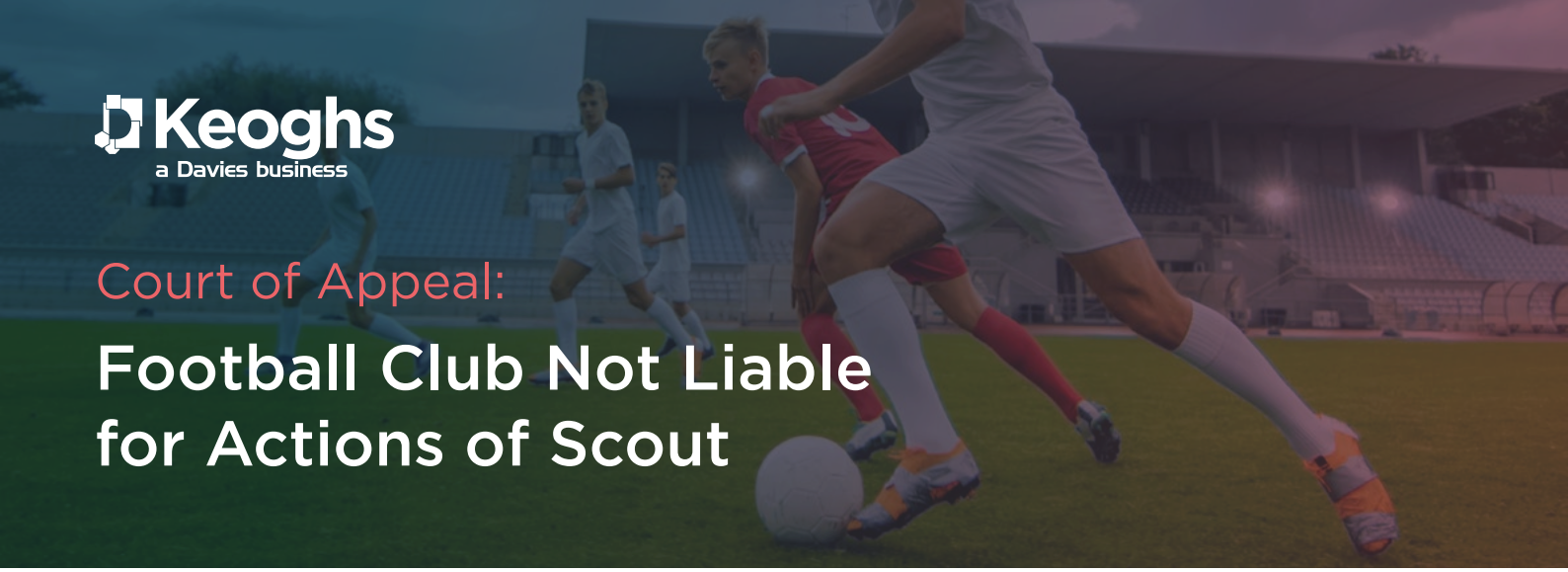

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# Court of Appeal:
# Football Club Not Liable for Actions of Scout

The Court of Appeal has today handed down its judgment in Blackpool Football Club v DSN, in which Keoghs acted for Blackpool Football Club ('Blackpool FC' or 'the Club') and its insurers. This was an appeal against the judgment of the High Court (Mr Justice Griffiths) handed down in March 2020, in which the court had found Blackpool FC vicariously liable for the tortious actions of a former football scout Frank Roper.

The Court of Appeal has now unanimously overturned that decision and found that the nature of Roper's role as an unpaid football scout meant the Club did not have any degree of control or direction of him to render it vicariously liable for his actions. Christopher Wilson (Associate) and Matthew O'Neill (Solicitor Apprentice), who acted in both the trial and the appeal, consider the Court of Appeal's guidance and its implications.

