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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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BANKING

Bank's security measures to combat fraud not 'commercially unreasonable', 1st Circuit concludes

Patco Construction used Ocean Bank's online banking to make payroll transactions and other transfers. In May 2009, it appeared that unknown third parties had made $588,000 in unauthorised withdrawals. The bank managed to block $288,000 of these. Patco sued to recover the rest. There were some obstacles to overcome, including clauses in Patco's customer agreement making e-banking at the risk of the customer, requiring the customer to monitor transfers daily and making the customer liable for all transfers 'purportedly' made by it. The real question for the US magistrate in Maine was, however, whether Ocean Bank had adopted 'commercially reasonable' security measures; where this is the case, article 4A of the Uniform Commercial Code (on funds transfers) will absolve the bank of liability, provided it also acted in good faith and in compliance with those measures and the relevant agreements with the customer. The magistrate concluded that while the bank's security measures did not include everything available at the time and were therefore 'not optimal', they were nevertheless OK. The US District Court agreed on appeal in a two-page order: *Patco Construction Co v Peoples United Bank dba Ocean Bank* (D Me, 27 May 2011; aff'd D Me, 4 August 2011), reported in the BLG Monthly Update, October 2011.

The 1st Circuit has reversed the order for summary judgment in favour of the bank (3 July 2012). By requiring the customer to answer security questions for every transaction it made, but not monitoring high-risk transactions which it had been warned were probably fraudulent or undertaking security measures which could easily have been implemented, the bank did not act in a commercially reasonable manner. The bank's collective failures in light of multiple incidents of fraud of which it was aware made its actions especially unreasonable. The frauds at issue triggered nothing more than an ordinary transaction would. The court did leave open the possibility that the customer had also acted in a commercially unreasonable manner in responding to inadequate security measures on the part of the bank, a question for remand.

CIVIL PROCEDURE

Court's inherent jurisdiction to strike out case as abuse of process, even after damages awarded at trial

Videosurveillance has been a boon to employers and insurers in weeding out fraudulent claims.

One such was at issue in *Fairclough Homes Ltd v Summers*, [2012] UKSC 26. Evidence obtained by undercover surveillance after a trial which established liability (but which left damages open to assessment) made it plain that the claimant had seriously misrepresented the extent of his ongoing disability as a result of a workplace accident. He had suffered injuries, but proved to have 'grossly and dishonestly exaggerated' their longer-term effects. The parties agreed on an assessment of damages, at which point the trial judge rejected the defendant's motion to strike out the claim as a whole on the grounds of fraud, which the judge doubted he had the power to do under the rules of court. This was upheld by the Court of Appeal (which noted the inapplicability of the special rule of insurance law which will allow a claim to be denied in its entirety where only part of the claim is fraudulent or dishonest).

The UK Supreme Court disagreed that the judge had no power to reject the claim in its entirety; this fell within his inherent jurisdiction and was consistent with the rules. The circumstances in which this power will be exercised when liability and quantum of damages have already been determined will, however, be exceptional. It would be more likely that a claim predicated on fraud would be dismissed on the merits, but striking it at a later stage was not so theoretical as to be impossible. The Supreme Court, somewhat unhelpfully, declined to define in advance the circumstances in which abuse of this kind might be found. On the facts, it would not be proportionate or just to strike out Summers's claim as a whole, as he had suffered injuries for which the defendant was liable. The court did note, though, that after deductions including those for state disability benefits, Summers was unlikely to receive much, if anything, of the damages originally agreed.

[Link available **here**].

CIVIL PROCEDURE/BANKING

Some points about seeking costs against self-represented parties

First among them that, 'in matters of costs, a self-represented litigant is sometimes his own worst enemy'. If Lewis O'Keefe had been represented by counsel from the start, he would doubtless have been advised to concede his mortgage debt to Deutsche Bank but to contest the precise amount of principal and interest, which the judge thought open to question: *Deutsche Bank AG, Toronto Branch v O'Keefe*, 2012 ONSC 4496.

As it was, O'Keefe ran up unnecessary costs in his defence. On the other hand, to award costs against him on a substantial indemnity basis would be to rub salt in a self-inflicted wound, and there was evidence to suggest that the bank had 'engaged disproportionate legal resources to refute Mr. O'Keefe's manifestly weak defence'. The bank was also unable to rely on the standard charge terms in the mortgage documentation, under which O'Keefe had agreed to pay the bank's costs of enforcement on a full indemnity scale. While a court will generally respect a contractual entitlement to costs, it retains the discretion to disregard an agreement in the face of inequitable conduct or special circumstances that would make the full award unfair or unduly onerous. In the circumstances, it was fair to make O'Keefe pay $38,000 in costs, rather short of the $80,000 the bank had asked for.

