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BLG MONTHLY UPDATE

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The BLG Monthly Update is a digest of recent developments in the law which Neil Guthrie, our National Director of Research, thinks you will find interesting or relevant – or both.

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ARBITRATION

How to determine the law of the arbitration agreement when none is stated

The arbitration clauses in the insurance policies related to a hydro-electric project in *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA,* [2012] EWCA Civ 638, provided for arbitration in London but also chose Brazilian law as the law of the contract and conferred exclusive jurisdiction on the courts of Brazil. Enesa claimed under the policies but coverage was denied by Sulamerica. The parties commenced arbitration proceedings, but Enesa also sought recourse in the Brazilian courts, which Sulamerica sought to enjoin. Enesa contended in anti-suit injunction proceedings that the law of the arbitration agreement was that of Brazil, given that the policies were governed by Brazilian law, the Brazilian courts had exclusive jurisdiction, and the dispute arose in Brazil; only the law of the seat of the arbitration was that of England.

Two levels of English court took a different view. While the preponderance of factors did point to

the law of Brazil, the arbitration provision had the closest and most real connection with the law of England. One cannot assume that the proper law of the underlying contract will also be the law of the arbitration agreement, although this is a natural inference. There must be a three-step inquiry: (1) is there an express choice of law? (2) if not, is there an implied choice? (3) which law has the closest and most real connection with the arbitration agreement? Steps 2 and 3 will often merge. While the factors pointing to Brazil were significant, two other factors tipped the balance in favour of England: the choice of London as the seat of arbitration (which suggested acceptance of English law as governing the arbitration itself, as well as the procedural aspects) and the fact that Brazilian law would make the agreement to arbitrate enforceable only with the consent of Enesa (which, on the facts, could not have been the parties' intention in choosing London as the seat). The parties had not made the implied choice of Brazilian law as the governing law of the arbitration agreement.

[Link available **here**].

CIVIL PROCEDURE

Green light for use of predictive coding in e-discovery, but not without some hiccups along the way

We reported in April 2012 that Magistrate Judge Peck of the New York district court in Manhattan had approved the use of predictive coding as a tool for document review in e-discovery: *Da Silva Moore v Publicis Groupe,* 11 Civ 1279 (SDNY, 24 February 2012).

This approach has been endorsed on appeal, but not without some procedural skirmishes. The plaintiffs alleged that use of predictive coding would benefit one of the defendants financially, that Judge Peck is a well-known proponent of the technology and therefore biased in its favour, and that he had accepted payments from a major producer of predictive coding software. They also alleged that Judge Peck made his decision on an insufficient evidentiary record. District Judge Carter disagreed: *Da Silva Moore v Publicis* (SDNY, 25 April 2012). Judge Peck's rulings were well reasoned and balanced, and the evidentiary record before him was adequate. The plaintiffs' challenges to Judge Peck's orders were denied.

CIVIL PROCEDURE/LEGAL WRITING

Judge's frustration at alphabet soup in pleadings

Silberman J of the DC Circuit, in a decision on the US government's evaluation of sites for the disposal of nuclear waste, has harsh words (in a footnote) for counsel who 'abandoned any attempt to write in plain English, instead abbreviating every conceivable agency and statute involved, familiar or not', thereby littering their materials with an indigestible mess of acronyms.

Nice quotation in the judgment from George Orwell: 'written English ... is full of bad habits which spread by imitation and which can be avoided if one is willing to take the necessary trouble'. Using 'reference' as a verb comes to mind...

National Association of Regulatory Utility Commissioners v US Dep't of Energy, 2012 US App LEXIS 11044 (DC Cir, 1 June 2012)

CIVIL PROCEDURE/SECURITIES

Law prof loses battle to compel disclosure of journalist's source in securities case

Jeffrey MacIntosh, a law professor at the University of Toronto, alleged that a *Globe & Mail* story on the ups and downs of the leveraged buy-out of BCE Inc. in 2008 contained both misrepresentations and insider information, in violation of Ontario securities law (or *possibly* in violation, anyway), information on which he relied in deciding to sell his call options in BCE at a significant loss. In *1654776 Ontario Ltd v Stewart,* 2012 ONSC 1991, MacIntosh (through his trading company) sought an order requiring the newspaper's writer to disclose the identity of his confidential sources.

Belobaba J gave all of this pretty short shrift. Noting that the OSC had declined to investigate the matter in spite of the professor's repeated urgings, the judge thought that most of the alleged violations of securities law probably weren't violations at all; the best that could be said was that some of them might be. Any public interest in identifying the people who provided information for the article was clearly outweighed by the competing goal of preserving the confidentiality of a journalist's sources. Good review of the requirements for a *Norwich Pharmacal* order and the Wigmore criteria for case-by-case privilege. Back to the library, professor.

[Link available **here**].

