and its employees."

62. As others have pointed out, the factors listed by Lord Phillips in [56] do not replicate the features he had listed at [35]. Rather, the elements he identified in [56] demonstrated the closeness of the analogy between the relationships of an employer and his employee on the one hand and of the institute and the individual brothers on the other. The factors listed in [56] include elements of control in elements (ii) and (iv); and a modified approach to enterprise risk in element (iii) with its reference to the individual brothers furthering the "objective, or mission, of the institute". The ultimate conclusion was that the relationship between the brothers and the institute was closer than that of an employer and its employees – not least in relation to the power to control and direct. On this basis the policy reasons for imposing vicarious liability on an employer that Lord Phillips had identified in [35] of his judgment were at least equally applicable to the institute. It was therefore a justifiable incremental step to conclude that stage 1 of the test was satisfied despite the absence of an employer/employee relationship.

63. It is also convenient to mention at this stage that, perhaps reflecting its chequered past in the law of tort, the existence of a deep pocket has since been relegated as not usually being a principled basis for imposing vicarious liability: see *Cox's case* at [20].

64. Moving on to stage 2 at [62], Lord Phillips dealt briefly with vicarious liability for negligent acts:

> "Where an employee commits a tortious act the employer will be vicariously liable if the act was done "in the course of the

> employment" of the employee. This plainly covers the situation where the employee does something that he is employed to do in a manner that is negligent. In that situation the necessary connection between his relationship with his employer and his tortious act will be established. Stage 2 of the test will be satisfied. The same is true where the relationship between the defendant and the tortfeasor is akin to that of an employer and employee. Where the tortfeasor does something that he is required or requested to do pursuant to his relationship with the defendant in a manner that is negligent, stage 2 of the test is likely to be satisfied."

65. This, however, led to the central issue:

> "… sexual abuse can never be a negligent way of performing such a requirement. In what circumstances, then can an act of sexual abuse give rise to vicarious liability?"

66. Lord Phillips started his review of authority by revisiting the Canadian cases of *Bazley v Curry* (1999) 174 DLR (4th) 45 and *John Doe v Bennett* [2004] 1 SCR 436. At [64] he identified two particular principles of policy underpinning *Bazley*, which was a case involving an employer/employee relationship, as (i) enterprise risk: "where an employer puts into the community an enterprise carrying with it certain risks and those risks materialise and cause injury it is fair that, having created the enterprise and the risk, the employer should bear the loss"; and (ii) deterrence; and he identified the test that emerged from *Bazley* as being:

> "there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer *significantly* increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned task." [emphasis in the original]

67. A similar theme emerged from Lord Phillips' review of *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215, in the course of which he cited from [65] of Lord Millett's judgment that:

> "the more general idea that a person who employs another for his own ends inevitably creates a risk that the employee will commit a legal wrong. If the employer's objectives cannot be achieved without a serious risk of the employee committing the kind of wrong which he has in fact committed, the employer ought to be liable. The fact that his employment gave the employee the opportunity to commit the wrong is not enough to make the employer liable. He is liable only if the risk is one which experience shows is inherent in the nature of the business."

68. In *Lister* both Lord Hobhouse (at [62]) and Lord Millett (at [82]) drew the distinction between the position of an employee to whom the care of the children was entrusted,

for whose sexual abuse the employer would be held vicariously liable, and an employee with other responsibilities, such as a groundsman, for whose sexual abuse the employer would not. At [82], as noted by Lord Phillips at [72] of his judgment in the *Christian Brothers' case*, Lord Millett "placed importance on the employee's act being an abnegation of a specific duty imposed upon him by his employment," in a passage that remains relevant:

> "In the present case the warden's duties provided him with the opportunity to commit indecent assaults on the boys for his own sexual gratification, but that in itself is not enough to make the school liable. The same would be true of the groundsman or the school porter. But there was far more to it than that. The school was responsible for the care and welfare of the boys. It entrusted that responsibility to the warden. He was employed to discharge the school's responsibility to the boys. For this purpose the school entrusted them to his care. He did not merely take advantage of the opportunity which employment at a residential school gave him. He abused the special position in which the school had placed him to enable it to discharge its own responsibilities, with the result that the assaults were committed by the very employee to whom the school had entrusted the care of the boys."

69. This passage and the passage cited above from [65] of Lord Millett's judgment establish two important points. First, the fact that an employer's enterprise creates a foreseeable risk and gives the employee the opportunity to commit sexual abuse is not sufficient to justify the imposition of vicarious liability on the employer. Second, the additional feature that justifies the distinction between the groundsman and the warden of the residential home is that the warden has been employed to discharge the school's responsibilities to the children who have been entrusted by the employer to his care.

70. The reasoning in *Lister*, which was an abuse case where the tortfeasor was in an employer/employee relationship, was applied in a commercial context by *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, which concerned the vicarious liability of a firm of solicitors for the allegedly dishonest conduct of a partner. Lord Phillips at [74] referred to Lord Nicholls' formulation of legal policy; but it is not necessary to set it out again here.

71. Having reviewed further authorities, Lord Phillips discussed them at [83]-[87], summarising his approach to stage 2 in cases not involving an employer/employee relationship as follows:

> "84. What has weighed with the courts has been the fact that the relationship has facilitated the commission of the abuse by placing the abusers in a position where they enjoyed both physical proximity to their victims and the influence of authority over them both as teachers and as men of God.
>
> 85. The precise criteria for imposing vicarious liability for sexual abuse are still in the course of refinement by judicial decision. Sexual abuse of children may be facilitated in a number

> of different circumstances. There is currently concern at the possibility that widespread sexual abuse of children may have occurred within the entertainment industry. This case is not concerned with that scenario. It is concerned with the liability of bodies that have, in pursuance of their own interests, caused their employees or persons in a relationship similar to that of employees, to have access to children in circumstances where abuse has been facilitated.
>
> 86. Starting with the Canadian authorities a common theme can be traced through most of the cases to which I have referred. Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.
>
> 87. These are the criteria that establish the necessary "close connection" between relationship and abuse. I do not think that it is right to say that creation of risk is simply a policy consideration and not one of the criteria. Creation of risk is not enough, of itself, to give rise to vicarious liability for abuse but it is always likely to be an important element in the facts that give rise to such liability."

72. To my mind, the significant features of this formulation go beyond the simple requirement of a "strong" or "close" connection between the risk created by the employer's enterprise and the wrongful act. In addition, the formulation involves (a) "placing" the abuser in their position, (b) using them to carry on its business, and (c) thereby significantly increasing the risk created by the employer's enterprise. Both (a) and (b) imply a degree of control and direction of the abuser by the "employer".

73. Applying those principles to the facts of the case, Lord Phillips held at [88] that "both the necessary relationship between the brothers and the institute and the close connection between that relationship and the abuse committed at the school have been made out." In summarising the factors that supported that conclusion at [89] – [93], he included:

i) The relationship between the brothers and the institute was much closer to that of employment than the relationship between the priest and the bishop in the *English Province case*;

ii) The business and mission of the institute was the common business and mission of every brother who was a member of it;

iii) The business was the provision of a Christian education to boys. It was to achieve that mission that the brothers joined and remained members of the institute;

iv) The relationship between the institute and the brothers enabled the institute to place the brothers in teaching positions and, in particular, in the position of headmaster of the school. The running of the school was largely carried out by the headmaster. There was thus a very close connection between the relationship between the brothers and the institute and employment of the brothers as teachers in the school;

v) The boys who lived in the school were triply vulnerable because they were children in a school, were virtually prisoners in the school and their personal histories made it unlikely that they would be believed if they attempted to disclose what was happening to them;

vi) The brother teachers were placed in the school (by the institute) to care for the educational and religious needs of these pupils. Abusing the boys in their care provided the necessary close connection between the abuse and the relationship between the brothers and the institute that gives rise to vicarious liability on the part of the latter;

vii) There was a very close connection between the brother teachers' employment in the school and the sexual abuse that they committed;

viii) The risk of abuse was recognised in such circumstances. The placement of brother teachers in the residential school where they also resided greatly enhanced the risk of abuse by them if they had a propensity for such misconduct.

74. In the light of Lord Phillips' formidable analysis it is unsurprising that little attention was paid to the distinctions between an employer/employee relationship, where vicarious liability would typically be imposed, and the relationship of employer and independent contractor, where typically it would not. The only reference was at [36] where the right to direct the manner in which an employee should do his work was identified as one of the earlier indicia of a "master and servant" relationship, but put somewhat to one side as a necessary prerequisite to the relationship of employer and employee: see [58] above. However, as the summary that I have set out above shows, the element of control was central to Lord Phillips' analysis and conclusion. The institute's control of the individual brothers was complete: it directed the individual brothers to teach at the school (i.e. what they should do) and dictated their conduct when there (i.e. how they should do it): see [61] above.

75. *Cox's case* was concerned not with sexual abuse but with the vicarious liability of the prison service for personal injuries caused by negligence on the part of a prisoner working in the prison kitchen. It was primarily concerned with stage 1. *Mohamud's case*, judgment in which was handed down on the same day, primarily concerned stage 2.

76. The judgment of Lord Reed JSC in *Cox's case*, with whom the other members of the Supreme Court agreed, built upon Lord Phillips' reasoning in the *Christian Brothers' case*. In doing so it provided clarification and development. One such clarification was in relation to control; a related development was the significance to be attached to the assigning of work by D2 to D1, as appears from the references below.

77. Referring to the fifth of the factors mentioned by Lord Phillips at [35] of the *Christian Brothers' case* – that the tortfeasor will, to a greater or lesser degree, have been under the control of the defendant – Lord Reed said at [21]:

> "the ability to direct how an individual did his work was sometimes regarded as an important test of the existence of a relationship of master and servant, and came to be treated at times as the test for the imposition of vicarious liability. But it is not realistic in modern life to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee; nor indeed was it in times gone by, if one thinks for example of the degree of control which the owner of a ship could have exercised over the master while the ship was at sea. Accordingly, as Lord Phillips PSC stated, the significance of control is that the defendant can direct what the tortfeasor does, not how he does it. So understood, it is a factor which is unlikely to be of independent significance in most cases. On the other hand, the absence of even that vestigial degree of control would be liable to negative the imposition of vicarious liability."

78. This observation was made in the dual context of (a) the development of the modern test of the existence of a relationship of master and servant and (b) the relationship in *Cox's case* not being one of master and servant or employer/employee but, as was being argued, a relationship "akin to employment." I understand Lord Reed in this passage to be saying that the presence or absence of an ability to direct *how* an individual did his work is unlikely to be of independent significance in most cases. The last sentence, to my mind, is a clear reminder that the presence or (particularly) absence of control is a material consideration for a court deciding whether or not to impose strict vicarious liability upon D2. It is, in my view, always to be borne in mind as a potentially material consideration when deciding whether to extend vicarious liability by incremental analogy from the safe confines of an employer/employee relationship. This is made clear by the last sentence of the passage.

79. Having identified that the second, third and fourth of Lord Phillips' five factors are interrelated, Lord Reed provided his own summation of "stage 1" principle at [24] as follows:

> "The result of this approach is that a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question."

80. Lord Reed developed this statement of principle at [29]-[30] as follows:

> "29. It is important, however, to understand that the general approach which Lord Phillips PSC described is not confined to some special category of cases, such as the sexual abuse of children. It is intended to provide a basis for identifying the circumstances in which vicarious liability may in principle be imposed outside relationships of employment. By focusing upon the business activities carried on by the defendant and their attendant risks, it directs attention to the issues which are likely to be relevant in the context of modern workplaces, where workers may in reality be part of the workforce of an organisation without having a contract of employment with it, and also reflects prevailing ideas about the responsibility of businesses for the risks which are created by their activities. It results in an extension of the scope of vicarious liability beyond the responsibility of an employer for the acts and omissions of its employees in the course of their employment, but not to the extent of imposing such liability where a tortfeasor's activities are entirely attributable to the conduct of a recognisably independent business of his own or of a third party. An important consequence of that extension is to enable the law to maintain previous levels of protection for the victims of torts, notwithstanding changes in the legal relationships between enterprises and members of their workforces which may be motivated by factors which have nothing to do with the nature of the enterprises' activities or the attendant risks.
>
> 30. It is also important not to be misled by a narrow focus on semantics: for example, by words such as "business", "benefit", and "enterprise". The defendant need not be carrying on activities of a commercial nature: that is apparent not only from [the *English Province case*] and the "*Christian Brothers*" case …, but also from the long-established application of vicarious liability to public authorities and hospitals. It need not therefore be a business or enterprise in any ordinary sense. Nor need the benefit which it derives from the tortfeasor's activities take the form of a profit. It is sufficient that there is a defendant which is carrying on activities in the furtherance of its own interests. The individual for whose conduct it may be vicariously liable must carry on activities assigned to him by the defendant as an integral part of its operation and for its benefit. The defendant must, by assigning those activities to him, have created a risk of his committing the tort. As [*Viasystems*, the *English Province case* and the *Christian Brothers' case*] show, a wide range of circumstances can satisfy those requirements."