## Background

The claimant alleged that he had been sexually abused by Roper on one occasion during a football trip (organised by Roper) to New Zealand in June 1987. Roper ran a junior football team called Nova Juniors which was said to have been a 'feeder team' for Blackpool FC. Whilst the claimant did not play for Nova Juniors, he did attend coaching sessions at Blackpool FC's School of Excellence from about 1985 to 1987. The New Zealand trip was arranged for a representative side from the Blackpool area and consisted of players from Nova Juniors and other local sides plus players from Blackpool FC's School of Excellence. The cost of the trip was estimated to be around £25,000 and it was funded by Roper himself (although it was alleged that the Club had made a contribution of £500).

In 2018 the claimant commenced a civil claim for compensation against the Club alleging that it was vicariously liable for the abuse committed by Roper. The defendant's position was that it was not vicariously liable for Roper, whom it argued was not an employee nor could be considered akin to an employee, and in any event the New Zealand trip was not closely connected to any association Roper had with the Club. The defendant also raised a limitation defence.

The matter proceeded to trial before Mr Justice Griffiths in March 2020 who found in the claimant's favour. He disapplied the limitation period and held that the Club was vicariously liable. He awarded the claimant damages of £19,000. He found that Roper was considered so much a part of the business and organisation of the Club that it was just to make it liable for his torts. The judge considered the recruitment of youth players was a key part of the Club's core business and that it relied on volunteers like Roper. He also noted that many players had gone on from Roper's Nova Juniors team to play for Blackpool FC to the extent that the Club was reliant on the players he referred.

Whilst some Nova Juniors' players went elsewhere, they were considered exceptions. In respect of the New Zealand trip, the judge ruled that, since the Club's First Team Manager's had told other parents that it was a good opportunity for the boys and his own son went on the trip, although it was not an official Blackpool FC trip it was so close to being an official trip as made no difference. It was considered to be a trip that formed part of Roper's operation to recruit players for Nova Juniors to then refer on to Blackpool FC.

## Grounds of Appeal

The defendant was granted permission to appeal on four grounds, two of which related to vicarious liability:

- That the trial judge was wrong to hold that Roper was in a relationship with the defendant that was capable of imposing vicarious liability (i.e. Stage 1 of the two-stage vicarious liability test).

- That the trial judge was wrong to hold that there was a sufficient connection between the claimant's assault and any relationship between Roper and the defendant (i.e. Stage 2 of the two-stage vicarious liability test).

The Club was additionally granted permission to appeal on two grounds relating to limitation.

## Judgment of the Court of Appeal

In the lead judgment, LJ Stuart-Smith (with whom LJ Macur and Sir Stephen Richards agreed) allowed the defendant's appeal on the grounds of vicarious liability (Stage 1 and 2) and dismissed the claimant's claim in full.

The Court of Appeal carried out a detailed analysis of recent leading cases on vicarious liability, including the two important Supreme Court judgments that were handed down after the High Court's judgment in this case; namely Various Claimants v Barclays Bank plc [2020] AC 973 ('Barclays') which concerned Stage 1 of the two-stage vicarious liability test and Various Claimants v Wm Morrison Supermarkets plc [2020] AC 989 ('Morrison's') which concerned Stage 2 of the two-stage vicarious liability test.

### Stage 1

Following Lady Hale's lead judgment in Barclays, the Court of Appeal first examined the nature of the relationship itself to ascertain whether it was one where Roper was carrying on business on his own account or whether he was in a relationship akin to employment with the Club. In doing so, it concluded that:

- Although Roper's scouting activities conferred benefits upon Blackpool FC that were important for the development and survival of its business, these were benefits that could equally have been conferred upon the Club by someone acting independently.
- Whilst there was evidence that Roper was afforded deference and welcomed by the Club in recognition of his having produced good players in the past and in the hope that he may continue to do so in the future, none of the other normal incidents of a relationship of employment were present.
- Roper had a completely free hand about how he went about his scouting activities. There was no evidence whatsoever of any control or direction by the Club as to what he should do.
- The evidence showed no more than an informal association between Roper's Nova Juniors and the Club (this merely being that a number of boys who played for Roper's teams went to Blackpool FC, so was generally regarded as 'a feeder' for the Club). However, his activity was not exclusively for the Club and there was no evidence Blackpool FC had any say in the existence or operation of Roper's teams.