CONFLICT OF LAWS

Choice of law was just 'window-dressing' and reliance on it inappropriate forum-shopping

So said the English Commercial Court in *Citigroup Global Markets Ltd v Amatra Leveraged Feeder Holdings Ltd,* [2012] EWHC 1331 (Comm).

One of Citigroup's UK affiliates was the counterparty in derivatives transactions entered into by the corporate vehicles of some family trusts, under agreements stated to be governed by English law and conferring non-exclusive jurisdiction of the English courts. But the real work involved in setting up the transactions and operating them was conducted by Citigroup in the US.

The judge accepted the submission that an attempt to characterise England as the proper forum to hear the dispute (arising from an investment loss of some $340 million by the trusts, which alleged gross misconduct, recklessness and deceit in structuring the transactions) was mere 'window-dressing' aimed at avoiding an arbitration process mandated by the Financial Industry Regulation Authority in the United States. This was an attempt to avoid the regulatory scheme and public policy of the jurisdiction with which the transactions were closely connected, and thus an exercise in 'inappropriate forum shopping'.

[Link available **here**].

Proper law of the contract should also govern closely-related tort claim

A sensible principle, but it led to some unexpected consequences in *Kingspan Environmental Ltd v Borealis A/S*, [2012] EWHC 1147 (Comm). Borealis, a Danish company, and its UK subsidiary sold a polymer to Kingspan, issuing invoices which were stated to be governed by general terms and conditions. The Ts & Cs provided that the law of Borealis' domicile governed and excluded warranties of quality and fitness for purpose. Kingspan alleged that the polymer was unfit for its intended purpose. It made claims for breach of contract and misrepresentation, arguing that it had contracted with the UK sub and that English law governed.

The English Commercial Court concluded on the facts that the contract was with the Danish parent and that the proper law of the contract was therefore that of Denmark. The evidence did not support a claim that the polymer was unfit for Kingspan's purpose. As for the tort claim, given its close connection to the contractual claim, it made sense that Danish law should also govern. The kicker: Danish law does not recognise the doctrines of misrepresentation or negligent misstatement, so Kingspan was out of luck here too. The court rejected the argument that it was unfair to deprive Kingspan of the protections of English tort law and UK legislation on unfair contract terms; Kingspan was a sophisticated party and should have considered what its position might be under Danish law.

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CONSTITUTIONAL

'Liking' someone on Facebook isn't speech protected by the US constitution, apparently

Sheriff BJ Roberts of Hampton, Virginia appears to have used some unusual means for re-election in 2009: he is alleged to have required prisoners to organise political events, and to have made city employees buy and sell tickets to campaign fundraisers. The plaintiffs in *Bland v Roberts* (ED Virginia, 24 April 2012) also alleged that he fired them for supporting his rival, Jim Adams, in violation of their 1st Amendment rights to free speech. But had the plaintiffs engaged in constitutionally protected activities? One had 'liked' Adams on Facebook; another had an Adams bumper-sticker.

The district court didn't think either of these expressions was sufficient to warrant protection, and there was evidence that bumper-sticker dude had been sacked for using profane language to a co-worker (at an election booth, mind you, where he referred to Roberts's campaign literature as 'f ---ing s---'). This was put down to a private grievance, not the expression of a matter of political concern that was being unduly squelched. Claims that the fired employees' freedom of association had been violated were purely speculative – and anyway, Roberts enjoyed immunity as a constitutional officer of the state.

All sounds a bit messed up, especially on the Facebook point: surely even the smallest political act is worthy of protection. Perhaps a further indication that democracy is under threat in the republic to the south of this peaceable kingdom?

CONTRACTS

Be careful when you agree to use best efforts

Something Blackpool Airports Ltd (BAL) found out the hard way in *Jet2.com Ltd v Blackpool Airport Ltd,* [2012] EWCA Civ 417. BAL agreed to undertake 'best endeavours' to promote the services of Jet2.com (Jet2), a low-cost airline, and 'all reasonable endeavours' to provide a cost-base that would facilitate Jet2's pricing. The airline contended that this required BAL to allow flights outside the airport's normal operating hours; BAL argued that it was obliged to conduct marketing on behalf of Jet2 but not to handle aircraft movements outside normal hours when the costs of doing so were greater than the associated revenues.

The trial judge sided with Jet2: the contract did not expressly limit BAL's promotional efforts to advertising and marketing, and therefore included the accommodation of off-hours flights, which were clearly necessary to support the Jet2 pricing model. BAL could consult its own commercial interests only up to a point, having agreed to promote those of Jet2. In the Court of Appeal, Moore-Bick LJ reviewed leading cases on 'best efforts' clauses, concluding that the trial judge was correct in his assessment (Longmore LJ concurring). Lewison LJ (author of the book on contract interpretation) dissented. His colleagues were in his view incorrectly writing terms into the agreement: 'if a contract says nothing about a particular topic, then even if that topic is demonstrated by the admissible background to be an important one, the default position must surely be that the topic in question is simply not covered by the contract.' The contractual construction offered by Moore-Bick LJ was construction in the sense of 'making' not 'interpretation'.