81. Although *Cox's case* was primarily concerned with stage 1, the synthesis of the two stages, to which Lord Phillips had referred at [21] of the *Christian Brothers' case* is also apparent in this passage. The influence of Rix LJ's approach in *Viasystems* is clear in the references to an individual carrying on activities "as an integral part of the business activities carried on by a defendant" and to the realities of modern workplaces

"where workers may in reality be part of the workforce of an organisation without having a contract of employment with it", while maintaining the distinction between such circumstances and those where "a tortfeasor's activities are entirely attributable to the conduct of a recognisably independent business of his own or of a third party."

82. The concept of assignment reappeared in [31] where Lord Reed said that what had weighed with the court in the *Christian Brothers' case* was that

> "the abusers were placed by the organisations in question, as part of their mission, in a position in which they committed a tort whose commission was a risk inherent in the activities assigned to them."

This observation incorporates both the notion of enterprise risk and also the notion of control inherent in the power to "assign" activities, which are also to be found in [24] of the Lord Reed's judgment: see above at [79]. It combines elements of "using" the abuser by "placing" them in a position which gives them physical proximity to and influence over their victims: see [71]-[72] above.

83. *Mohamud's case* was primarily concerned with stage 2. It is sufficient to note two points. First, the Supreme Court was invited to depart from the "close connection" test established by *Lister* and to adopt a broader test of "representative capacity". It was submitted that, in the case of a tort committed by an employee, the decisive question should be "whether a reasonable observer would consider the employee to be acting in the capacity of a representative of the employer at the time of committing the tort." This submission was rejected: see [46] of the judgment of Lord Toulson.

84. Second, Lord Toulson provided his own summary of the established principles where there was a relationship of employer and employee as follows:

> "44. In the simplest terms, the court has to consider two matters. The first question is what functions or "field of activities" have been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. As has been emphasised in several cases, this question must be addressed broadly; … .
>
> 45. Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice which goes back to Holt CJ. To try to measure the closeness of connection, as it were, on a scale of 1 to 10, would be a forlorn exercise and, what is more, it would miss the point. The cases in which the necessary connection has been found for Holt CJ's principle to be applied are cases in which the employee used or misused the position entrusted to him in a way which injured the third party. *Lloyd v Grace, Smith & Co* [1912] AC 716, *Pettersson v Royal Oak Hotel Ltd* [1948] NZLR and *Lister v Hesley Hall Ltd* were all cases in which the employee misused his position in a way which injured the claimant, and that is the reason why it was just

> that the employer who selected him and put him in that position should be held responsible. By contrast, in *Warren v Henlys Ltd* [1948] 2 All ER 935 any misbehaviour by the petrol pump attendant, qua petrol pump attendant, was past history by the time that he assaulted the claimant. The claimant had in the meantime left the scene, and the context in which the assault occurred was that he had returned with the police officer to pursue a complaint against the attendant."

85. Three points should be noted arising from this passage. First, the substitution of a "sufficient" for a "strong" or "close connection" was seen by some as a relaxation of the previous test, which was subsequently reversed by *Morrison 2*: see below. Second, I am not alone in finding the distinguishing of the facts in *Warren v Henlys* from the facts of *Mohamud's case* less than fully convincing; but that does not affect the principle that, in an employer/employee case, there must be a sufficient (i.e. strong/close) connection between *the position in which he was employed* and the employee's wrongful conduct. The decided cases show that this second question is highly fact-sensitive and requiring of detailed scrutiny. Where it is proposed to extend the imposition of vicarious liability beyond its traditional bounds, the rigour to be attached to the second question (as well as to the first) must, in my judgment be even greater because notions of entrusting functions, assigning work, and the extent of the "employer's" control are likely to be more fluid than in a conventional employer/employee relationship. Third, and quite apart from the distinction between those relationships that are akin to employment on the one hand and akin to independent contracting on the other, it is always to be remembered that it is not sufficient simply to provide the "employee" with the opportunity to commit the tort.

86. We were not referred by counsel to *Armes v Nottinghamshire County Council* [2017] UKSC 60, [2018] AC 355, but it cannot be ignored. The Defendant local authority, having taken the claimant into care, was held to be vicariously liable to the claimant for physical and sexual abuse inflicted on her by foster parents to whose care the local authority had entrusted her. Giving the judgment of the majority (Lord Hughes dissenting), at [59]-[63] Lord Reed considered that the five policy reasons from [35] of the *Christian Brothers' case* pointed towards the imposition of vicarious liability. In summary:

    i) The relevant activity of the local authority was the care of children who had been committed to their care. They were under a statutory duty to care for such children and, in order to discharge that duty, they recruited, selected and trained persons who were willing to accommodate and look after the children. The foster parents were provided with expenses and necessary equipment as well as in-service training. The foster parents were expected to carry out their duties in co-operation with the local authority's social workers; they were involved in the local authority's decision making concerning the children; and they were expected to co-operate with arrangements about contact with the children's families. They could therefore not be regarded as carrying on an independent business of their own: see [59];

    ii) Though the picture was complex, "as a whole it points towards the conclusion that the foster parents provided care to the child as an integral part of the local authority's organisation of its childcare services." It was "impossible to draw a

sharp line between the activity of the local authority, who were responsible for the care of the child and the promotion of her welfare, and that of the foster parents, whom they recruited and trained, and with whom they placed the child, in order for her to receive care in the setting which they considered would best promote her welfare." In those circumstances it could properly be said that the torts committed against the claimant were committed by the foster parents "in the course of an activity carried on for the benefit of the local authority": see [60];

iii) Considering the issue of risk creation, "the local authority's placement of children in their care with foster parents and the children, in circumstances where close control cannot be exercised by the local authority, and so renders the children particularly vulnerable to abuse. … [I]t is relevant to the imposition of vicarious liability that a particular risk of abuse is inherent in [that placement]": see [61];

iv) There were features of control, monitoring, supervision and approval such that "although the foster parents controlled the organisation and management of their household to the extent permitted by the relevant law and practice, and dealt with most aspects of the daily care of the children without immediate supervision, it would be mistaken to regard them as being in much the same position as ordinary parents. … [T]he local authority exercised a significant degree of control over both what the foster parents did and how they did it, in order to ensure that the children's needs were met.": see [62];

v) The principal tortfeasor was not worth suing and the local authority was able to compensate the victim of the tort: see [63].

87. The decision in *Armes* has subsequently been described as "difficult". However, it can be seen from the summary I have just set out that the most important considerations leading to the imposition of vicarious liability included (a) the specific nature of the local authority's relevant activity, namely discharging its statutory duty to care for the claimant, (b) the measure of control exercised by the local authority over the foster carers, (c) the fact that the local authority chose to place the claimant with the foster carers, (d) the decision to place the claimant with the foster carers represented the local authority's decision about how to discharge its relevant activity and its duty to the claimant, and (e) that decision gave rise to the recognised enterprise risk of physical and sexual abuse. Standing back, these features can justify the conclusion that the foster parents were integral to the local authority's relevant activity and (perhaps less obviously) that the relationship between the local authority and the foster carers could be treated as "akin to employment" and as capable of giving rise to the imposition of vicarious liability.

88. The decisions in *Barclays' case* and *Morrison No 2* were handed down on the same day, which was after judgment had been given by the Judge in the present case. *Barclays' case* was a case of sexual abuse, this time committed by a doctor to whom potential employees of the bank were referred for medical examinations. It was primarily concerned with stage 1. *Morrison No 2* was primarily concerned with stage 2. They followed widely expressed concerns, both by academic commentators and the High Court of Australia, about the potential for unprincipled expansion of the doctrine of vicarious liability in the light of *Mohamud's case* and *Armes*. As set out below, both

Barclays' case and *Morrison No 2* adopted a more restrictive approach than had been apparent from *Mohamud* and *Armes.*

89. At [27] of *Barclays' case*, Lady Hale, with whom the other members of the Court agreed, said:

> "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 [the *Christian Brothers' case*, *Cox's case*] and *Armes* … , 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."

90. As a matter of principle, Lady Hale's last sentence in this passage is applicable both to stage 1 and to stage 2. Despite the fact that it has now been re-confirmed that Lord Phillips' five factors are concerned with stage 1 (see [94] below), it is entirely possible for there to be a relationship between D1 and D2 which would in principle be capable of giving rise to vicarious liability but for the tortious acts in question to fail to satisfy stage 2 because, when committing the acts, D2 is acting "on his own independent business" or, as used to be said, "on a frolic of his own": see *Joel v Morison* (1834) 6 C&P 501, 503 per Parke B, and *Dubai Aluminium* at [32]. Hence the need for stage 2.

91. On the facts of *Barclays' case* the doctor provided a vital service that was integral to the bank's recruitment process; but he was not "anything close to an employee" ([28]). Among the features of the case that led to that conclusion were that he was "not paid a retainer that might have obliged him to accept a certain number of referrals from the bank. He was paid a fee for each report. He was free to refuse an offered examination should he wish to do so. … He was in business on his own account as a medical practitioner with a portfolio of patients and clients. One of those clients was the bank." The imposition of strict vicarious liability was not appropriate.

92. In *Morrison No* 2 an employee was provided with confidential data by his employer for the sole purpose of passing it to the company's auditors, which he fulfilled. He then malevolently published it on the internet with the intention of damaging his employer. The Supreme Court took the opportunity to correct what were perceived to be misunderstandings of the judgment of Lord Toulson in Mohamud's case. In doing so it applied something of a brake on the more expansionist approaches to the imposition of vicarious liability.

93. When addressing the stage 2 application of the close connection test, Lord Reed, with whom the other members of the court agreed, said at [23]:

> "As Lord Phillips noted in [the *Christian Brothers case*], paras 83 and 85, the close connection test has been applied differently in cases concerned with the sexual abuse of children, which cannot be regarded as something done by the employee while acting in the ordinary course of his employment. Instead, the courts have emphasised the importance of criteria that are particularly relevant to that form of wrongdoing, such as the employer's conferral of authority on the employee over the victims, which he has abused."

94. Lord Reed was at pains to emphasise that Lord Toulson in *Mohamud's case* had not intended to effect a change in the law of vicarious liability; and, specifically, that there had been no departure from the close connection test as laid down by the House of Lords at [22]-[26] of *Dubai Aluminium*, which he summarised authoritatively at [23] and [25] of his judgment:

> "… in a case concerned with vicarious liability arising out of a relationship of employment, the court generally has to decide whether the wrongful conduct was so closely connected with acts the employee was authorised to do that, for the purposes of the liability of his employer, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment."

95. At [31] Lord Reed identified four short points of principle of particular importance:

> "First, the disclosure of the data on the internet did not form part of Skelton's functions or field of activities, in the sense in which those words were used by Lord Toulson JSC: it was not an act which he was authorised to do, as Lord Nicholls put it. Secondly, the fact that the five factors listed by Lord Phillips in [the *Christian Brothers case*], para 35 were all present was nothing to the point. Those factors were not concerned with the question whether the wrongdoing in question was so connected with the employment that vicarious liability ought to be imposed, but with the distinct question whether, in the case of wrongdoing committed by someone who was not an employee, the relationship between the wrongdoer and the defendant was sufficiently akin to employment as to be one to which the doctrine of vicarious liability should apply. Thirdly, although there was a close temporal link and an unbroken chain of causation linking the provision of the data to Skelton for the purpose of transmitting it to KPMG and his disclosing it on the internet, a temporal or causal connection does not in itself satisfy the close connection test. Fourthly, the reason why Skelton acted wrongfully was not irrelevant: on the contrary, whether he was acting on his employer's business or for purely personal reasons was highly material."

The first and second of these points are directly relevant to stage 1. The third and fourth are relevant to stage 2, though the fourth may be said to be relevant to a synthesis of both stages 1 and 2.

96. In *BXB's case* the Court of Appeal affirmed the imposition of vicarious liability upon what may loosely be described as the unincorporated organisation of the Jehovah's Witnesses in respect of the rape of the claimant by one of the elders of the organisation. Nicola Davies LJ at [81] found the stage 1 question to be satisfied by close analogy with the facts of the *Christian Brothers' case*:

> "The elders were the chief conduit of the guidance and teachings of Jehovah's Witnesses, they were not carrying on business on their own account. Elders were integral to the organisation, the nature of their role was directly controlled by it and by its structure. The Judge was entitled to conclude that the relationship between elders and the Jehovah's Witnesses was one that could be capable of giving rise to vicarious liability."

The other members of the Court, Bean LJ and Males LJ agreed in the result and with Nicola Davies LJ's reasons.

