

THE MENTAL ELEMENT OF ACCESSORY LIABILITY IN TORT

HORNBY Street Ltd. (“Hornby”) infringed the registered trade marks of Lifestyle. Hornby was therefore strictly liable in tort ([2017] EWHC 3313 (Ch), [2018] F.S.R. 15). However, Hornby went into administration. Lifestyle therefore sued two directors of Hornby, the Ahmeds, claiming that they were jointly and severally liable with Hornby for the infringements, and sought an account of profits from them. Lifestyle was successful both at first instance ([2020] EWHC 688 (Ch), [2020] F.S.R. 29) and in the Court of Appeal ([2021] EWCA Civ 675, [2021] Bus. L.R. 1020). The Supreme Court rightly allowed the Ahmeds’ appeal: *Lifestyle Equities CV v Ahmed* [2024] UKSC 17, [2024] 2 W.L.R. 1297. In a compelling and comprehensive judgment, Lord Leggatt held that the Ahmeds could not be primarily liable for the infringement, and nor could they be liable as accessories since there was no finding that they knew of the unlawful infringement of Lifestyle’s rights. This latter point is likely to be of wider importance: the Supreme Court recognised a general principle of accessory liability in private law, and that accessory liability is never strict but depends upon the accessory’s knowledge of the primary wrong.

A person might incur liability under section 10 of the Trade Marks Act 1994 “if he uses in the course of trade a sign” which infringes a registered mark. Since this provision imposes strict liability, Lord Leggatt held that it should be interpreted narrowly as “referring to acts done by a person on their own account and not as an employee or agent of someone else” (at [24]). The Ahmeds were not trading on their own account but as employees and had not assumed personal responsibility towards Lifestyle. They were therefore not primarily liable for the trade mark infringement.

The focus of the decision of the Supreme Court concerned whether the Ahmeds could be “jointly liable” either for authorising or procuring the company to commit a tort, or for participating in a common design to commit a tort. The lower courts held that the Ahmeds were liable on both bases: trade mark infringement is a strict liability wrong, and it was said that the same approach should apply to accessories also. On that basis, it did not matter whether the Ahmeds knew that Lifestyle’s rights were infringed. Although some support for that approach could be found, *obiter*, in earlier case law (e.g. *C Evans & Sons Ltd. v Spritebrand Ltd.* [1985] 1 W.L.R. 317, 329–30; *Vestergaard Frandsen A/S v Bestnet Europe Ltd.* [2013] UKSC 31, [2013] 1 W.L.R. 1556, at [37]), Lord Leggatt convincingly explained why it is misconceived. After all, the accessory “is not liable because all the elements of the tort are established in relation to them. They are liable even though they do not satisfy all the elements of the tort” (at [92]). There is therefore no logical

reason why any mental element should be the same for primary liability as for accessory liability. Since not all the elements of the primary wrong can be established against the accessory, there is often good reason to require a more demanding mental element. As Lord Leggatt highlighted, accessory liability in equity requires dishonesty, and knowledge of the breach of trust or fiduciary duty, even if the primary wrong of breach of trust or breach of fiduciary duty can be committed innocently (*Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 A.C. 378). Similarly, accessory liability for breach of contract requires knowledge of the breach of contract, although the liability of the primary wrongdoer for breach of contract is strict (*Lumley v Gye* (1853) 2 E.&B. 216; *OBG Ltd. v Allan* [2007] UKHL 21, [2008] A.C. 1). There is no reason for tort law to be different. Indeed, a string of cases applied the *Lumley v Gye* principle to instances of procuring a tort (see *Lifestyle*, at [102]–[107]). It is right to demand that an accessory must “know the essential facts” which make the primary wrong unlawful (at [108], [126]–[134], [137]).