[Link available **here**].

Online trader not liable for losses allegedly incurred by 5-year-old boy

Colin Cochrane claims to have left his computer on, which allowed his girlfriend's 5-year-old son to incur losses of £50,000 in commodities trades in Cochrane's account with Spreadex, an online spread betting platform. (Hmm, and the dog ate your homework?)

Spreadex argued that its 49-page standard-form documentation deemed Cochrane to have authorised all trading using his account number, including that of the boy. Cochrane managed to avoid liability under the UK's *Unfair Terms in Consumer Contracts Regulations,* which render terms that have not been individually negotiated unenforceable, where they would otherwise create a 'significant imbalance' in the relative obligations of the parties. The Spreadex terms also violated requirements for drafting contracts in good faith and in plain language, and for notifying consumers of onerous terms: *Spreadex Ltd v Cochrane,* [2012] EWHC 1290 (Comm).

[Link available **here**].

EMPLOYMENT

Corporate officer defrauded company but still entitled to contractual payment in lieu of notice of termination

The managing director of a firm of London gunsmiths defrauded his employer of £10,000. Ignorant of this, the employer decided he was redundant and terminated his employment, agreeing that he would receive a payment in lieu of notice, as provided in his employment contract. When the fraud came to light, the employer reneged on that promise. The ex-employee sued. He was unsuccessful at first, but prevailed on appeal: *Cavenagh v William Evans Ltd,* [2012] EWCA Civ 697.

The employer relied on *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339, which established the rule that dismissal may be justified by reliance on gross misconduct not known to the employer at the time of the dismissal. The trial judge thought that this was a complete defence to the ex-employee's claim. Not so, said the English Court of Appeal; the rule in *Boston Deep Sea Fishing* would preclude a wrongful dismissal claim but not a contractual one. The employer chose to terminate the employment agreement and was not entitled to resile from the consequences, even though if it had known all the facts it could have treated the employee's conduct as repudiation of the agreement. Termination of an agreement according to its terms is not the same as taking the position that the contract has been repudiated. Prior unknown misconduct was not a defence to a claim for payment of a contractual debt.

For a similar case, see *Mady Development Corp v Rossetto,* 2012 ONCA 31 (reported in the March 2012 BLG Update).

[Links available **here** and **here**].

Freedom 75?

This will be of particular interest to those of – how shall we say it? – a certain age. Seldon, an English solicitor, was a partner of Clarkson Wright and Jakes (CWJ). In 2006, he reached the retirement age set out in the CWJ partnership agreement. In 2007, he sued the firm for age discrimination (and for withdrawing the offer of a proposed *ex gratia* payment in response to Seldon's offer to stay on as a consultant).

Although much of the judgment of the UK Supreme Court, where Seldon's claim ultimately wound up, turns on European Community legislation and case law, there are some general principles to extract: *Seldon v Clarkson Wright and Jakes (A Partnership),* [2012] UKSC 16. Baroness Hale expressed the view that while mandatory retirement ages may have a justification as matter of public policy (such as freeing up spots for the young and diversifying the workforce), it remains to be determined whether that particular aim is a legitimate one in the business in question. If it is, the means chosen must be both appropriate and necessary in the particular context. In general, a measure requiring retirement at a certain age does not need to be justified in relation to a particular individual – although there could be circumstances in which it might. The UKSC ruled that the aims of CWJ's

mandatory retirement age were legitimate, dismissing Seldon's appeal, but remitted the matter to the employment tribunal to determine whether the CWJ measure was appropriate and reasonably necessary to achieve its aims.

[Link available **here**].

Was the lap-dancer self-employed or an employee?

It mattered to the claimant in *Quashie v Stringfellows Restaurants Ltd*, UKEAT/0289/11/RN, because only as an employee could she invoke the wrongful dismissal provisions of applicable legislation. According to the agreement between Ms Quashie and Stringfellows, she provided non-assignable 'personal services' and it was apparently the general assumption in the, er, profession that dancers were independent contractors. Like other dancers at the club, Ms Quashie was paid by customers in vouchers obtained for cash from the management of the establishment. If a dancer received cash from a patron, it had to be converted immediately into vouchers. Dancers provided their own outfits but were required to pay a fixed fee to the 'house mother' for dress repairs, hairdressing and make-up. At the end of each night, the club cashed out the dancer's vouchers, less a commission and deductions for lateness and other infractions.