97. Turning to stage 2, at [89] Nicola Davies LJ found that three findings of the Judge below provided the basis for satisfying the test of close connection because of the tortfeasor's "position as an elder, his role and authority within the organisation and the power which it engendered so as to make it just and reasonable for the defendants to be held vicariously liable for his [tort]". Bean LJ agreed in the result and with Nicola Davies LJ's reasons. Males LJ gave a concurring judgment in which he identified four key factors which led him to agree that vicarious liability should be imposed. First, ordinary members of the congregation were required to be obedient and submissive to the elders and not to question their conduct or instructions. Second, the elders of the congregation knew of and permitted sexually inappropriate conduct on the part of the tortfeasor. Third, when the claimant had raised the question of that inappropriate conduct with a senior and highly respected elder (who happened to be the tortfeasor's father), his response was that the claimant and her husband should give the tortfeasor additional support as good Jehovah's Witnesses. This advice (which in practical terms amounted to an instruction) was given in the knowledge of the tortfeasor's sexually inappropriate conduct and capacity for violence. Fourth, had that advice not been given, the claimant and her husband would have cut off contact with the tortfeasor. He concluded that the rape occurred because of the tortfeasor's status as an elder and because the claimant had been put in a position where the risk of sexual abuse of some kind was apparent.

98. Before leaving these authorities, it is convenient to refer to the speech of Lord Steyn in giving the advice of the Board in *Bernard v Attorney General for Jamaica* [2004] UKPC 47, [2005] IRLR 398, to which reference was made at [77] to the *Christian Brothers' case*. At [21] Lord Steyn pointed to the fact that vicarious liability is a principle of strict liability, which "underlines the need to keep the doctrine within clear limits." At [23] he repeated that "the policy rationale on which vicarious liability is founded is not a vague notion of justice between man and man. It has clear limits. … The principle of vicarious liability is not infinitely extendable."

99. With Lord Steyn's words in mind, it is apposite to review the nature of the extension of principle that has been achieved by the authorities to which we have been referred. The employer/employee cases have concentrated upon the stage 2 requirement because the fact of the employer/employee relationship is of itself sufficient to satisfy the stage 1 requirement. Where an employer/employee relationship is lacking there is a broad spectrum from those which are, in reality, only technically different from a conventional employer/employee relationship to those which are readily identified as being either true independent contractor/employer relationships or relationships that have essentially the same characteristics.

100. The scope of the phrase "akin to employment" is not capable of precise definition, but was used by Lady Hale at [27] of *Barclays' case* in an apparently binary categorisation, asking "whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant." Lady Hale evidently recognised that the boundaries between these categories are indefinable; hence the need to resort to Lord Phillips' five "incidents" in doubtful cases, to help "in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability."

101. Even Lord Phillips' five incidents cannot be taken as providing definitive outcomes, not least because they do not purport to be an exhaustive catalogue by reference to which hard-edged boundaries can be established. It is, however, material that the journey towards extending the scope of relationships where vicarious liability should be imposed beyond conventional employer/employee relationships is substantially based upon the approach of Rix LJ to dual vicarious liability in *Viasystems* and the approach of the Canadian courts, with particular reference to *Bazley v Curry*, which have as their hallmarks features of control, enterprise risk and integration of the tortfeasor into the business. Where the relationship is such that the "employer" is not even in a position to direct what the tortfeasor shall do, as Lord Reed held at [21] of *Cox's case,* "the absence of even that vestigial degree of control would be liable to negative the imposition of vicarious liability." The same idea is implicit in Lord Reed's reference (at [24] of *Cox's case*) to the defendant creating a risk by assigning particular business activities to the tortfeasor: see also [31] of *Cox's case*.

102. Questions of vicarious liability will generally not arise unless the tortfeasor can be described as doing something for, or for the benefit of, the "employer" or their enterprise. That will therefore seldom be a determinative characteristic. More is required, both at stage 1 and stage 2, than that the "employer" has engaged the tortfeasor to carry out work which gave them the opportunity to commit the tortious acts in question. To my mind, the authorities suggest that it is the combination of the creation of enterprise risk inherent in the employer's "business", combined with the measure of control (if only in assigning the tortfeasor to roles that significantly enhance that risk), that will frequently provide the touchstone for the synthesis of stage 1 and stage 2. That of itself necessitates a close examination of the relationship between the tortfeasor and the person upon whom vicarious liability may be imposed, both when addressing whether their relationship is one which is capable of giving rise to vicarious liability and when considering whether the connection that links the relationship between D1 and D2 and the tortious act or omission of D1 is sufficient to justify the imposition of vicarious liability on the facts of the particular case.

103. I would add that there is a risk that the phrase "integral to" may be used loosely in circumstances where it adds little or nothing to the observation that the primary tortfeasor has been performing one or more functions that are beneficial to the "employer's" enterprise. To my mind, there is a strand running through the cases from *Viasystems* onwards which suggests that what one should look for is not merely a beneficial involvement with (or for) the "employer's" enterprise but a real degree of integration of the primary tortfeasor into the employer's business or relevant activity. This is not capable of hard-edged definition in advance; but it may in appropriate cases provide an additional marker when seeking to distinguish between relationships that are properly to be regarded as "akin to employment" and those that are not. Integration in this sense may be seen to be present on the facts of the *Christian Brothers' case*, *Cox's case*, Armes and *BXB* but to be absent *Barclays' case*.

104. As has been recognised on numerous occasions, stages 1 and 2 are not susceptible to a "tick-box" approach; nor do the statements of principle to which I have referred provide a precise definition that can simply be applied so as to give a ready answer when the question of vicarious liability arises beyond the safe confines of an employer/employee relationship. It is for that reason that the Court is enjoined to adopt the common law approach of comparison with previous decided cases with a view to taking incremental steps where that may be appropriate: see *Dubai Aluminium* at [26] per Lord Nicholls, and *Morrison 2* at [24] per Lord Reed.

The Appeal: Grounds 7 & 8:

(i) the learned judge was wrong on the facts and in law to hold that Frank Roper was at any material time in a relationship with the Defendant that was capable of imposing vicarious liability on the Defendant for his torts.

(ii) the learned judge was wrong in law and in fact to hold that there was a sufficient connection between the Claimant's assault and any relationship between Frank Roper and the Defendant.

105. Ground 7 is formulated to challenge the Judge's conclusion on stage 1 and Ground 8 to challenge his conclusion on stage 2. Although Grounds 7 and 8 are presented sequentially, I bear in mind that the resolution of the issue of vicarious liability in the absence of an employer/employee relationship depends upon a synthesis of stages 1 and 2 so that there is obvious scope for cross-fertilisation of evidence and conclusions between the two stages. For that reason, I set out below the paragraphs in which the Judge set out his discussion and conclusion on both stages.

106. The Judge provided his summary of the law on vicarious liability at [78]-[90] of the judgment. Starting with the *Christian Brothers' case*, he noted the two-stage test and set out relevant passages from [35], [45] and [47] of Lord Phillips' judgment, which form part of Lord Phillips' consideration of stage 1. In doing so, he noted the approval of Rix LJ's formulation of the control test for the purposes of the modern law of vicarious liability and the adoption of language similar to that of Ward LJ in the *English Province case.* He did not separately refer to Lord Phillips' consideration of the principles applicable to stage 2 (e.g. the need for a strong connection between the risk created by the employer's enterprise and the wrongful act or the need for the employer to have significantly increased the risk of harm by putting the employee in his position and requiring him to perform the assigned task: see [66] above). Nor did he refer to the

principle that the fact that employment gives the employee the opportunity to commit the wrong is not enough to make the employer liable.

107. When the Judge gave judgment, the most recent Supreme Court decisions were *Cox's case* and *Mohamud's case*. In relation to stage 1, he therefore paid close attention to *Cox's case*, setting out [29]-[31] of the judgment of Lord Reed, the first two paragraphs of which I have set out at [80] above.

108. Turning to stage 2, the Judge gave detailed attention to the judgment of Lord Toulson in *Mohamud's case*. He set out [44]-[46] of that judgment, the first two paragraphs of which I have set out at [84] above. In doing so he identified as the essence of those paragraphs a rather different two-fold test from that identified by Lord Phillips in the *Christian Brothers' case*, namely (i) what was the nature of the employee's job, and (ii) whether there was *sufficient* connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice which goes back to Holt CJ.

109. The judge did not have the corrective guidance of *Barclays' case*, primarily in relation to stage 1, and *Morrison No 2*, primarily in relation to stage 2. As I have explained earlier, each of those decisions heralded a more restrictive approach to imposing vicarious liability in cases where the relationship between the tortfeasor and the person on whom it is said that vicarious liability should be imposed is more than merely technically different from those of employers and employees.

110. The Judge set out his conclusion on stage 1 at [159]-[162] of the judgment, as follows:

> "159. Reviewing all this evidence, in the light of the authorities on vicarious liability which I have cited, I am satisfied that the relationship between Roper and the Club was one capable of giving rise to vicarious liability. It is just and reasonable on the facts I have found that this should be so. Roper was an unpaid volunteer, but the Club's dire financial state meant that almost all the non-playing staff were in the same position, Ellis (the manager) and Chapman (the youth manager) being the exceptions. Chapman could not and did not do his job alone. He depended on people like Roper and Hurst to help him, and in doing what he did, Roper was very much doing the work of the Club. There was no more important task for the Club than spotting and capturing young players and bringing them into a position when they were willing to sign up for a lower division side with limited resources. This is the task that Roper did better than anyone else, and everyone knew that he was doing it. He was a Blackpool scout, and his Nova Juniors side was a Blackpool feeder team. Its sole purpose was to take boys, so far as possible, into a closed environment in which Blackpool had a better chance than any other club of securing their signatures when they were old enough to sign (if not before). There was evidence that some boys did not take the bait. DSN himself did not sign for Nova Juniors after the New Zealand trip. But, on the evidence, they were the exceptions. Roper was very effective,

and both the number and the quality of the young players he brought to Blackpool was exceptionally high.

160. Blackpool gave Roper credibility by lavishing tickets and access on him and his protégés. These were talented boys and there were other clubs. Roper was not a footballer. The only currency he had to offer was his connection with Blackpool FC, and Blackpool FC kept him supplied with everything that it could, short of money, to confirm that connection and provide that currency to Roper for its own benefit. Roper's activity was not only on behalf of Blackpool, it was exclusively on Blackpool's behalf, and the fact that he was not paid made it all the more striking. Roper's activity was part of Blackpool's business activity. Blackpool, by giving Roper the "aura" (as it was put in evidence) he had there, and his own room, and a special place in the stand, and free tickets, and access to the private areas, and association with the older players including first team players, and what was described as "the run of the place", as well as by the track record it gave Roper of taking on his boys time after time, created the trust in Roper that allowed him to abuse the boys. None of the boys, and none of the parents of the boys, that I heard about, knew anything at all about Roper except that he was a Blackpool scout who ran a Blackpool feeder team at Nova Juniors from which a professional career at Blackpool might, if Roper rated them, develop. It was on that basis that the boys were placed in his power, and that is how he was able to abuse them. I did not hear evidence of a single case of Roper abusing anyone who was not a young footballer being groomed for Blackpool, or playing for Blackpool, at the same time as he was being groomed for abuse, or actually abused. The football and the abuse were symbiotic, and all the football was directed to recruitment for Blackpool FC.

161. It is true that Roper seemed to control Chapman more than Chapman controlled Roper. But Blackpool FC could have removed Roper's access and all the other incidents of his position with Blackpool FC, at a stroke - and, if it did, Roper would have been nothing. He depended on Blackpool FC, even though he was not employed by them under a contract. He could not do what he did without them. They gave him the tools to do his work for them, the credibility to make promises about them, the perks to buy allegiance to them and the association to build loyalty to them. At any time, they could have taken all that away, refused him access to the Club, stopped his association with Chapman and made it known that Roper no longer had any influence over the selection of boys for schoolboy forms or apprenticeships - and then he would have been finished. He was as dependent on Blackpool's favour and on his integration into Blackpool FC as an employee would have been: he was working for them, and they could have fired him at any time. Truly, the relationship

> between Roper and Blackpool FC was akin to that between employers and employees between whom there is vicarious liability. Roper was, in reality, part of Blackpool FC's workforce in the youth set up. He was at least as important as Chapman in that respect. Chapman coached the youth but, without Roper, and without the likes of Stewart and Bardsley and the other talented boys Roper found and brought in, Chapman would not have had the youth he was coaching. Even the money men on the board, who did not involve themselves in the footballing side, knew that Roper's recruitment of Stewart and Bardsley had saved the Club. Conversely, Nova Juniors was not an independent club. It was a Blackpool feeder club. That is how it was promoted, that is how it was known, that is how it operated, and that is how it maintained its reputation and thrived.
>
> 162. Roper was so much a part of the work, business and organisation of Blackpool FC that it is just to make Blackpool FC liable for his torts within the first limb of the two-stage test, and subject to the second limb, to which I will turn when considering, specifically, the New Zealand trip and the context of the abuse suffered by DSN during that trip."