[Link available **here**].

CONFLICT OF LAWS

Creditor can't get funds which arose from commercial transaction but now used for sovereign purpose

In 1988 it must have seemed like a good idea to SerVaas Inc. to supply equipment to the Iraqi

government for a metal processing plant. But Iraq invaded Kuwait two years later, and the UK assets of Rafidain Bank, owned by the Iraqi state, were frozen; these assets included commercial debts owed to SerVaas. After the fall of Saddam Hussein's government, a process of debt restructuring took place, with the new Iraqi government offering to repurchase claims from commercial creditors of specified Iraqi debtors, including Rafidain. SerVaas declined to participate in the process, having obtained judgments against Iraq, and sought to enjoin Rafidain's liquidators from making dividend payments to the Iraqi government under the restructuring scheme unless the judgment debt in favour of SerVaas was recognised. Iraq moved to discharge the injunction on the grounds that the funds payable to it by the bank were immune from execution.

SerVaas argued that the funds were subject to an exclusion in the *State Immunity Act 1978* for property that is 'for the time being in use or intended for use for commercial purposes'. Given the clearly commercial purpose of the underlying supply contract, the dividends were, it contended, to be used to obtain payment for or to complete that transaction or as part of the transaction by which Iraq acquired the claims from Rafidain. The UK Supreme Court agreed with the majority of the English Court of Appeal that the origin of the debts was irrelevant: *SerVaas Inc v Rafidain Bank*, [2012] UKSC 40. The funds were not being used for the original commercial purpose of the supply contract, but instead for the sovereign purpose of restructuring Iraqi state debt. This conclusion was consistent with US (and Hong Kong) authority on analogous issues.

[Link available **here**].

Opportunities narrowed for enforcement of state debt against state-owned companies

The Privy Council has indicated that only in 'quite extreme circumstances' will creditors be able to look to sovereign states to satisfy the obligations of state-owned entities (SOEs) – or *vice versa*. In *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC*, [2012] UKPC 27, FG Hemispheres wanted to go after the assets of Gécamines, a corporation owned by the Democratic Republic of the Congo (DRC), in order to enforce arbitration awards made against the DRC in its sovereign capacity.

The case is an appeal from the courts of Jersey, but judging by the range of authorities considered – English, US, Canadian, South African, French – it is clear that the Board is enunciating principles of broad application. One needs to consider first whether the SOE is distinct from the organs of the state in question and whether it has separate legal personality. Constitutional and factual control of the SOE by the state will be relevant, as will the extent to which the SOE exercises sovereign functions – but neither of these factors necessarily makes a SOE an organ of the state. Where a SOE with separate legal personality has been formed for commercial or industrial purposes, with its own management and budget, the 'strong presumption' is that its separate status should be respected – with the result that the state that owns it will not be liable for its commercial debts, nor will it be liable for the debts of the state. Under circumstances which the Privy Council described as 'quite extreme', this presumption can be rebutted, but it will require a finding that the SOE's operations and the state are 'so closely intertwined and confused' as to make the SOE a 'mere cypher'. On the facts, this was not the case with Gécamines, which meant that FG Hemispheres could not seek recourse from it for the obligations of the DRC under the arbitral awards.

The judgment also considers veil-piercing in the context of SOEs, concluding that the factors for lifting the veil in domestic law are not necessarily the same as those under international law (an underlying fraudulent or otherwise improper purpose seems not to be a prerequisite under the latter). It may be appropriate in particular circumstances to disregard a SOE's corporate formalities where its

owner has interfered with it or otherwise behaved in such a way as to make those formalities a sham, but that couldn't be said of Gécamines.

[Link available **here**].

CONSUMER PROTECTION

Online terms and conditions longer than Shakespeare plays

Not even many lawyers will read, much less inwardly digest, the terms and conditions (Ts & Cs) that come with the online services we all use: everyone just clicks 'I accept' and moves on. Not surprisingly: PayPal's Ts & Cs, together with related policies on privacy, acceptable use, shipping and billing, clock in at over 36,000 words; as a recent article in *Which*? (a UK consumer magazine) points out, this is longer than *Hamlet*. It's also much less memorable.

All of which raises the obvious question of enforceability, as in *Spreadex Ltd v Cochrane*, [2012] EWHC 1290 (Comm) (reported in the BLG Monthly Update, July 2012), where an online spread betting platform couldn't rely on its 49-page Ts & Cs because it had not brought onerous terms to the attention of the consumer, or drafted its documentation in good faith and plain language. So where does that leave you, caught between the rock of protecting your client (the online provider, we assume) and the hard place of contract interpretation in the consumer context?

[Link available **here** and **here**].