The employment judge concluded that Ms Quashie was not an employee: she was not required to work a certain number of hours (although she did agree to sign on to a rota of dancers) and was free to work elsewhere when not at the club. Her earnings, moreover, did not come from the club but from individual patrons. The employment appeals tribunal disagreed: there was a sufficient degree of control over the claimant to make her an employee (as the possibility of fines tended to suggest, as well as a requirement to obtain permission to take vacation), and it was overly simplistic to say that because she didn't receive wages she couldn't be an employee. The voucher system was not material, employment status not being determined by the source or the route of payments. The fact that Ms Quashie was not tied to the club did not detract from this finding: 'employment status can be in place for one night' or during such time as she was on the rota of dancers. The fact that Ms Quashie had misrepresented her status to the revenue authorities as being self-employed meant that her contract of employment, while not illegal from inception because she was unaware of her true status, might be illegal in its performance and thus unenforceable.

[Link available **here**].

EVIDENCE

Another US circuit court rejects the doctrine of limited waiver of privilege

This time the 9th Circuit, which joins the 1st, 2nd, 3d, 4th, 6th, 7th, 10th, DC and Federal circuits in rejecting the notion of selective or limited waiver.

In a fight over royalties arising from Superman comics, the heirs of the creator of the character

claimed that production of privileged materials produced to the US government under a grand jury subpoena in ancillary proceedings did not waive privilege with respect to third parties. The 9th Circuit disagreed, holding that while recognising limited waiver would encourage voluntary disclosure to the government, it did not serve the ultimate objective of privilege in promoting absolute candour with one's attorney.

In re Pacific Pictures Corp, 2012 US App LEXIS 7643 (9th Cir, 17 April 2012)

Lawyers' note of witness interviews protected by litigation privilege

The accused in *R v Dunn*, 2012 ONSC 2748, were senior executives of Nortel Networks, who were charged with fraud arising from the restatement of the company's financials in 2004. Before the charges were laid, the executives were called in for a little chat with counsel and forensic auditors retained by the Nortel audit committee. Lawyers for the executives (including Jim Douglas and Kara Beitel of the Toronto office of BLG) were present and took notes of the interchange. In the ensuing criminal proceedings, the Crown called the executives' lawyers as witnesses, seeking production of their notes of the interviews. The lawyers asserted litigation privilege over the notes, which the Crown contested on the grounds that the communications in question took place in the presence of an adverse party and were not generated for the dominant purpose of litigation.

Marrocco J rejected the Crown's position. Nortel clearly thought litigation was in prospect, and it was reasonable to assume that the executives and their counsel did too. The notes were more than a factual record of the interviews; they also contained the lawyers' assessment of the importance of various points, and were clearly created to assist in the preparation of the executives' defence. Litigation privilege was not displaced because the communications were being used to facilitate a crime (covering up fraud), as it was premature to say that criminal activity had occurred until this was actually determined at trial.

[Link available **here**].

Retaining counsel doesn't magically make earlier investigation report privileged

Toronto Hydro (TH) investigated a fire and explosion that occurred in the underground hydro vault of a 300-unit residential complex. Several days later, it retained external counsel. In class proceedings a group of occupants of the complex alleged that TH owed them a duty of care with respect to the design, operation and maintenance of the hydro vault. In the course of those proceedings, the plaintiffs asked for disclosure of TH's investigation reports. TH maintained that they were privileged.

Both the Master hearing the privilege motion and, on appeal, Strathy J of the Ontario Superior Court of Justice, found that merely retaining counsel was not enough to make the reports privileged: *Kennedy v Toronto Hydro-Electric System Ltd,* 2012 ONSC 2582. TH would have investigated a catastrophic event whether or not litigation was in prospect, and even though a external lawyer was retained a few days after the incident, the factual evidence fell

short of establishing a claim that the reports were privileged.

[Link available **here**].

HEALTH

Mental health facilities successfully challenge order compelling them to admit accused 'forthwith'

102 Court is a courtroom at Old City Hall in Toronto which deals with the mentally ill who are charged with criminal offences. Brian Conception was one of these and the subject of an order to submit involuntarily for anti-psychotic drug therapy after being found unfit to stand trial for sexual assault. Judges of the 102 Court, frustrated with a shortage of beds to accommodate people in Conception's position, had been issuing orders for treatment or committal either 'forthwith' or 'with no stop-over in jail', without regard to the actual availability of places at mental health facilities. The appellants in *The Person in Charge of Centre for Addiction and Mental Health and The Person in Charge of the Mental Health Centre Penetanguishene v Ontario,* 2012 ONCA 342, argued that the 'forthwith' order in relation to Conception should be set aside.

The Ontario Court of Appeal appreciated the rationale for the order but agreed it was improper: requiring a facility to take someone like Conception immediately would displace another patient or pose a danger if more patients were squeezed into a facility than it was equipped to handle. Section 672.62 of the *Criminal Code,* which requires a treatment facility to consent to the admission of an accused with mental illness, does not violate the accused's *Charter* rights, although making him or her wait for treatment in a jail cell is by no means ideal. On the other hand, compelling a facility to administer treatment is not desirable either, and the requirement for consent in s 672.62 ensures that treatment occurs safely at a facility which can accommodate the accused. The consent mechanism permits a facility to assess the needs of the accused and to allocate resources in a realistic way – even if this necessarily means that some accused persons will spend time in jails that aren't equipped for them, pending availability of a place at a proper treatment facility. There was evidence to suggest that a 6-day spell in jail before treatment would not impair the likelihood that Conception would become fit to stand trial within the 60-day window provided in the *Criminal Code*; if that were not the case, a 'forthwith' order might be reasonable, but not in this instance.