111. After reviewing the evidence on stage 2 as follows, he set out his "conclusion on vicarious liability" at [175] of the judgment, as follows:

> "175. Taking all this evidence into account, and bearing in mind all the authorities I have reviewed, I am satisfied that Roper's abuse of DSN on the New Zealand tour, and the New Zealand tour itself, were so closely connected with Roper's relationship with Blackpool FC that it is just to hold Blackpool FC vicariously liable for it. Blackpool FC, given its inadequate resources, was never going to be able to run this as an official trip, but it was as close to an official trip as made no difference. It was a football tour that was part of Roper's operation in building the allegiance of promising young footballers to Blackpool FC. He swiftly followed it up by trying to sign them up to the Blackpool FC feeder team he ran at Nova Juniors (the fact that some, including DSN himself, resisted Roper's efforts and did not go on to join Blackpool FC makes no difference). The parents only allowed Roper to take their sons on this tour because they saw it as part of a Blackpool FC recruitment operation offering the boys the prospect, if they were good enough, of finding an opening at Blackpool FC in due course or, at the very least, of benefitting, in their playing as youths, from the expertise and association with Blackpool FC that Roper and his affiliation to Blackpool FC provided. Roper's involvement with the boys on the tour, and the opportunity he took to abuse DSN in the course of it, may fairly and properly be regarded as taking place in the ordinary course of Roper's work for Blackpool FC although it was a crime which was not, of course,

> authorised or condoned by Blackpool FC and although it took place off the club premises and outside the football season. Roper used and misused his position with Blackpool FC to get DSN into a position where Roper could and did sexually abuse him. Blackpool FC is vicariously liable for that abuse."

Submissions on Ground 7: Blackpool FC

112. Blackpool FC submits that the Judge has taken an incomplete view of the evidence and that he has failed to concentrate sufficiently, when considering stage 1, on the actual nature of the relationship between the club and Mr Roper. Instead, it submits that he has been over-influenced by impressionistic evidence that is not sufficient to justify a conclusion that the relationship between the club and Mr Roper was capable of giving rise to vicarious liability. In briefest outline, it submits that the club exercised no relevant control over Mr Roper when acting as a scout and that it is incorrect to characterise Nova Juniors as anything other than an independent venture run by Mr Roper; and equally incorrect to suggest that Nova Juniors was established and operated solely as a part of Blackpool FC's recruitment process. The better analysis, submits Blackpool FC, was that Mr Roper was a free agent and that the club was happy to receive his recommendations if and when he chose to make them; but that he was not under any obligation to make recommendations or to make recommendations exclusively to Blackpool FC.

113. Turning to the evidence upon which the Judge relied, Blackpool FC supports its submission that there was no exclusivity, control or obligation on the part of Mr Roper:

    i) By identifying that, of the 11 school-age footballer witnesses, 5 did not join Blackpool FC in any capacity; of the 6 who did, 2 were introduced by other "scouts", one was approached (via his parents) by Mr Chapman directly and one (who signed in 1967) did not say how or by whom he was spotted;

    ii) By identifying evidence not mentioned by the Judge to the effect that (a) CFS had the opportunity to train at other clubs (Manchester United, Everton, Spurs and Leeds), (b) Graham Wright left Nova Juniors at 13/14 and signed schoolboy forms for Coventry, (c) Mark Bradshaw was taken by Mr Roper to training at Manchester United over a period of 18 months during which time Mr Roper also drove two of his friends whom he had introduced to that club, (d) Mark Bradshaw also trained with Manchester City, Spurs, West Bromwich Albion and Bury, (e) ANF signed for Manchester United, and (f) Mr Sharp's son and another boy (Jamie Forrester) both played for the second Nova Juniors but signed for Auxerre.

114. On close analysis, submits Blackpool FC, the evidence of Mr Roper holding himself out as acting for the club is of little or no significance when analysing the nature of the relationship between them; and there is nothing in the evidence of the club welcoming Mr Roper to justify a finding that they were in a relationship that was "akin to employment" or such as was capable of giving rise to vicarious liability. The danger of relying upon assumptions or impressions is shown by the fact that Mr Sharp assumed that Blackpool FC had made substantial payments to Mr Roper when it signed players he had introduced because he could not see any other way that Mr Roper would recover the huge outlay for the trip. On the findings made by the judge, that assumption was

incorrect. On proper analysis, submits Blackpool FC, Mr Roper's activities with Nova Juniors are an independent enterprise by which Mr Roper incurred no obligation to the club and for which he received no payment; the club had no control over how Mr Roper scouted and no right of first refusal on talented players he discovered; and the 1987 trip was Mr Roper's venture, independent of the club, privately organised and financed, not in any sense under the control of the club, and having no features consistent with either employment or being akin to employment. It submits that the trip was never endorsed as a Blackpool FC trip and that, on proper analysis, it was not one.

Submissions on Ground 7: Claimant

115. The Claimant's basic submission is that the Judge applied the correct test and that Blackpool FC's appeal on both Grounds 7 and 8 is no more than a re-arguing of the factual evidence, in relation to which the Claimant submits that there is no legitimate challenge to the Judge's findings of fact. Put shortly, it was Mr Roper's position at the club which gave him the power and hold over the boys in his charge; it was an arrangement involving mutual benefits; and it was one that was capable of giving rise to vicarious liability because Mr Roper was "part of Blackpool FC's workforce in the youth set-up". The 1987 trip was part of the recruitment process. Mr Ellis' contribution in the meetings would have left parents reassured because he was the manager of the club. None of the parents would have let their sons go on the trip without the legitimacy conferred by the club's support and involvement. Most of the players who went on the trip joined the new Nova Juniors on their return. Therefore the abuse was so closely connected to the relationship between Mr Roper and the club that vicarious liability should be imposed.

116. In relation to stage 1, the Claimant points to the club being financially stretched but recruitment being part of the club's core business. He submits that, in addition to introducing Paul Stewart and David Bardsley, Mr Roper was "central to the development of youth players at Blackpool FC". Relying upon the Judge's reasoning at [159]-[162] of the judgment, the Claimant submits that the relationship between Mr Roper and the club was much closer than the relationship between the bank and the independent doctor in *Barclays' case*. Ultimate control of what he did is said to derive from the fact that the club could have terminated Mr Roper's involvement with the club at any stage. As it was, he remained integral to what the Judge found to be a core part of Blackpool FC's business, which involved a relationship of complete interdependence.

Submissions on Ground 8: Blackpool FC

117. Blackpool FC submits that the pleaded case against it is based on Mr Roper's position as a scout for Blackpool FC. On that basis alone it submits that there is no strong connection between his relationship with Blackpool FC as a scout and the happening of the sexual abuse on the 1987 tour. Blackpool FC submits that the tour was not something that Mr Roper was authorised or required to do as the club's scout or representative: the club could not and did not determine whether the tour should take place and had no control over it once Mr Roper had decided to do it. Rather, it was an independent venture undertaken by Mr Roper of his own initiative. The tour was not a Blackpool FC tour because it formed no part of its business of recruiting new young talent. Furthermore, the club did not create a close connection by endorsing or adopting the tour. To the contrary, it was not billed as a Blackpool FC tour, it was not a

Blackpool School of Excellence tour, and the club took no part in organising, running, administering or financing it (subject to the £500 contribution). All of the evidence, submits Blackpool FC, shows that this was Mr Roper's venture. The most that could be said is that his association with Blackpool FC gave him the opportunity to organise the tour and, thereby, to abuse the Claimant which, the club submits, is not sufficient for the imposition of vicarious liability. The judge was simply wrong to characterise the trip as being "as close to an official trip as made no difference": the differences were critical.

Submissions on Ground 8: Claimant

118. The Claimant submits that the Judge was entitled to find that the trip was connected with the club's overall youth team operations and, thereby, with the work, business and organisation of Blackpool FC. The club benefitted from the tour because Mr Roper used the tour to recruit young players to his new Nova Juniors team, who would go on to become some of the next generation of Blackpool players. Furthermore, it was only through Mr Roper's connections with Blackpool FC that he was able to run the trip to New Zealand. This is shown by the Judge's conclusion that Mr Ellis had endorsed the trip and that, had he not done so, the parents would not have allowed their children to go on the trip with Mr Roper as the sole responsible adult.

119. Overall the Claimant submits that there was sufficient evidence for the Judge to conclude that the abuse perpetrated against him by Mr Roper was only possible because of the close connection between Mr Roper and Blackpool FC and the role that Mr Roper had carved out for him in its youth football operations.

Reasons and conclusion on Grounds 7 and 8

120. There is an ambiguity at the heart of the case that needs to be identified at the outset: should the 1987 trip be treated as part of his role as a "scout" and, if so, what impact does it have when considering stage 1? The Judge did not mention the 1987 trip as a material feature in giving his reasons on stage 1: see [110] above. Yet when considering stage 2, he described the trip as "part of Roper's operation in building the allegiance of promising young footballers to Blackpool FC" and it is part of the Claimant's case on this appeal that the trip was part of the recruitment process. The significance of this point derives from the vague and undefined nature of Mr Roper's position as a football "scout" and what the 1987 trip reveals (if anything) about the nature of the relationship between Mr Roper and Blackpool FC. Given the need for an intense and fact sensitive analysis of the details of that relationship when considering stage 1, Mr Roper's freedom from any supervision or obligation vis a vis Blackpool FC when organising and conducting the 1987 trip is at least potentially material if and to the extent that it throws light upon whether the relationship is properly to be regarded as "akin to employment". If, alternatively, the 1987 trip is treated as outside the normal range of his scouting activities, two questions arise. First, which is a stage 1 question, the nature of the relationship between Blackpool FC and Mr Roper on the basis that the 1987 trip is not part of that relationship; and second, which is a stage 2 question, whether the trip is to be treated as "a frolic of his own" or, in more modern parlance, something that does not demonstrate a strong connection linking the relationship between Blackpool FC and Mr Roper and the infliction of the sexual abuse when in New Zealand.

121. The features upon which the Judge relied in support of his conclusion that the relationship between Mr Roper and Blackpool FC was capable of giving rise to vicarious liability are set out at [159]-[160] of his judgment, which I have set out at [110] above. At risk of over-simplification, the most important features relied upon by the Judge were:

    i) The importance to Blackpool FC of spotting and capturing young players so that they would eventually sign for Blackpool; the fact that Mr Roper spotted and captured young players for Blackpool FC as a known Blackpool scout; and that the "sole" purpose of Nova Juniors was to further that scouting: see [159] of the judgment;

    ii) Blackpool FC gave him "credibility" by lavishing tickets and access on Mr Roper and his protégés and providing him with his "aura"; his activity was "exclusively" on behalf of Blackpool; the only currency he had to offer was his connection with Blackpool FC; what he did was part of Blackpool's business activity and giving him the run of the place and the club's track record of taking on his boys created the trust in him that allowed him to abuse boys; and it was on this basis that Blackpool FC placed boys in his power, the football and the abuse being "symbiotic" and the football being directed to recruitment for Blackpool FC: see [160] of the judgment;

    iii) Blackpool FC could have removed Mr Roper's access and other incidents of his position and, had it done so Mr Roper would have been "nothing" because he depended on Blackpool FC to do what he did; had the club terminated his position and access to the club, he would have been "finished"; he was as dependent on Blackpool's favour and on his integration into Blackpool FC as an employee would have been; he was "in reality, part of Blackpool FC's workforce in the youth set up"; Nova Juniors was not an independent club but was promoted and operated as a Blackpool feeder club: see [161] of the judgment;

    iv) Mr Roper was so much a part of the work, business and organisation of Blackpool FC that it is just to make Blackpool FC liable for his torts within the first limb of the two stage test: see [162] of the judgment.

122. I start by reminding myself that the mere giving of an opportunity to commit abuse is not sufficient and that the critical question is whether the features of the relationship between Mr Roper and Blackpool FC are to be regarded as akin to employment as opposed to Mr Roper carrying on business (broadly construed) on his own account. The fact that the opportunity to commit abuse would have been removed if Blackpool FC had severed its connection with Mr Roper is equally applicable whether the relationship was akin to employment or one where Mr Roper was acting on his own account: it is therefore not of itself informative about the nature of the relationship. Similarly, the fact that, as the Judge found, there was no more important task for the club than spotting and capturing young players for the club and that Mr Roper was one of a number of unpaid volunteers who did that scouting and conferred important benefits upon the club by the introduction of players is also consistent with his acting either in a role that was akin to employment or one where he was effectively doing that work as an independent third party.

123. Nor can it be said that the existence and operation of Nova Juniors evidences the nature of the relationship. As the Judge recognised, Nova Juniors was Mr Roper's team. On the evidence as summarised by the Judge all decisions about the running, and even the existence, of Nova Juniors were Mr Roper's, including the winding down of the first Nova Juniors that had been based in Stockport and the creation of the second Nova Juniors based nearer to Blackpool after the 1987 trip. There is no evidence of which I am aware to suggest that Blackpool FC had any say in the existence or operation of the Nova Juniors teams at all. Although they fed players primarily to Blackpool they also fed them to other clubs, as the summary I have set out above shows. Their existence and operation cannot, in my judgment, be said to support a finding that the relationship between Mr Roper and Blackpool FC was akin to employment. Furthermore, I do not consider it to be helpful to assert that "Roper's activity was part of Blackpool's business activity." It would, in my judgment, be more accurate to say that Mr Roper's scouting activities conferred benefits upon Blackpool FC that were important for the development and survival of its business. This alternative formulation carries the point that the benefits he conferred could equally have been conferred by someone in a relationship that was akin to employment or someone acting independently. It is therefore necessary to look elsewhere for informative features.