Accordingly, the Court of Appeal came to the 'clear conclusion' that the relationship between Blackpool FC and Roper was not one that could be treated as akin to employment.

The Court of Appeal did not stop there, acknowledging the requirement to test their conclusions with reference to Lord Phillips' five policy reasons for the imposition of vicarious liability (as set out in Various Claimants v Catholic Child Welfare Society [2013] 2 AC 1).

Whilst acknowledging that it is possible to fit the facts of the case within the language of Phillips' first three incidents if it was accepted that Roper's activities were solely for the benefit of Blackpool FC (which the Court of Appeal had already roundly rejected in any event), the fifth incident relating to control was clearly lacking. In particular, the Court of Appeal said Roper was not "in any meaningful sense under the control" of the Club and that:

> *Blackpool FC … 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"*

The Court of Appeal also considered the development of 'enterprise risk' as a possible factor for establishing vicarious liability, but concluded that:

> *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. [our emphasis]*

Finally, in summarising their conclusions in allowing the Club's appeal on Stage 1 of vicarious liability, the Court of Appeal said:

> *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 [our emphasis] ...*
>
> *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.*

### Stage 2

Turning to Stage 2 of the vicarious liability test, the Court of Appeal disagreed with the High Court's analysis that the New Zealand trip was so close to an official Blackpool FC trip that it made no difference.

The Court of Appeal noted that Blackpool FC had "no involvement at all apart from providing something in the order of 2% of the funding and the use of its social 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." This was "Mr Roper's trip in every sense", evidenced by the last ten days of the tour being spent in Thailand which was purely for Roper's own independent commercial interest and where no football was played.

The Club's appeal in respect of limitation was dismissed on the basis that the Court of Appeal held that the judge was entitled to exercise his discretion and allow the claimant's claim to proceed. However, the Court of Appeal acknowledged that every case must be considered on its individual facts.