[Link available **here**].

MERGERS AND ACQUISITIONS

Board's rush to the altar with merger partner could be acting in bad faith

Answers Corporation's 30% shareholder wanted to unload its stake and told the company's management team that they'd all be fired if they didn't find an acquiror. The managers got on it and found a potential buyer, AFCV, which made a couple of offers. It then became apparent that Answers' operating results were looking up – to the point where it appeared that the company might be worth more than AFCV's best offer per share. The sale to AFCV was consummated quickly, to the disgust of the plaintiff shareholders

in *Re Answers Corp Shareholder Litigation,* 2012 Del Ch LEXIS 76.

Chancellor Noble of the Delaware chancery court declined to strike the claim that the Answers board had acted in bad faith in approving the speedy union with AFCV, also leaving open the possibility that the acquiror may have aided and abetted a breach of the Answers directors' fiduciary duties. The chancellor cast some doubt on the proposition that an aiding and abetting claim could be predicated on a director's breach of a duty of care, but left that for trial as well.

Can a confidentiality agreement serve as a standstill, and does 'between' mean only one thing?

Yes and no, respectively, according to Vice-Chancellor Strine of Delaware. Martin Marietta Materials (MMM) and Vulcan Materials (VM) entered into a confidentiality agreement with a view to concluding a friendly combination. There was no express standstill agreement. MMM then appeared to change its tune, relying on confidential information (CI) derived from the earlier discussions to mount a hostile take-over bid. VM objected, saying that their agreement precluded use of CI for a purpose other than a transaction 'between the parties', the word 'between' connoting reciprocity and excluding a hostile bid. MMM contended that 'between' meant simply 'involving' or 'linking', not necessarily in a friendly way.

Strine VC thought both were plausible readings, but preferred VM's on the strength of the context of the parties' dealings, good old lexicography and the Ontario decision in *Certicom Corp v Research in Motion Ltd* (2009) 94 OR (3d) 511. In *Certicom,* the court concluded that use of 'between' implied some degree of reciprocity or mutuality. Strine VC noted that MMM's counsel would certainly have known about the 'between' issue as a result of widespread coverage of *Certicom* in the M&A world. Because MMM's use of CI for its hostile bid was not contemplated under the agreement with VM, the latter's request for specific performance of the agreement and injunctive relief against misuse of the CI was granted, in effect turning the confidentiality agreement into a standstill: *Martin Marietta Materials Inc v Vulcan Materials Co,* 2012 Del Ch LEXIS 93. MMM has appealed: watch this space.

[Link available **here**].

PERSONAL PROPERTY/PET LAW

Court can't make an order for access to a dog, even if treated as a child

Some pet law from the BC provincial court in Kamloops: *Kitchen v MacDonald,* 2012 BCPC 9. Richard Kitchen and Deanna MacDonald were in a relationship, but it was unclear whether they actually lived together or whether he just spent a lot of time at her house. In any event, they were not in a marriage-like relationship when they broke up. After the rupture, Kitchen sought a declaration that he was at least joint owner of Laddie, MacDonald's border collie. (Stunningly unoriginal name, that.) Kitchen claimed Laddie had been given to them jointly; MacDonald said he was a gift from her father to her alone. There was, however, evidence that MacDonald had sent

letters to Kitchen on Laddie's behalf, in which he was referred to (by the dog) as 'my daddy'. Kitchen also continued to visit the dog after his break-up with MacDonald.

Cutting through the sentimental twaddle, Frame J noted that all he could do was make an order as to ownership of Laddie; orders for access to dogs as if they were children just aren't possible. On the facts, it was clear that MacDonald was Laddie's sole owner; Kitchen's claim failed entirely.

[Link available **here**].

REAL PROPERTY

NBCA puts brakes on real estate transaction by e-mail

The New Brunswick trial court found in *Girouard v Druet,* 2011 NBQB 204, that the parties had concluded a valid contract for the sale of a condo through an e-mail exchange, and that the writing requirement in the *Statute of Frauds* had been satisfied.

Not so fast, said the NB Court of Appeal (2012 NBCA 40), finding that there was an insufficient intention on the part of the defendant to be bound. The CA thought there should be a rebuttable presumption that a quick exchange of e-mail does not give rise to binding obligations, at least in the context of real estate transactions. The court did leave open the possibility, however, that an electronic signature could satisfy the *Statute of Frauds.*

[Links available **here** and **here**].

SECURITIES

Is a promissory note a security?