124. I would accept that Blackpool FC's giving free rein and full access to its premises, including the desirable areas such as the directors' box and the players' areas, suggests close involvement between Mr Roper and the club; but on closer examination, even the giving of those privileges provides limited evidence about the real nature of the relationship save to suggest, in a very general sense, that Mr Roper could be described as being "embedded" in Blackpool's business. To my mind, the features identified by the Judge in [160] of the judgment demonstrate that Mr Roper's position, however it is to be categorised for the purposes of the doctrine of vicarious liability, gave Mr Roper access to and the opportunity to abuse boys who he came across in the course of his scouting activities. That, as I have said, is not enough to satisfy the requirements of stage 1.

125. The Judge considered the question of control at [161] of the judgment, accepting that Mr Roper seemed to control Mr Chapman rather than the other way round. He evidently regarded this as showing a lack of control by Blackpool FC over Mr Roper, as he continued by pointing out that the club could have sacked Mr Roper "at a stroke", which would have ended his scouting for the club. This, as I have already said, seems to me to be uninformative.

126. With these preliminary observations, I turn to the parties' submissions on Ground 7, which I have summarised at [112] ff above. Blackpool FC correctly concentrates upon the nature of the relationship, submitting that an absence of control is a defining feature of the relationship between Mr Roper and the club and that Mr Roper was to be regarded as a free agent rather than someone who was in a relationship akin to employment.

127. I have reached the clear conclusion that the evidence as identified and found by the Judge did not justify a finding that the relationship between Blackpool FC and Mr Roper was one that can properly be treated as akin to employment. I would reach this conclusion whether or not the 1987 trip is to be treated as part of Mr Roper's scouting activities. While it can properly be said that what Mr Roper did as a scout conferred important benefits upon Blackpool FC in the conduct of its business and that he was afforded deference and welcome by the club in recognition of his having produced good

players in the past and in hope that he would continue to do so, none of the normal incidents of a relationship of employment are otherwise present. Leaving on one side the fact that he had a completely free hand about *how* he did his scouting, there is no evidence of any control or direction of *what* he should do. This appears to be confirmed by the Judge's acceptance that Mr Roper appeared to control Mr Chapman rather than Mr Chapman having control over Mr Roper. The evidence shows no more than an informal association between Nova Juniors and Blackpool FC, that informal association merely being that a number of boys who played for Nova Juniors went to Blackpool FC so that it was generally regarded as a "feeder" for the club. His activity was not exclusively for Blackpool FC, as is demonstrated by the evidence that he was actively involved in assisting boys (including Mark Bradshaw) who were trying to get to other clubs. These are not exceptions that prove the rule of Blackpool exclusivity: they disprove it.

128. The fact that he was an unpaid volunteer who had a full-time job running his own sportswear business is not determinative; but it is indicative of a person who was in a position to act independently to support a club that was in dire financial straits. Adopting the words of Lord Reed at [21] of *Cox's case*, there was a complete absence even of a vestigial degree of control. This absence of control would become even more apparent if one were to include the 1987 trip as part of Mr Roper's normal scouting activities. With the exception of the minimal contribution of £500, every aspect of the planning, running, administration and financing of the trip was exclusively down to Mr Roper. He decided to run the trip (as he had his previous trips) and precisely how it should be run, including the commercial diversion to Thailand. I shall consider separately the suggestion that Blackpool FC "endorsed" the trip. At this stage it is sufficient to say that Mr Roper decided both what to do and how it should be done.

129. Since I regard this as a clear case on stage 1, it is tempting to follow the observation of Lady Hale at [27] of *Barclay's case* and not to consider Lord Phillips' five incidents as set out at [35] of the *Christian Brothers' case*. However, in case I am wrong in considering this to be a clear case, and because comparison with previous decided cases may point the way for the determination of this one, I follow the development of principle that I have set out earlier in this judgment.

130. It is possible to fit the facts of the present case within the language of principles (i) to (iii) of Lord Phillips' five incidents if one accepts that all of Mr Roper's activities (including his running of the Nova Juniors teams) were exclusively for the benefit of Blackpool FC which, for reasons I have explained above, is not a correct view of the evidence or the Judge's findings. Similarly, incident (iv) may also be said to be applicable to the normal incidents of scouting, though not, in my view, to the circumstances of the 1987 trip. Incident (v), however, is lacking since Mr Roper was not in any meaningful sense under the control of the club. Turning to Lord Phillips' identification of the elements of a relationship between employer and employees that he found to exist on the facts of that case, Blackpool FC was a corporate body, but it had no power to direct Mr Roper to carry out scouting activities: on the contrary, the relationship between Mr Roper and Blackpool FC imposed no power upon the club (other than the power to end its association with him) and no obligation upon Mr Roper to scout either at all or in any particular way. There is no evidence of a contract between Mr Roper and the club, either of service or of services. In contrast to the ties that bound the brothers to the institute, which were held to be stronger than those imposed by a

contract of employment, there were no ties imposing obligations on either side in the present case. Comparison with the facts and reasoning in the *Christian Brothers' case* does not support the taking of an incremental step and deciding that the relationship between Mr Roper and Blackpool was akin to contract.

131. Turning to *Cox's case*, the elements of control and assignment were clearly to be seen and are lacking in the present case: the prison service had and exercised the power to compel the prisoners and to assign them to particular jobs. It could not reasonably be said that the prisoners were carrying out an independent business of their own. The conclusion reached in *Cox's case* was that the negligent prisoner was carrying on "activities assigned to him by the defendant as an integral part of its operation and for its benefit." That is not, in my judgment a conclusion that can properly be reached on the facts of this case. Put another way, features of a contract of employment that were present in *Cox's case* are lacking in the present.

132. There were a number of features present in *Armes* that are absent in the present case. First, the local authority was under a statutory duty to care for the children and chose to discharge this duty by recruiting and training foster parents and placing children with them. By contrast, Blackpool FC was under no relevant statutory duty to boys who wanted to play football and did not "place" the boys with Mr Roper in any meaningful sense of the word. The opposite was the case: Mr Roper scouted for boys who had no previous connection with Blackpool FC at all unless and until he introduced them to Blackpool. At that point, Blackpool might enrol them into the School of Excellence and might thereby assume duties to them: but by then the scouting had been done. As I have outlined above, Mr Roper had at most a peripheral involvement with the training that Blackpool provided at the School of Excellence. Furthermore, the continuing involvement of the local authority in *Armes* in controlling, monitoring, supervision and approval of the foster parents was a feature that has no equivalent in the present case. To my mind, *Armes* is at present the high-watermark for an expansionist approach to the imposition of vicarious liability; and the present case falls far short of being analogous.

133. *Barclays' case* shares with the present case that it can be said that what the doctor (or Mr Roper) did was essential or integral to the Defendant's business. As the decision in *Barclays' case* shows, that is not enough. What *Barclays' case* and the present case also have in common is that neither Mr Roper nor the Doctor were under any obligation to accept work: see [91] above. Despite the fact that he was integral to the bank's business and charged a fee for what he did, the imposition of strict vicarious liability was not appropriate in *Barclays' case*. The decision does not support a conclusion that stage 1 is satisfied in the present case.

134. *BXB* is most closely analogous to the *Christian Brothers' case*. The features identified by Nicola Davies LJ at [81] find no equivalence or analogy in the facts of the present case: see [96] above. As in the *Christian Brothers' case*, it could reasonably be said that the ties and obligations owed by members of the Jehovah's Witnesses were stronger than those to be found in a conventional employer/employee relationship. That is far from the present case.

135. I have traced the development of "enterprise risk" as a factor in the doctrine of vicarious liability at [57] ff above. What emerges from the various citations is that the creation of risk by the establishment of a defendant's business is not of itself enough to engage

the doctrine. What is required is the creation of enterprise risk *and* increasing that risk by using the "employee" to further the objects of the business in circumstances where there is a level of control rendering the relationship between the defendant and the "employee" at least akin to employment. Thus, in the present case, it is not sufficient to say that the running of a football club with the need to attract young and talented players gives rise to the risk that it will also attract sexual predators. What is required is to show that the relationship between the defendant and the predator involves a degree of control and direction of the abuser by the defendant that makes it akin to employment rather than the utilisation of someone over whom the defendant does not even exercise a vestigial degree of control. That vestigial degree of control must be present during the course of the relationship: it is not sufficient to show that the employer has the power to terminate it: see [72], [77]-[82] and [87] above.

136. I do not find language such as "interdependence" or that Mr Roper was "integral to" Blackpool FC's business helpful on the facts of this case or as demonstrating features of the relationship that go beyond those that I have already identified. Neither does more than reiterate that Mr Roper provided benefits to Blackpool FC that were important for the club's survival and success and obtained the opportunity to access boys as a result of his position as a scout, neither of which would have happened had the club severed its links with him. They do not materially assist in identifying whether the relationship was akin to employment.

137. In the present case, although the running of Blackpool FC's business gave rise to the risk of sexual offending against young boys, the relationship between Mr Roper and the Defendant fell far short of being akin to employment as that phrase has been developed in the authorities. On the contrary, while not in any way underestimating the importance of Mr Roper's scouting activities to the club, it is clear that he did so with a degree of independence and lack of control by the club that compels the opposite conclusion. I would therefore hold that the requirements of stage 1 are not satisfied in the present case. I reach that conclusion whether or not the 1987 trip is treated as a normal part of his activities as a scout though, for the reasons I give below, I would not do so.

138. The features upon which the Judge relied in support of his conclusion on stage 2 were set out at [175] of the judgment, which I have set out at [111] above. Risking over-simplification by summarising once again, they were that:

i) The trip was "as close to an official trip as made no difference";

ii) The trip was part of Mr Roper's operation in building the allegiance of promising young footballers to Blackpool FC;

iii) Parents only allowed Mr Roper to take their sons on this tour because they saw it as part of a Blackpool FC operation or from the expertise and association with Blackpool FC that Mr Roper and his affiliation to Blackpool FC provided;

iv) Mr Roper's involvement with the boys on the tour, and the opportunity he took to abuse the Claimant in the course of it, may fairly and properly be regarded as taking place in the ordinary course of his work for Blackpool FC;

v) Mr Roper used and misused his position with Blackpool FC to get the Claimant into a position where he could and did sexually abuse him.

139. I am unable to accept this analysis of the position or that it justifies the imposition of vicarious liability on the club. On the evidence before the Judge and his findings of fact, it cannot be said that the trip was "as close to an official trip as makes no difference." The Judge's finding that Blackpool had inadequate resources and was never going to be able to run the trip as an official trip is of itself significant in making clear that the trip was essentially Mr Roper's trip both in relation to its funding and its running. Leaving on one side the question of endorsement, to which I turn below, Blackpool had no involvement at all apart from providing something in the order of 2% of the funding and the use of the Tangerine Club for meetings. There is no evidence that the trip was even in any sense Blackpool FC's idea, or that they asked Mr Roper to organise and finance it for them, or that they had any hand in choosing who went on the trip. At least the great majority of the boys had no existing connection with Blackpool FC. Mr Sharp said that Mr Roper told him he wanted a representative team from the Fylde Coast, and it appears that is what he got - including the four boys from Mr Sharp's Poulton Youth team. The tour party did not refer to itself as being connected with Blackpool FC; and they wore Everton or England colours, not Blackpool tangerine. Instead, according to the Claimant (whose evidence the Judge appears to have accepted) they were referred to as a Blackpool representative side from England or, in other circumstances, as "Mr Frank Roper's Football Tour" or "Frank Roper and his squad of youngsters from Blackpool". The only other possible connection was the presence of four Blackpool apprentices, out of season, there being no evidence that they held themselves out or were held out as being part of Blackpool FC while on tour and helping Mr Roper.

140. Describing the trip as being "as close to an official trip as makes no difference" ignores the reality that this was Mr Roper's trip in every sense and, specifically, ignores the Thailand leg of the trip. On any view, that leg had nothing to do with Blackpool FC; but its significance goes further by demonstrating the complete control being exercised by Mr Roper, including his determination of how the trip would be funded and he would be reimbursed his outlay. Blackpool FC may have hoped that one or more boys who went on the trip might ultimately develop an allegiance to the club, and it was open to the Judge to describe the trip as part of Mr Roper's operation in building that allegiance, but that did not change the fundamentals of the trip, which were as I have described. The Judge's description of the trip as being "as close to an official trip as makes no difference" is not sustainable in the light of the evidence which he accepted about the organisation, running, make-up and funding of the trip.