## Commentary

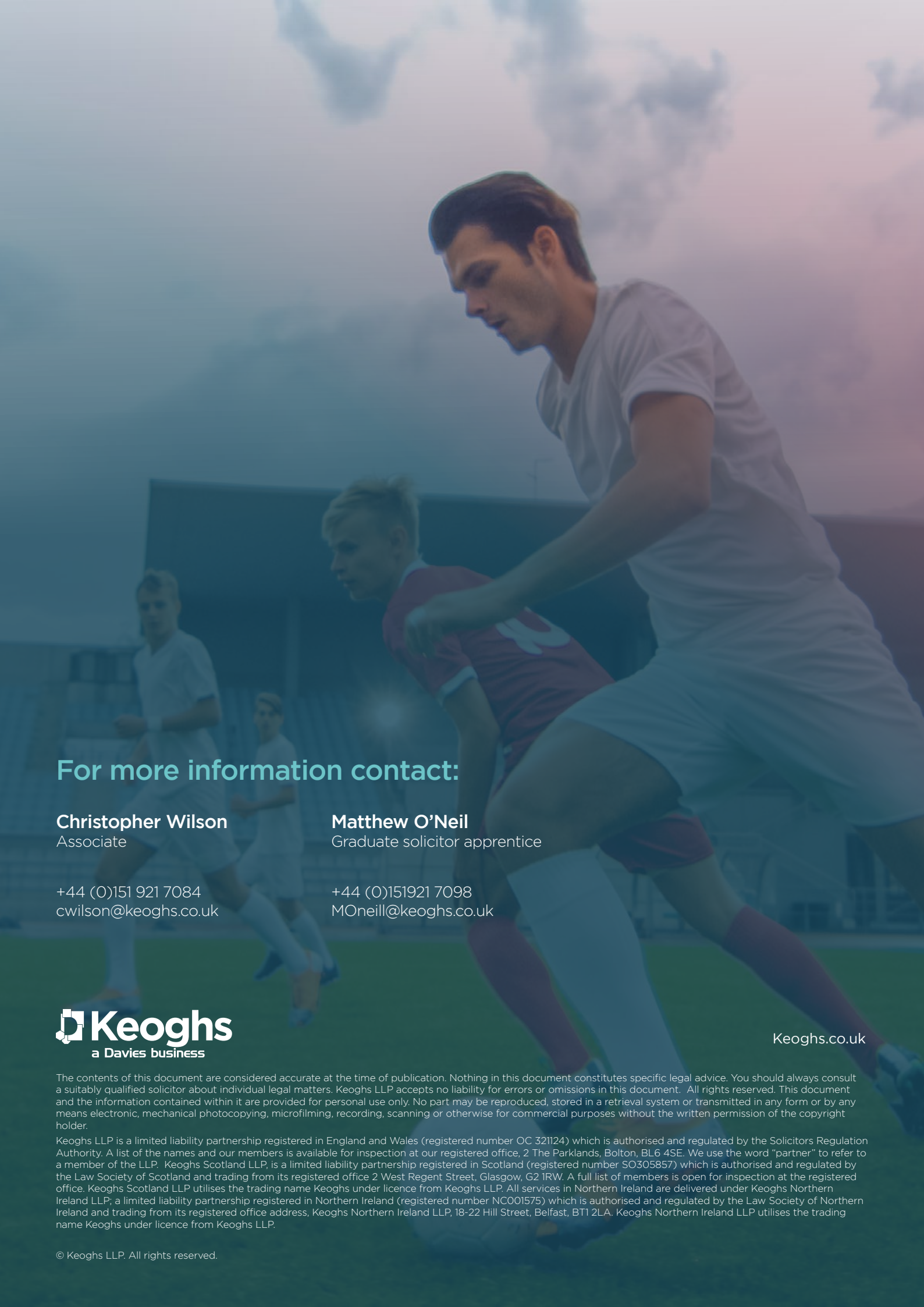
First and foremost, the judgment will of course be a considerable disappointment to the claimant in circumstances where the court found he had been the subject of abhorrent abuse by Roper in the manner alleged. Notwithstanding this, given the effect of the first instance judgment, the Court of Appeal was compelled to assess and apply the legal principles of vicarious liability to the claimant's case, particularly in circumstances where it is likely to have wide-ranging effects on other organisations.

In this respect, there have been a spate of claims in recent times which have looked to expand the boundaries of the doctrine of vicarious liability. This case is yet a further example. Significantly, this was also the first case in which the courts had been asked to assess the liability of professional football clubs for the actions of independent scouts. Blackpool FC was not the only professional club that relied on the services of independent scouts in similar circumstances (historically, most clubs did), and the implications of this judgment in respect of the many other claims involving independent scouts will be significant. However, the potential implications of the judgment do not stop there.

In Barclays, Lady Hale established that when considering vicarious liability we must look at the nature of the relationship itself, and that is exactly what the Court of Appeal has done here. This emphasises the importance of available evidence addressing the nature of the relationship in contrast to evidence that merely deals with people's perception of the relationship. In this case, there was plenty of evidence that Roper held himself out as being a representative of the Club, but this had little importance when evaluating the true nature of Roper's relationship with the Club for the purposes of establishing the issue of vicarious liability.

It has long been established that control over how individuals carry out their duties on an employer's behalf is not necessarily required for the imposition of vicarious liability (for example, an airline has no control over how a pilot carries out his duties whilst flying a plane). However, this judgment acts as a welcome reminder to organisations and insurers that there must at least be an element of control over what these individuals do on the organisation's behalf for liability to attach: it is not enough that the organisation had the power to terminate the individual's association.

The judgment is also a forceful reminder that mere creation of risk is insufficient to engage the doctrine of vicarious liability and that creation of risk needs to be accompanied by a degree of control. Professional football clubs are not the only organisations who rely on the services of such individuals and the Court of Appeal's guidance will equally apply to those situations as well.



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