It depends, said Vice-Chancellor Strine in *Fletcher International Ltd v ION Geophysical Corp,* 2012 Del Ch LEXIS 113. ION's subsidiary issued three promissory notes: if the notes were securities, their issuance violated a contractual requirement to obtain Fletcher's consent.

Strine VC applied *Reves v Ernst & Young,* 494 US 56 (1990), which sets out a 'family resemblance' test that includes consideration of the following: (1) was the motivation of the parties akin to investment or was it short-term financing? (2) was there a broad distribution plan? (3) would the investing public reasonably expect the instrument to be treated as a security? and (4) is there a regulatory scheme in place that would make the protections of securities laws unnecessary? A promissory note is presumptively a security, unless the economic realities make it clear that it is not an investment vehicle but instead a short-term commercial or consumer lending transaction.

The first two notes were not securities because their term was brief, they were essentially bridge financing to facilitate a corporate acquisition and there was no real market for them. The fact that they bore legends that securities are required to have and referred to securities legislation did not alter their characterisation as short-term commercial loans rather than securities. The third note was, however, a security, because it was a transferable, long-term debt instrument that offered interest – in other words, a marketable investment and thus a security. Not a surprising result, but it's nice when a good judge goes through the analysis.

No duty to correct misstatements of third parties present during earnings call

MGIC Investments, an insurer of mortgage loans, was under pressure when the sub-prime market faltered in 2007. One pressure point was the increase in margin calls by lenders. This affected the liquidity of C-BASS, which securitised packages of mostly sub-prime mortgage loans and which was 46%-owned by MGIC. (Radian Group, another mortgage insurer, owned a further 46% stake in C-BASS.) In a quarterly earnings call with MGIC's investors, two C-BASS executives were present at MGIC's request. The executives allegedly misstated the liquidity of their company, which they indicated was 'substantial' – a statement belied, the investors argued, by the liquidity crisis which subsequently ensued.

The issue was whether MGIC had a duty to correct any misstatements made by the C-BASS execs, on the grounds that C-BASS was an entity 'controlled' by MGIC for the purposes of the *Securities Exchange Act of 1934.* The answer for two levels of court was no, on the grounds that MGIC could exert control over C-BASS only with the concurrence of Radian Group. The statements of the C-BASS officers were therefore not attributable to MGIC and there was no duty to correct anything they said that was misleading to the investors.

Fulton County Employees Retirement System v MGIC Investment Corp, 675 F3d 1047 (7th Cir, 12 April 2012)

SECURITIES/STATUTORY INTERPRETATION

Issuer with real and substantial connection to Ontario need not be publicly traded in Canada to be subject to secondary market liability

The secondary market liability provisions of Ontario's *Securities Act* (OSA) apply to a 'responsible issuer', defined as (a) a reporting issuer and (b) 'any other issuer with a real and substantial connection to Ontario' with publicly-traded securities. Canadian Solar was not a reporting issuer because it was not traded on an Ontario exchange, and it argued (in response to a proposed class action alleging misrepresentations in secondary-market disclosure documents) that it didn't fall in the 'any other issuer' category either. While it had obvious connections to Ontario (registered and executive offices in Ontario, sales in the province), it traded on the NASDAQ exchange. Canadian Solar's argument was essentially that being a responsible issuer required being traded in Canada.

Not surprisingly, neither the motion judge nor the Court of Appeal bought it. If the legislature had intended to limit the class of responsible issuers to those that trade somewhere in Canada it would have said so; other definitions in the OSA do have territorial limitations, suggesting that this definition was not so circumscribed. There are, moreover, good policy reasons not to read in a territorial limitation, which were identified in the Canadian Securities Administrators' published comments on the draft *Uniform Securities Act*, which contained a similar definition.

Abdula v Canadian Solar Inc, 2012 ONCA 211

[Link available **here**].

TORTS

Court declines to extend fraudulent misrepresentation claim to purely personal sphere

Oh, the perils of internet chat rooms. Paula Bonhomme made the acquaintance of a charming man called Jesse in one dedicated to some TV show they both followed. Jesse was, however, a fiction created by Donna St James, the defendant in *Bonhomme v St James* (SC Ill, 24 May 2012). An elaborate fiction, at that: St James not only created an entire persona for Jesse, but also a cast of friends and relations, all of whom corresponded with Bonhomme (some of them even sent her presents from foreign locations). St James also befriended Bonhomme online under her own identity. The relationship between Bonhomme and Jesse (if one can call it that) became romantic, to the point where Bonhomme bought herself a plane ticket to travel from California to Jesse's ostensible home in Colorado. Jesse cancelled the meeting at the last minute, and Bonhomme was devastated to learn from Jesse's 'sister' (another of St James's fictions) that he had attempted suicide and then died of liver cancer. When St James herself visited Bonhomme, the latter's friends sussed out the deception and exposed St James for what she was. Bonhomme sued St James for fraudulent misrepresentation, seeking the costs of her aborted Colorado trip, fees for therapy to deal with the sad news of Jesse's death and expenses incurred in making her house ready for St James's more than somewhat callous visit.