141. The evidence about what persuaded parents to entrust their children to Mr Roper's tour was provided by Mr Ellis and Mr Sharp. I have set out or summarised the salient passages of the judgment and the evidence at [44], [45] and [47] above. What is conspicuously lacking is any endorsement of the trip by Blackpool FC as such. When a parent who was a former Blackpool player reported his conversation with Mr Ellis to Mr Sharp, the point he made was that Mr Ellis was sending his own son on the trip. When he spoke at the meetings, Mr Ellis spoke as a father and not as manager of the club; and the reasons he gave did not include any suggestion that the trip was a Blackpool FC trip. What satisfied Mr Sharp that the trip was "legitimate" was that Mr Ellis' son was going on the trip. Despite this, Mr Sharp's evidence, which the Judge

evidently accepted, was that "the involvement and support provided by Blackpool Football Club made the trip legitimate, especially as the first team manager's son would also be on the trip." That may have been Mr Sharp's genuine belief, but in fact Blackpool was not in a position to offer any involvement or support apart from the £500 and the fact that at least one meeting was held at the Tangerine Club. There is no evidence that these were features that influenced the parents into letting their sons go on Mr Roper's trip.

142. The evidence justified the Judge's conclusion that "parents only allowed Mr Roper to take their sons on this tour because *they saw it as* part of a Blackpool FC operation." However, they were wrong. Not only was it not in any real sense a Blackpool FC operation, neither Blackpool FC nor anyone else had held it out as being one. It was given legitimacy by the fact that Mr Ellis was allowing his son to go and the fact that he was the current Blackpool manager doubtless made his decision influential. But that is not the same as saying either that he endorsed the trip as manager of Blackpool FC or that Blackpool FC endorsed it.

143. In my judgment, relying upon Mr Ellis' endorsement and the belief of the parents would be to re-introduce by the back door the test that was rejected by the Supreme Court in *Mohamud's case*. Allowing, for the sake of argument, that the parents as reasonable observers would have considered Mr Roper to be acting in the capacity of a representative of Blackpool FC when leading the trip and committing the tort, that is not an acceptable test for the imposition of vicarious liability: see [83] above.

144. The idea that a person employed as a scout by a football club (great or small) would be required single-handedly to promote, organise, run and fund a trip for young boys lasting a month, during ten days of which no football would be played but the employee would pursue their own independent commercial interests seems to me to be unlikely in the extreme. To suggest that undertaking such a trip would be part of the ordinary course of such a scout's work seems to me to be quite unreal. This immediately calls into question the validity of the Judge's view that Mr Roper's involvement with the boys on the tour may fairly and properly be regarded as taking place in the ordinary course of his work for Blackpool FC. On the evidence that was available to and accepted by the Judge, and for the reasons I have given, the tour had little to do with Blackpool FC apart from its small financial contribution and the hope that boys who went on the tour would form an allegiance to Blackpool FC, possibly as a result of being invited to play for a new Nova Juniors team on their return. On any view, Mr Roper's ordinary course of scouting involved his operation of Nova Juniors and trying to spot talented youngsters who might be introduced to the Blackpool FC School of Excellence. That he took the opportunities that this role afforded him to ingratiate himself with club and players, and to groom and ultimately abuse children, does not provide any support for the suggestion that the trip was something that occurred in the normal course of his work for the club; nor does the fact that his association with the club may have reassured some parents who, for very good reason, had their doubts and suspicions about a trip that seemed too good to be true.

145. For these reasons the Judge's description of the trip as forming part of Mr Roper's ordinary course of scouting cannot be supported. It therefore falls to be considered, as the Judge did, primarily as part of stage 2. However, the trip remains potentially relevant to stage 1 because it sheds some light on whether, as the Claimant submits, his normal scouting activities were being conducted by someone who was in a relationship

with the club that was akin to employment or not. Though I would not hold it to be determinative, the circumstances surrounding the trip provide some additional support for the view that Mr Roper acted independently and not subject to any measure of control or integration that suggests a relationship akin to employment. To that extent it supports the conclusion that I have reached in relation to stage 1.

146. I have summarised the parties' submissions on Ground 8 at [117]-[118] above. Lord Phillips' formulation was that "it must be possible to say that the employer *significantly* increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned task.": see [66] above. While it may be said that Blackpool FC put Mr Roper in his position as scout, it stretches meaning beyond breaking point to suggest that the club required him to organise and lead the trip. Equally, it cannot in my judgment, be said that Blackpool FC placed Mr Roper in the position of leading the trip or assigned the leadership of the trip to him: see [72] and [82] above. Adapting the language of Lord Millett in *Lister*, it cannot reasonably be said that Blackpool FC either had or assumed responsibility for the boys going on the trip or entrusted them to Mr Roper's care: see [68] above. The importance of conferring authority was made clear by Lord Reed in *Morrison 2*: see [93]-[94] above. It is, in my judgment, a complete mischaracterisation of the facts as found by the Judge to suggest that they show a conferral of authority upon Mr Roper by the club in relation to the trip.

147. I am unable to identify any statement of principle in the various authorities to which I have referred that supports the submission that there was the requisite close connection linking the relationship between the club and Mr Roper and the sexual abuse he inflicted upon the Claimant while in New Zealand. Those cases where vicarious liability has been imposed in the absence of a relationship of employment are clearly distinguishable on their facts – the *Christian Brothers' case* and *BXB* because of the all-enveloping nature of the relationship between the tortfeasor and the defendant, and *Armes* because of the particular features that I have identified at [86] above. They do not provide support for the imposition of vicarious liability in this case.

148. I would allow the appeal on Grounds 7 and 8.

Limitation: the applicable principles

149. The law relating to the disapplication of primary limitation periods pursuant to s. 33 of the Limitation Act 1980 is considerably more settled than the law relating to the imposition of vicarious liability for the acts of non-employees. S. 33, so far as relevant, provides:

> *Discretionary exclusion of time limit for actions in respect of personal injuries or death*
>
> (1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—
>
> (a) the provisions of section 11 … of this Act prejudice the plaintiff or any person whom he represents; and
>
> (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;

> the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.
>
> …
>
> (3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—
>
> (a) the length of, and the reasons for, the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 …;
>
> (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
>
> (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

150. It is well established that the section gives the Court an unfettered discretion, though the burden rests on a claimant to establish that the discretion should be exercised in their favour. The statutory test is clear: the discretion arises if, having regard to the matters identified in s. 33(1)(a) and (b) and all the circumstances of the case it appears to the Court that it would be equitable to allow an action to proceed. The reference to "all the circumstances of the case *and in particular* ..." demonstrates that the circumstances identified in s. 33(3)(a)-(f) are not an exhaustive list of matters to be taken into account. Thus for example, though not mentioned in s. 33(1)(a) and (b) or s. 33(3)(a)-(f), the fact that a claim has become stale during the primary limitation period may be relied upon after its expiry: see *Donovan v Gwentoys* [1990] 1 WLR 472, 479H-480A per Lord Oliver of Aylmerton.

151. In *Cain v Francis* [2008] EWCA Civ 1451, [2009] QB 754 Janet Smith LJ rephrased the test at [73], saying that "in the exercise of the discretion, the basic question to be asked is whether it is fair and just in all the circumstances to expect the defendant to

meet this claim on the merits, notwithstanding the delay in commencement." This is a convenient paraphrase of the exercise that will be undertaken and indicates the balancing act that is likely to be required.

152. More recently, Sir Terence Etherton MR provided a general summary of relevant principles in *Carroll v Chief Constable of Greater Manchester Police* [2017] EWCA Civ 1992, [2018] 4 WLR 42 at [42] (with supporting citations omitted), which I respectfully adopt:

> "1. Section 33 is not confined to a "residual class of cases". It is unfettered and requires the judge to look at the matter broadly: ...
>
> 2. The matters specified in section 33(3) are not intended to place a fetter on the discretion given by section 33(1), as is made plain by the opening words "the court shall have regard to all the circumstances of the case", but to focus the attention of the court on matters which past experience has shown are likely to call for evaluation in the exercise of the discretion and must be taken into a consideration by the judge: *Donovan's* case, pp 477H–478A.
>
> 3. The essence of the proper exercise of the judicial discretion under section 33 is that the test is a balance of prejudice and the burden is on the claimant to show that his or her prejudice would outweigh that to the defendant: …. Refusing to exercise the discretion in favour of a claimant who brings the claim outside the primary limitation period will necessarily prejudice the claimant, who thereby loses the chance of establishing the claim.
>
> 4. The burden on the claimant under section 33 is not necessarily a heavy one. How heavy or easy it is for the claimant to discharge the burden will depend on the facts of the particular case: ....
>
> 5. Furthermore, while the ultimate burden is on a claimant to show that it would be inequitable[1] to disapply the statute, the evidential burden of showing that the evidence adduced, or likely to be adduced, by the defendant is, or is likely to be, less cogent because of the delay is on the defendant:…. If relevant or potentially relevant documentation has been destroyed or lost by the defendant irresponsibly, that is a factor which may weigh against the defendant: ....
>
> 6. The prospects of a fair trial are important: .... The Limitation Acts are designed to protect defendants from the injustice of having to fight stale claims, especially when any witnesses the defendant might have been able to rely on are not available or have no recollection and there are no documents to assist the court in deciding what was done or not done and why: .... It is, therefore, particularly relevant whether, and to what extent, the

[11] The sense demands that this word should be "equitable".

defendant's ability to defend the claim has been prejudiced by the lapse of time because of the absence of relevant witnesses and documents: ....

7. Subject to considerations of proportionality (as outlined in para 11 below), the defendant only deserves to have the obligation to pay due damages removed if the passage of time has significantly diminished the opportunity to defend the claim on liability or amount: ....

8. It is the period after the expiry of the limitation period which is referred to in sub-subsections 33(3)(a) and (b) and carries particular weight: ... . The court may also, however, have regard to the period of delay from the time at which section 14(2) was satisfied until the claim was first notified: ... . The disappearance of evidence and the loss of cogency of evidence even before the limitation clock starts to tick is also relevant, although to a lesser degree: ... .

9. The reason for delay is relevant and may affect the balancing exercise. If it has arisen for an excusable reason, it may be fair and just that the action should proceed despite some unfairness to the defendant due to the delay. If, on the other hand, the reasons for the delay or its length are not good ones, that may tip the balance in the other direction: ... . I consider that the latter may be better expressed by saying that, if there are no good reasons for the delay or its length, there is nothing to qualify or temper the prejudice which has been caused to the defendant by the effect of the delay on the defendant's ability to defend the claim.

10. Delay caused by the conduct of the claimant's advisers rather than by the claimant may be excusable in this context: ... .

11. In the context of reasons for delay, it is relevant to consider under subsection 33(3)(a) whether knowledge or information was reasonably suppressed by the claimant which, if not suppressed, would have led to the proceedings being issued earlier, even though the explanation is irrelevant for meeting the objective standard or test in section 14(2) and (3) and so insufficient to prevent the commencement of the limitation period: ... .

12. Proportionality is material to the exercise of the discretion: ... . In that context, it may be relevant that the claim has only a thin prospect of success … , that the claim is modest in financial terms so as to give rise to disproportionate legal costs … ; that the claimant would have a clear case against his or her solicitors … , and, in a personal injury case, the extent and degree of damage to the claimant's health, enjoyment of life and employability… .

> 13. An appeal court will only interfere with the exercise of the judge's discretion under section 33, as in other cases of judicial discretion, where the judge has made an error of principle, such as taking into account irrelevant matters or failing to take into account relevant matters, or has made a decision which is wrong, that is to say the judge has exceeded the generous ambit within which a reasonable disagreement is possible: ... ."

153. In their submissions to us, Counsel for the opposing parties inevitably placed weight on particular aspects of these principles. The Claimant concentrated upon the significance of a claimant having good reason for their delay, citing the balance of [73] of *Cain v Francis* where Janet Smith LJ said:

> "The length of the delay will be important, not so much for itself as to the effect it has had. To what extent has the defendant been disadvantaged in his investigation of the claim and/or the assembly of evidence, in respect of the issues of both liability and quantum? But it will also be important to consider the reasons for the delay. Thus, there may be some unfairness to the defendant due to the delay in issue but the delay may have arisen for so excusable a reason, that, looking at the matter in the round, on balance, it is fair and just that the action should proceed. On the other hand, the balance may go in the opposite direction, partly because the delay has caused procedural disadvantage and unfairness to the defendant and partly because the reasons for the delay (or its length) are not good ones."