Lord Leggatt helpfully illustrated that a principle of accessory liability runs throughout private law. But in the context of tort law, some confusion has arisen concerning the requirement of a “common design”. Lord Leggatt was rightly critical of the puzzling judgment of Lord Templeman in the leading decision of the House of Lords in *CBS Songs Ltd. v Amstrad Consumer Electronics plc* [1988] A.C. 1013, since it is a “false dichotomy” (at [120]) to view procurement of an infringement as either a distinct tort or a form of participation in a common design. Rather, they are both ways to incur liability as an accessory. Yet explaining why tort law requires a “common design” before an accessory can be liable for assisting a tort remains difficult. The requirement of acting in concert with the primary wrongdoer is not required for accessory liability in other areas of private law. Lord Leggatt referred to the need for a “common design” in tort law as representing the law “as it stands” (e.g. at [132]–[134], [136]), perhaps indicating that this issue could be revisited in a suitable case (it did not need to be resolved in *Lifestyle* since the trial judge made no finding that the Ahmeds knew or ought to have known of the unlawful infringements of *Lifestyle*’s trade marks).

*Lifestyle* emphasises that there is no special immunity from accessory liability for directors: if they knowingly participate in a primary wrong, directors may be personally liable as accessories (contrast *Mentmore Manufacturing Co. Ltd. v National Merchandising Manufacturing Co. Inc.* (1978) 89 D.L.R. (3d) 195). One notoriously tricky decision is *Said v Butt* [1920] 3 K.B. 497. In that case, a theatre critic bought a ticket, through a friend, for the first night of a theatre performance. He was then denied entry to the theatre, and sued the managing director of the theatre company for inducing a breach of contract between him and the

theatre company. On the facts, it was held that there was no contract, but McCardie J. nevertheless expressed the view that even if there had been a breach of contract, the agent should not be liable for the wrong of his principal. That outcome seems correct, but McCardie J. unfortunately reached that result on the basis that the agent was the alter ego of his master. Such reasoning is widely recognised to be “flawed” (*Lifestyle*, at [52]). It is suggested that the better explanation is that the agent could avail himself of a defence of justification, which applies generally to claims for inducing breach of contract (R. Stevens, “Why Do Agents ‘Drop Out?’” [2005] L.M.C.L.Q. 101, 108). Justification should be accepted as a general defence to claims in accessory liability (P. Davies, *Accessory Liability* (Oxford: Hart Publishing, 2015) ch.7). However, Lord Leggatt thought that *Said v Butt* should be limited to the contractual context, and “does not apply to civil wrongs which do not depend on any contract or voluntary arrangement between the parties and where liability arises even if they are complete strangers to one another” (at [63]), an example being trade mark infringement. His Lordship drew upon “tort’s cooperation principle” (J. Stapleton, *Three Essays on Torts* (Oxford: OUP, 2021), p. 36) when explaining *Said v Butt*. But that controversial principle, developed in the context of negligence, fits awkwardly in this area of the law. The suggestion that the law of tort will not impose obligations which might circumvent parties’ contractual allocation of risks could undermine *Lumley v Gye* and important aspects of accessory liability.

Since the Supreme Court held that the Ahmeds were not liable for the infringement of *Lifestyle*’s trade marks, it did not need to consider what remedies may have been awarded against them. Lord Leggatt recognised that even innocent infringers of intellectual property rights may have to account for the profits they have made, but importantly emphasised that defendants should only ever have to give up gains they personally have made, and not profits made by someone else (see similarly, in the equitable context, *Novoship (UK) Ltd. v Mikhaylyuk* [2014] EWCA Civ 908, [2015] Q.B. 499). Otherwise, the remedy of an account of profits would be punitive in effect. Since the Ahmeds had not personally made profits from the infringement of *Lifestyle*’s trade marks, no order for an account of profits could be made against them.

Accessory liability remains an important and under-explored area of private law. In cases such as *Lifestyle*, where the primary wrongdoer is unable to provide satisfactory redress, it is natural for claimants to seek a remedy against third parties. But there must be limits to the extent to which claimants can go “defendant-shopping”. Accessory liability should be hard to establish, and a major restriction is found in a demanding mental element. That applies across private law, including in tort law. As Lord Leggatt concluded (at [137]):

Considerations of principle, authority and analogy with principles of accessory liability in other areas of private law all support the conclusion that knowledge of the essential features of the tort is necessary to justify imposing joint liability on someone who has not actually committed the tort. This is so even where, as in the case of infringement of intellectual property rights, the tort does not itself require such knowledge.

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