The Illinois Supreme Court upheld the dismissal of Bonhomme's claim, declining to extend the tort of fraudulent misrepresentation 'beyond its traditional application in commercial and transactional settings'. This was a purely personal relationship, albeit one built on one party's 'relentless deceit'. There was no public interest in having the courts treat this as a case of fraudulent misrepresentation because there was no commercial, transactional or regulatory component to it. Purely personal deceit isn't for the courts to regulate.

Evidence required to establish civil conspiracy

As if practising law wasn't tough enough. In *Mraiche Investment Corp v McLennan Ross LLP,* 2012 ABCA 95, Mraiche alleged that a solicitor had conspired with his client to defraud it in its position as creditor of the client. Mraiche asserted that there were facts which the lawyer knew or ought to have known were suspicious and that this amounted to constructive knowledge of the unlawful acts of the client amounting to civil conspiracy.

The Alberta Court of Appeal agreed that intent for conspiracy may be inferred, if one of the defendants knows or ought to know that injury to the plaintiff is likely to and does result: the Supreme Court of Canada said as much in the leading case, *Canada Cement Lafarge v BC Lightweight Aggregate* [1983] 1 SCR 452. But the court didn't think there was enough evidence to go on in this instance: there was no agreement with the client to defraud anyone in particular (including Mraiche), and the lawyer had no information to indicate directly that the client

intended to do so. He may not have asked all the questions he ought to have, but that did not mean the plaintiff could essentially turn the tort of conspiracy into a new variety of negligence claim. The appeal was dismissed.

[Links available **here** and **here**].

Investment adviser negligent but losses not foreseeable so no damages

The plaintiff in *Rubinstein v HSBC Bank plc* (QB, 2012) invested £1.25 million at HSBC in 2005, telling his adviser he wanted to do so at 'no risk'. The adviser put him in AIG bonds, telling him they were like cash in the bank: safe as houses, as the old adage goes. Well, houses can be shaky – as AIG turned out to be in September 2008, when it suspended withdrawals and left Rubinstein with a capital loss of £180,000.

Yes, the court said, the adviser was negligent in stating that the bond was equivalent to a cash deposit and for failing to suggest alternatives. But the run on AIG in the fateful autumn of 2008 was unthinkable in 2005, to the point where it was not a foreseeable risk giving rise to an award of damages.

The scope of the 'unlawful means' tort clarified (maybe)

Torts geeks, take note. The New Brunswick Court of Appeal reviews a wide range of English and Canadian cases and commentary on the 'muddled' and difficult economic tort of interference with contractual relations by unlawful means, including its sometimes uneasy relation to the tort of inducing breach of contract, in *AI Enterprises Ltd v Bram Enterprises,* 2012 NBCA 33.

Three corporations (Bram Enterprises, Jamb Enterprises and AI Enterprises) made an investment in real estate which was governed by a syndication agreement. The agreement provided that if two of the investors wanted to sell the building, the third had a right to buy it at its appraised value, failing which it could be marketed to the public. Bram and Jamb wished to sell, but AI and its principal declined to offer to buy at the appraised value and prevented any other sale by instituting arbitration proceedings, registering encumbrances on title and preventing would-be purchasers from seeing the property. This thwarted two offers in excess of the appraised value. Bram and Jam eventually sold the property to AI for its appraised value, but sued for the difference between that and the higher of the two offers that fell through. The trial judge awarded damages for interference with contractual relations through unlawful means; the NBCA dismissed the appeal, but for different (and perhaps not entirely satisfying) reasons.

The trial judge failed to consider the discussion of unlawful means in the leading modern case, *OBG v Allan,* [2007] UKHL 21, in which Lord Hoffmann confined the tort to situations where the interference exerted by A on B not to contract with C must be independently actionable by B against A; if A merely uses lawful means of persuasion, the tort will not be made out. On that basis, the appeal in *AI Enterprises* would have to

be allowed; the thwarted purchasers had no claim against AI. While accepting that *OBG* is, generally speaking, the law of Canada, Robertson JA thought it should be subject to 'principled exceptions' (partly because the Supreme Court of Canada, which may ultimately rule on all of this, tends to dislike rules without such exceptions) and to a defence of justification. He also agreed with the Ontario cases which require that the impugned conduct must not be directly actionable by the claimant. The conclusion was that the defendant's 'intentional erection of legal barriers', which were not actionable by a third party but akin to abuse of process, put the case within a principled exception to the narrow rule in *OBG*, resulting in affirmation of the damages award.

Note to judges and others: could we please avoid the Americanism 'pled'? It's 'pleaded'.

[Links available **here** and **here**].

What is one to do when one's gamekeeper shoots himself in the foot?