154. Conversely, the Appellant concentrated heavily upon dicta tending to suggest that the existence of prejudice to a defendant has primacy. Thus, for example, in *CD v Catholic Child Welfare Society and Others* [2018] EWCA Civ 2342, at [35], Lewison LJ (with whom Rafferty LJ agreed) said:

> "35. It follows that the disapplication of the limitation period is an exception to the general rule. For that reason the burden of persuasion lies on the claimant. Delay of itself may not preclude disapplication of the limitation period. What is of importance is what prejudice the defendant has suffered by the delay: see [*Cain v Francis]* at [73]. Indeed, in AS v Poor Sisters of Nazareth [2008] UKHL 32, 2008 SC (HL) 146, a case about the Scottish equivalent of section, Lord Hope (with whom the other law lords agreed) said at [25]:
>
> > "The issue on which the court must concentrate is whether the defender can show that, in defending the action, there will be the real possibility of significant prejudice. As McHugh J pointed out in *Brisbane South Regional Health Authority v Taylor* (p 255) it seems more in accord with the legislative policy that the pursuer's lost right should not be revived than that the defender should have a spent liability reimposed on him. The burden rests on the party who seeks to obtain the benefit of the remedy. The court must, of course, give full

> weight to his explanation for the delay and the equitable considerations that it gives rise to. But proof that the defender will be exposed to the real possibility of significant prejudice will usually determine the issue in his favour."

155. I would hesitate before endorsing any suggestion that particular features should be given primacy when the court is conducting its balancing act, for two main reasons. First, in *RE v GE* [2015] EWCA Civ 287 McCombe LJ (with whom Pitchford and Lewison LJJ agreed) said that "no factor … can be given a priori importance." Second, given the infinite variety of factual situations in which a claimant may come to the court asking for it to disapply the primary limitation period, it seems to me to be impossible to predict which features will hold sway, always bearing in mind that it is for the claimant who makes the application to satisfy the Court that it would be equitable in all the circumstances to allow the action to proceed and that the court should exercise its discretion in their favour. Furthermore, although the policy reasons that have caused Parliament to establish limitation periods are well known, so too are those that caused Parliament to temper the harshness of fixed-point cut-offs by a series of statutory provisions from 1963 onwards, including s. 33. Thus, for example, a finding that a claimant *could not* have brought an action before they did is likely to attract significant weight, particularly if that inability is attributable to the tort that is to be the subject of the action. Precisely how much weight is to be attributed to different features of a case is quintessentially a matter for the Judge in the exercise of their discretion, applying the established principles summarised in [42] of *Carroll* that I have set out above.

156. For these reasons I would not accept the Appellant's headline submission that "the central question for the Judge under section 33 was whether and to what extent the Defendant was prejudiced in meeting this claim as a consequence of the lengthy delay in commencing proceedings". Although that was a question which the Judge had to determine, the central question for the Judge was that posed by the statute, applying the principles that I have summarised above.

157. A separate point of principle is not in dispute, though the parties disagree about whether the Judge complied with it. In *KR v Bryn Alyn Community (Holdings) Ltd* [2003] QB 1441 CA at [74(vii)] Auld LJ expressed the point as follows:

> "Where a judge determines the section 33 issue along with the substantive issues in the case, he should take care not to determine the substantive issues, including liability, causation and quantum, before determining the issue of limitation and, in particular, the effect of delay on the cogency of the evidence. Much of such evidence, by reason of the lapse of time, may have been incapable of being adequately tested or contradicted before him. To rely on his findings on those issues to assess the cogency of the evidence for the purpose of the limitation exercise would put the cart before the horse. Put another way, it would effectively require a defendant to prove a negative, namely, that the judge could not have found against him on one or more of the substantive issues if he had tried the matter earlier and without the evidential disadvantages resulting from delay."

158. The same point was made by Burnett LJ (as he then was) in *Archbishop Bowen & The Scout Association v JL* [2017] EWCA Civ 82 at [26]:

> "The logical fallacy which Lord Clarke MR was concerned with in paragraph 21 of the Nugent Care Society case and Auld LJ in paragraph 74(vii) of the Bryn Alyn case was proceeding from a finding on the (necessarily partial) evidence heard that the claimant should succeed on the merits to the conclusion that it would be equitable to disapply the limitation period. That would be to overlook the possibility that, had the defendant been in a position to deploy evidence now lost to him, the outcome might have been different."

159. That said, one of the tasks for a Judge when asked to exercise their discretion under s. 33 will almost always involve making an assessment of the extent to which the existence or cogency of the evidence has been affected by the delay since, without such an assessment, no view can be formed of the evidential prejudice that may have been suffered by the defendant. The principle derived from the *KR* and *Archbishop Bowen* cases is not in doubt; but it may require something of a tight-rope intellectual exercise.

The Appeal: Grounds 2 and 4

Ground 2: the decision that section 11 of the Limitation Act 1980 should not apply to this action was founded on a perverse conclusion that there was no real possibility of significant prejudice to the Defendant from the delay.

Ground 4: the learned judge misdirected himself as to the significance of the evidence said to be consistent in supporting the Claimant's case on vicarious liability.

160. The Judge dealt with limitation at [23]-[68] of the judgment. At [23]-[28] he provided a concise review of the authorities to which he had been appropriately referred. He recognised that consideration of the whole period since the accrual of the cause of action was required in order to assess "all the circumstances of the case". Having done so he summarised the approach he was required to adopt at [29]:

> "it is clear that I must weigh many factors and approach them in a principled fashion, notwithstanding the breadth of the question posed at the beginning of section 33 of the Limitation Act as to whether it appears to me that it would be "equitable" to allow the action to proceed after a long delay. I must and will bear in mind the prejudice to the Claimant if the primary limitation period is not extended, the prejudice to the Defendant if it is, and "all the circumstances of the case" under sections 33(1)(a) and (b), and (3), including but not limited to the statutory factors in section 33(3)(a)-(f). Of these, I regard factors (a) and (b) of particular importance in this case: namely, the length of the delay, the reasons given for the delay by DSN, and "the extent to which, having regard to the delay, the evidence adduced or likely to be adduced [by the Claimant or the Defendant] is or is likely to be less cogent" than if the action had been brought within the primary limitation period. Although not part of the statutory

> language, a number of the authorities confirm that the question of whether there is a "real possibility of significant prejudice" by reason of the delay is of critical importance, as is whether it is possible to have a fair trial."

161. With one qualification, this summary is unimpeachable. It is evident that the Judge had well in mind the principles which I have attempted to summarise at greater length above. The one qualification I would make is that I would not say that the real possibility of significant prejudice by reason of the delay "is of critical importance". I think that the degree of certainty implied by saying that it "is" of "critical" importance overstates the position, for the reasons I have given at [154]-[156] above.

162. The Judge first considered the reasons for the delay, finding that (a) there was a clear barrier to the Claimant making a disclosure, (b) he did not know that Mr Roper had died when, in 2012, publicity about the Jimmy Savile scandal broke, and (c) it was for practical purposes impossible for the Claimant to disclose the abuse before he did, or to raise a legal claim before he did. Then, recognising that the delay was "very long indeed", he addressed the specific point that Blackpool FC was no longer able to obtain records and papers from 1987 which might bear on the role played by Mr Roper, with particular regard to the issue of vicarious liability. However, he noted that Mr Roper was not an employee and that, even for employees, documentation was limited. He appears to have accepted Blackpool's evidence that the destruction of records probably took place in the early 1990s, before the expiry of the primary limitation period.

163. The Judge then reminded himself (at [45]) that "particularly important in this case … is "the extent to which, having regard to the delay, the evidence to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11" … and … whether there is a "real possibility of significant prejudice" to Blackpool FC by reason of the delay. He also reminded himself (citing *Bowen v Scout Association* [2017] EWCA Civ 82) that he should not fall into the error of forgetting that evidence which seemed cogent to him on the evidence now available might have seemed substantially less cogent if other evidence had been available, which, because of the delay, he had not seen or heard. At [47] he reminded himself of "the basic question" by reference to [73] of *Cain v Francis*; and he cautioned himself by reference to the dictum of Lord Brown in *A v Hoare* [2008] UKHL 6 emphasising the difficulties that may be faced by a Defendant when a complaint of sexual abuse "comes out of the blue with no apparent support for it" such that a fair trial (which includes a fair opportunity for the Defendant to investigate the allegations) may be simply impossible.

164. The Judge correctly identified that the two issues potentially most affected by the long delay were the allegation of abuse itself and the dispute over Mr Roper's relationship with the club and whether the club should be vicariously liable for anything he did on the New Zealand trip. In relation to the first issue, the Judge said that he found the evidence of the Claimant cogent and compelling quite apart from Mr Roper's record as a convicted paedophile and the evidence of five other witnesses of similar or worse sexual abuse committed in similar circumstances and using similar tactics. While recognising that Mr Roper might have denied the allegations, the Judge assessed the evidence against him as cogent and compelling and concluded at [49] that "having heard [the Claimant] give evidence, and being cross-examined, I am confident that [an

accusation by Mr Roper that the Claimant was lying] would have had no prospect of succeeding, whatever [Mr] Roper might have said."

165. The Judge dealt with the impact of delay on the issue of vicarious liability at greater length. Having identified that the deaths of Mr Roper and Mr Chapman might be assumed to pose a greater risk to a fair trial, the Judge stated his conclusion at [50] that:

> "… a remarkable number of witnesses, both youths and adults at the material time, gave a great deal of evidence on this question which proved to be strikingly consistent and cogent, and I do not think that [Mr] Roper and [Mr] Chapman, even if they had contradicted this evidence (which, of course, they might not have done) would have been able to prevail as lone voices against it."

166. The Judge explained this conclusion by referring to the large number of witnesses from whom he had heard (and whose evidence I have summarised earlier in this judgment). He noted that other witnesses would have been available of the same sort as the various players who had been called, and that such witnesses could have given evidence about the apparent connection between Mr Roper and the club (or the lack of it). The evidence of Blackpool FC's solicitor was that the club had chosen not to attempt to approach such people. The Judge concluded at [56] that:

> "… given the number of such witnesses I did hear from, and given the consistency of the picture they painted, I am confident that earlier proceedings would not have had access to relevant witnesses who would have altered the effect of this evidence."

167. Turning to the evidence that he had heard from the witnesses who had been adults in 1987, the Judge expressed the view (with reasons) that Mr Sharp's evidence had been "no less cogent and complete than it would have been had it been given 20 years ago." He said that Mr Ellis was "a confident and solid witness, who did not appear to be handicapped in his ability to recall and give evidence by the passage of time." He said at [59] that, apart from Mr Roper and Mr Chapman (whose significance he said he did not underestimate) it did not appear that any witness had become unavailable because of the passage of time; and that there were potentially large numbers of witnesses who might have been called but who were not. He restated his overall conclusion at [60] that:

> "because of the cogency and abundance of the evidence that was put before me on both sides, and the nature of the issues in this case, and the narrow scope of factual dispute, at least so far as primary facts are concerned, no real risk of substantial prejudice has been caused by the delay in the defendant receiving notice of the claimant's claim, or in the issue of proceedings so long after the primary limitation period."

168. The Judge then addressed a separate submission, based upon the judgment of Sir Murray Stuart-Smith in *Robinson v St Helen's MBC* [2003] PIQR P128, that it would not be proportionate to disapply the limitation period as any award was likely to be modest. The Judge held that the cited observations had less force when determination of the issue of limitation occurred at the trial of the main action and rejected the

submission. I agree with his reasoning and conclusion. Permission to appeal on this point was refused by Simler LJ and I need say no more about it.

169. The Judge concluded his section on limitation by saying at [68] of the judgment:

> "In my judgment, paying careful regard to the considerations in the authorities cited to me, and applying the criteria in section 33 of the Limitation Act which I have set out, it is equitable to allow the action to proceed."

Submissions on Ground 2: Blackpool FC

170. Blackpool FC emphasises the length of the delay, which required it to investigate events more than 30 years before it was notified of a possible claim and to investigate its relationship with Mr Roper over a number of years before and including 1987. It points to the deaths of Mr Roper in 2005 and Mr Chapman in 2012 and the destruction of any relevant club records in the 1990s.

171. The first point made by Blackpool FC can be disposed of shortly. It submits that the Judge applied the wrong test in [60] when he concluded that there was "no real risk of *substantial* prejudice." The proper test, submits Blackpool FC, is whether there is a real risk of *significant* prejudice. There is nothing in this point, for two reasons. First, there is no material difference between "substantial" and "significant" prejudice in this context. Their normal meanings, as defined in (for example) the Shorter Oxford Dictionary, are substantially the same and without significant difference: the definition of "significant" includes "important, notable, consequential", while the definition of "substantial" includes "of real significance". These definitions coincide with my understanding of the normal meaning of the words. Second, it is clear from the judgment that the Judge had in mind the "significant prejudice" test and was treating the words "significant" and "substantial" as interchangeable: see [160] and [163] above.

172. More substantially, Blackpool FC submits that there were multiple factual findings that required to be made in order to enable to court to determine which side of the vicarious liability line the case fell. It submits that Mr Roper and Mr Chapman were not merely crucial witnesses on those factual issues, they were the only people who could have provided the detail necessary to resolve them. In addition, it submits that there would have been other sources of evidence had the case been brought earlier, including the Claimant's parents who could have assisted on whether it was Mr Roper or Mr Chapman who had recruited the Claimant to the Blackpool School of Excellence. It is submitted that both Mr Roper and Mr Chapman would have had potentially relevant documents, including documents relating to the New Zealand trip and correspondence with parents. It places weight upon the destruction of the club's contemporaneous records which, by way of example, may have shed light on whether the £500 payment made by the club was to support the 1987 trip or another of Mr Roper's trips and why the contribution was made.

173. Blackpool FC challenges the Judge's description of the available evidence being abundant, pointing to the impressionistic nature of some of the evidence and the absence of anything expressly said by or on behalf of the club that amounted to an acknowledgment that Mr Roper was part of their formal scouting set-up. It submits that, had the case come on for trial shortly after the events complained of, Mr Chapman

would have been called and Mr Roper would have been a party either as defendant or as a Third Party at the instance of the club. Mr Chapman's importance would have lain in the fact that he was directly responsible for the youth set up in a way that none of the other adult witnesses were. It seeks to challenge the Judge's assessment of Mr Hurst's evidence as deficient because of lack of involvement in the youth set up. And it submits that the absence of Mr Chapman of itself gives rise to a risk of significant prejudice.

174. Blackpool FC make two subsidiary points. First, it says that the absence of Mr Chapman meant that it could not deal with the (unpleaded) allegation that CFS had told Mr Chapman that Mr Chapman had sexually abused him and other boys in 1984 and 1985, with the Judge rejecting Mr Johnson's statement that, had he done so, it would have been taken extremely seriously and forming an adverse view of Mr Johnson as a witness. Second, it submits that the Judge downplayed the significance of the missing witnesses because of what he regarded as a failure to follow up further lines of enquiry: see [166] above. It submits that, while the club was under an evidential burden to raise a case of potential prejudice, it had discharged that burden by reference to the deaths of Mr Roper and Mr Chapman and the destruction of relevant documents long before a claim was intimated: it was not required to go further and show that no stone had been left unturned.

Submissions on Ground 4: Blackpool FC

175. Blackpool FC submits that the Judge pre-empted the decision on vicarious liability by the passage at [50] of the judgment that I have set out at [165] above and that this contravened the precautionary point of principle established by *Bryn Alyn* by "putting the cart before the horse": see [157] above. It submits that he erred in concluding that, because of the evidence he had heard, it would have been, in effect, unnecessary to hear from Mr Roper or Mr Chapman had they been available despite the impressionistic nature of the evidence called for the Claimant and the Judge's conclusion that those called on behalf of the club were not in a position to speak directly about Mr Chapman's activities including how he ran the junior set up. It submits that a central question in relation to stage 1 of the test for vicarious liability was whether what Mr Roper did was as an independent volunteer or whether he was in some way constrained to scout for the club and no other. In relation to that central question it submits that it was "simply unknown" whether Mr Roper and/or Mr Chapman "would have been able to prevail as lone voices" against the evidence that was called. It relies upon the observations of Nicol J in *Murray v Devenish* [2018] EWHC 1895 where he said:

> "102. But, and it is a major qualification, with Riddle's death, the Defendant has been undeniably disadvantaged. Ms O'Rourke asked, perhaps rhetorically, 'What could Riddle have said?' He was unlikely to have admitted what would have been a crime and could not have been compelled to incriminate himself. And, she argued, how could he have denied the allegations in the face of such strong evidence?
>
> 103. I do not accept this line of argument. I have agreed that there would have been a case for Riddle to answer; it may even be said that it would have been a strong case to answer, but on each occasion when the alleged abuse took place, there were only two people present: Riddle and the Claimant. When Ms

> O'Rourke asked her question, I was reminded of what Vice Chancellor Megarry said in *John v Rees* [1970] Ch 345 at 402,
>
> 'It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious," they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'
>
> 104. Because Mr Norris could not take instructions from Riddle, he was inhibited in how he could cross-examine the Claimant (or Father X or Christopher Speight). Absent instructions or other evidence to contradict their accounts of abuse, it would have been professionally improper for Mr Norris to suggest that they were not telling the truth. Where (in the case of the Claimant) there was such evidence, he could and did so, but I accept this meant that the nature of the cross-examination was limited."

176. In support of this Ground of Appeal, Blackpool FC applies to rely upon the series of anonymised and heavily redacted police witness statements to which the Judge said that he attached no weight: see [27] above. The Judge's decision to attach no weight formed the basis for one of the discrete Grounds on which permission to appeal was refused by Simler LJ. In the present context, Blackpool FC wishes to rely upon them in support of its submission that differences of recollection will inevitably exist about significant facts so many years after the events in question. The Court agreed to read them de bene esse. I deal with them below.

Submissions on Grounds 2 and 4: Claimant

177. The Claimant submits that the Judge identified the applicable principles of law accurately and exercised his discretion correctly. He evaluated the Section 33 issues carefully and there is nothing wrong with his analysis. He balanced the prejudice to the Claimant if the limitation period were not disapplied against the risk of significant prejudice to the Defendant if it were. The flaw in Blackpool FC's argument is said to be that it focuses wrongly and solely upon the potential prejudice to Blackpool FC if it were required to defend the claim rather than on the need to balance the potential for prejudice to each side in reaching a conclusion whether it is equitable to allow the action to proceed. There is no question of the Judge "putting the cart before the horse"; and his decision was well within the "generous ambit" of his discretion.

Reasons and conclusion on Grounds 2 and 4

178. The Judge identified the correct principles to be applied, asked himself the right questions, analysed the evidence upon which the parties relied, formed an assessment based upon that analysis of the potential prejudice to Blackpool FC, and then conducted the requisite balancing exercise that led him to conclude that it was equitable to allow the action to proceed. In the course of doing so he expressly considered the impact of the loss of documentation and the deaths of Mr Roper and Mr Chapman, which form the bedrock of Blackpool FC's submissions on these Grounds. Although the burden rested on the Claimant in the Court below to satisfy the Judge that the limitation period should be disapplied, before this Court it is for Blackpool FC to satisfy the Court that the conclusion the Judge reached was perverse in the sense of being outside the generous ambit of a proper exercise of the Judge's discretion.

179. It is a notable feature of the Judge's approach that he expressly reminded himself of the pitfalls that he should avoid and the precautionary approach that he should adopt. Not content with identifying the correct principles and main questions to be asked more than once – see for example [29], [45] and [47] of the judgment to which I have referred above – he was expressly conscious of (a) the danger that evidence that seemed cogent to him might have seemed less cogent if other evidence had been available, (b) the difficulties faced by a Defendant when a complaint of sexual abuse comes out of the blue many years later, (c) the very long period of delay in this case, (d) the significance of a Defendant being able (or not) to investigate the allegations, and (e) the danger of putting the cart before the horse. It is another notable feature that he started his consideration of the impact of the deaths of Mr Roper and Mr Chapman with the assumption that the risk to a fair trial and the possible effect on the cogency of the Defendant's case might be greater in relation to vicarious liability than in relation to the primary allegation about the happening of the abuse. It is clear that he at least started his assessment with the potential risk of significant prejudice well in mind. In my judgment there is no sign that the Judge lost sight of these features in the course of his concise section on limitation.

180. By concentrating exclusively on the question of potential prejudice to the club, Blackpool FC's submissions fail to reflect the balancing exercise that was required of the Judge. That said, the existence and extent of any risk of significant prejudice necessarily falls to be weighed in the balance and, as the Judge evidently recognised, requires close attention. It is obvious, and the Judge recognised, that Mr Roper and Mr Chapman would have been witnesses having direct knowledge of facts relevant to vicarious liability and (in Mr Roper's case) to the primary allegation of abuse. In relation to each issue, the Judge explained why he considered that the absence of these witnesses did not cause a risk of significant prejudice: see [164]-[167] above.

181. Part of the criticism of the Judge's reasoning is based upon the anonymised statements upon which Blackpool FC relied. There are five of them. They cover much of the same ground as was covered by the live witnesses who had been youth footballers. They include some points that contradict findings made by the Judge (e.g. one witness describes Mr Roper as a scout for Blackpool, Stockport and Manchester City, another that he was a scout for Blackpool and Coventry City, and another that, at least in the early 1970s, Mr Roper had no influence at Blackpool); in other respects the statements support his conclusions. However, the starting point for present purposes is that the Judge decided to attach no weight to them. Simler LJ refused permission to appeal against the decision to attach no weight to them because "the matters addressed in the

documents were dealt with by witnesses during the course of the hearing, many of whom were cross-examined, and the Judge was best placed to determine what weight, if any, to afford to the different forms of evidence of evidence available. In particular, he was amply entitled to regard the identified witnesses, who gave evidence and were tested in cross-examination as more reliable and to prefer their evidence accordingly." I respectfully agree. The Judge's decision to attach no weight to those statements cannot now be challenged and means that the contents of the statements should simply be left out of account. Nor can they be reintroduced, as Blackpool FC now attempts to do, by saying that they "demonstrate the differences of recollection about significant facts that inevitably exist so many years after the events in question." It cannot sensibly be suggested that the Judge was unaware that recollections could differ, not least because his judgment set out numerous such differences, between which he had to (and did) choose.

182. I return therefore to the question whether the Judge was entitled to reach the decision he did about the unavailability of Mr Roper and Mr Chapman. Dealing first with Mr Roper, I do not share Blackpool FC's confidence that he would have taken an active part or would have given evidence even if he had been alive. However, I see no reason to criticise the Judge's conclusion that, even if he had been called and had denied the abuse, Mr Roper's evidence would have been rejected, for the reasons the Judge gave. Turning to the issue of vicarious liability, the Judge's assessment was based upon what he described as a "remarkable number of witnesses both youths and adults at the material time, gave a great deal of evidence on this question which proved to be strikingly consistent and cogent." Blackpool FC devoted significant time at the hearing of the appeal to trying to shake this assessment; but, in my judgment, the attempt failed. Certainly there were differences between individual witnesses, but the overall effect could reasonably bear the description given by the Judge. The question whether the effect of that body of evidence could have been shaken by contrary evidence from Mr Roper or Mr Chapman (or both) was a paradigm example of a decision to be taken by the trial Judge after balancing the relative weight of the arguments.

183. Blackpool FC identifies particular points where it is said that missing documentary or witness evidence may have provided clarity. In general, there is no reason to suppose that the Judge was not conscious of these points. In particular, I do not find the peripheral examples cited by Blackpool FC to be persuasive: it makes no real difference to the important issues in the case whether the Claimant was first recruited to Blackpool by Mr Roper or Mr Chapman or whether Blackpool's modest contribution of £500 was for the 1987 trip or another one.

184. The Judge had the inestimable advantage of having heard the numerous witnesses who did give evidence. He was therefore best placed to assess the potency of that evidence and whether contrary evidence from witnesses or documents could have led to the partial or wholesale rejection of the evidence he had heard. It was permissible for him to take into account that evidence from other witnesses would have been available and could have been called, though there is no sign that this was a determinative feature in the Judge's reasoning. In my judgment, the analysis and assessment which he conducted was open to him and his reasons were cogent. It would be wrong in principle for this court to substitute a different view in such circumstances even if it would or might have reached a different conclusion from that reached the Judge which, speaking for myself, I would not.

185. A similar approach should be adopted to the loss of documentation. The Judge considered the point. His assessment was that such documentation was likely to be limited in scope and effect. That was an assessment that was open to him and was one with which this court should not interfere.

186. Viewed overall, the Judge was entitled to conclude that, at least so far as the primary facts were concerned, no real risk of substantial (or significant) prejudice had been caused by the delay in the Defendant receiving notice of the Claimant's claim, or in the issue of proceedings so long after the primary limitation period. That conclusion was not perverse. There is no reason to suppose that the Judge simply ignored or failed to appreciate the significance of the absence of witnesses or documents when conducting the balancing exercise that led to his conclusion that it was equitable to disapply the limitation period and it is clear that he did not do so. He was entitled and right to give weight to his finding that the Claimant was for practical purposes disabled from commencing proceedings before he did. There was ample material on the basis of which he could reasonably exercise his discretion in favour of disapplying the limitation period.

187. Turning to Ground 4, there is no substance in the submission that the Judge put the cart before the horse. First, he expressly identified the danger and was astute to the need to avoid it. Second, what he was doing in [50] was to carry out the necessary exercise of assessing whether the absence of Mr Roper and Mr Chapman was or might be material and whether it gave rise to a risk of significant prejudice. That exercise was unavoidable.

188. Before leaving Ground 4, it is worth setting out the passage immediately following the citation from *Murray* on which Blackpool FC relies. At [105] Nicol J continued:

> "Ms O'Rourke submitted that there had been other cases of historic sex abuse where the alleged abuser had died, but the court nonetheless decided to disapply the primary limitation period. I viewed such a submission with caution. Earlier decisions can give valuable guidance on the proper principles, but the application of those principles to the individual facts of the case are necessarily dependent on the whole corpus of facts and, inevitably those will vary from one case to another."

On the individual facts of this case, I would uphold the reasoning and conclusion of the Judge.

189. I would dismiss the appeal on Grounds 2 and 4.

Sir Stephen Richards

190. I agree.

Macur LJ

191. I also agree.