Hope that one's staff have taken adequate measures to control workplace risks, that's what. 'One' in this instance being the Duke of Devonshire, although the gamekeeper's claim for breach of statutory duty and common-law negligence was brought against the trust that holds the duke's 65,000-acre domain: *Whitehead v Trustees of the Chatsworth Settlement,* [2012] EWCA Civ 263.

Mark Whitehead, a keeper on one of the duke's estates, accidentally shot himself while patrolling for 'vermin'. He was carrying a 12-bore shotgun broken over his arm, which meant that the safety catch was on, but had left a live cartridge in each barrel. Whitehead climbed a low stone wall, stumbled and caused the gun not only to close but also to fire a shot into his shin. He sued his employer, alleging it had taken inadequate measures to ensure safety on the job. Two levels of court found for the employer. Whitehead was aware that the best practice was to unload a gun when navigating an obstacle, although he and other keepers routinely ignored this. Estate management had communicated the best practice on a number of occasions in written policies for workers and couldn't be expected to enforce it in the way Whitehead contended they should have done. The old adage applies: 'never let your gun pointed be at anyone' – including putting yourself in a position where it might be pointed in your own direction.

[Link available **here**].

TORTS/CORPORATIONS

Parent company can be liable for negligence of subsidiary, says English CA; veil-piercing not required

This is apparently the first (but no doubt not the last) English case in which a parent has been found liable in negligence for the acts or omissions of its subsidiary: *Chandler v Cape plc,*

[2012] EWCA Civ 525. David Chandler was employed by Cape Building Products Ltd (CBP) from 1959 to 1962 in conditions that were acknowledged to have been unsafe: he was exposed to asbestos which resulted in his contracting asbestosis some 50 years later. In the interim, CBP had been dissolved; setting the dissolution aside to allow Chandler to enforce rights against CBP's liability insurance would have been to no avail, as the policy contained an exclusion for asbestos-related diseases contracted by employees. So Chandler sued CBP's parent, Cape plc (Cape).

He was successful both at trial and in the English Court of Appeal: Cape owed a duty of care to ensure that Chandler's workplace was safe, which it was not. The facts are important. Cape and CBP had some directors in common, but the parent did not exert more than usual operational control over its sub. Cape did, however, have actual knowledge of conditions at CBP and assumed responsibility for health and safety policy at all Cape affiliates. The company doctor at CBP, while not officially medical adviser for the entire Cape group, effectively exercised that function. Cape was liable on the basis of a relationship with Chandler that gave rise to an assumption of responsibility by Cape – not, Lady Justice Arden in the Court of Appeal was quick to add, through any kind of piercing of the corporate veil; Cape and CBP's separate legal personality was left untouched.

Arden LJ went on to say that liability for a subsidiary's employees may be imposed on a parent in circumstances including where (1) the business of the parent and sub are 'in a relevant respect' the same; (2) the parent has or ought to have superior knowledge on some relevant aspect of health and safety in the industry; (3) the parent is aware (or ought to be aware) that the sub's system of work is unsafe; and (4) the parent knew of ought to have foreseen that the sub's employees would rely on its superior knowledge for their protection, whether or not the parent actually intervenes in the sub's health and safety policies (but evidence that the parent intervenes in the sub's business operations may be taken into account).

[Link available **here**].

TRUSTS/BANKING

'Knowing assistance' class action certified

Good rule of thumb: don't knowingly assist in someone else's breach of trust; you'll be liable too. Whether a financial institution fell afoul of this general principle is the central issue in *Pardhan v Bank of Montreal,* 2012 ONSC 2229, recently certified as a class proceeding.

Salim Damji raised $77 million from investors in a fraudulent scheme. He ended up in jail but most of the money has yet to be recovered. Damji deposited the ill-gotten gains in various accounts with the Bank of Montreal (BMO). The plaintiffs alleged that Damji held their 'investments' on trust for them and that BMO knowingly assisted him in siphoning assets offshore. BMO argued that (1) a knowing assistance (KA) claim must be predicated on a 'genuine' trust, (2) actual rather than constructive knowledge of the breach would

be required and (3) s 437 of the *Bank Act* precludes a KA claim by a non-customer against a bank. The motion judge rejected all three arguments: (1) as long as there was an intent by the settlor of the trust that the funds would be held on trust, a KA claim could be made out (Damji's *bona fides* were irrelevant); (2) the requirement is actual knowledge, but this includes recklessness or wilful blindness and the pleadings were adequate on this point; (3) s 437 may shield a bank from liability in certain circumstances, but not clearly here. It was not plain and obvious that the plaintiffs' claim would fail. The plaintiffs' claim that BMO was in knowing receipt of funds resulting from a breach of trust was also viable, as were their negligence claims (although the latter seemed to be on the 'general and sweeping' side). The other elements of the certification test were satisfied, the net result being a green light to the action.

[Link available **here**].

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