CONTRACTS

Part-performance of void contract doesn't make it enforceable

To say otherwise would be 'contrary to principle and wrong', in the view of the English Court of Appeal.

The argument was made in *Keay v Morris Homes (West Midlands) Ltd*, [2012] EWCA Civ 900, where the plaintiffs claimed damages for alleged breach of an oral agreement for prompt completion of building works following a sale of land. Morris Homes argued that it had never made such an oral agreement and that, even if it had, the agreement was void because it failed to comply with the *Law of Property Act (Miscellaneous Provisions) Act 1989*. The statute requires contracts involving the sale of land to be incorporated in a signed document; the works obligation was supplementary (not collateral) to the land-transfer agreement, and was thus void for not having been part of the land transfer. The plaintiffs countered with the argument that the practical completion of the land elements of the contract caused the void, non-land elements to become enforceable.

The Court of Appeal found this a 'surprising' argument, and a misapplication of some admittedly difficult earlier case law. The omission of the supplementary works obligation from the main contract rendered it a nullity or at most a proposed contractual term that had never been incorporated into a valid contract. It was in any event unenforceable.

[Link available **here**].

Scope of third-party beneficiary rights in New York

New York common law allows a third party to enforce contractual obligations made for its benefit, where there is clear evidence that the intention of the contracting parties was to permit the third party to enforce those rights. Bayerische Landesbank (BL) argued that it could, as an investor in a synthetic collateralised debt obligation (CDO), sue the portfolio manager for the loss of its investment (in this case, about 60 million bucks) – even though BL was not a party to the portfolio management agreement (PMA) which defined

the manager's role and duties on behalf of investors. That contract was between Aladdin Capital and the shell issuer of the notes purchased by investors: it stated in section 29 that no person apart from the issuer and the manager had any right, benefit or interest in the agreement, 'except as otherwise specifically provided herein'. Goldman Sachs, the swap counterparty, was then specifically identified as an intended third-party beneficiary, but there was no mention of investors in the scheme. BL argued that 'herein' didn't refer only to section 29 but to the agreement as a whole.

Rakoff J concluded that section 29 of the PMA did not on its own confer third-party rights on investors, but that 'herein' was indeed ambiguous. He preferred BL's reading because other provisions of the PMA tended to suggest that investors were within the intended scope of the third-party rights. Investors could, for example, remove Aladdin as portfolio manager for breach of duty; it would be 'odd' if they could not also sue it for that breach. BL's position was plausible even without looking beyond the four corners of the PMA but, given the ambiguity of 'herein' it was also appropriate to look at extrinsic evidence. Aladdin and Goldman Sachs had marketed the CDO investment to BL, representing that the portfolio would be managed conservatively and defensively on behalf of investors, which also suggested that BL was an intended third-party beneficiary of the PMA. Given that BL ultimately lost its entire investment in reliance on the representations that had been made to it, its claim that Aladdin had been grossly negligent in managing the portfolio was also plausible. Aladdin's motion to dismiss BL's claims was therefore dismissed.

Bayersiche Landesbank, New York Branch v Aladdin Capital Management LLC (2d Cir, 6 August 2012)

CORPORATIONS

Is separate legal personality dead?

No, but it doesn't seem as hale and hearty as it used to. In *Vava v Anglo American South Africa Ltd*, [2012] EWHC 1969 (QB), Anglo American South Africa Ltd (AASA) sought a declaration that the English courts had no jurisdiction to hear claims made in England by a group of South African mine-workers, on the grounds that the company was domiciled in South Africa, not England. Under applicable EU regulations, corporate domicile is where a company has its (a) 'statutory seat', (b) 'central administration' or (c) 'principal place of business'. Because AASA was incorporated and had its registered office in South Africa, AASA's statutory seat was there, but the judge thought there was a good arguable case (the test on a jurisdiction motion) that its central administration (and maybe, but less probably, place of business) was actually in England; there was evidence to suggest that AASA's UK parent, Anglo American plc, had the real decision-making power over AASA and effective control of its 'entrepreneurial management'.

Sure, all of this turns on an EU regulation and a lot of European academic commentary, but taken with another recent case (*Chandler v Cape plc*, [2012] EWCA Civ 525 (reported in the BLG Monthly Update, July 2012), where a parent company was liable in tort for the failures of its subsidiary), there seems to be an increasing willingness on the part of common-law judges to consider affiliates under a theory of group enterprise, without the need to engage in traditional veil-piercing (which is predicated on a fraudulent or other nefarious purpose in trying to hide behind corporate formalities, absent in both *Vava* and *Cape*).

[Link available **here** and **here**].

No fiduciary duty to minimise taxes

The Delaware Chancery court has rejected the contention that there is an independent duty of directors and officers to minimise taxes payable by the corporation (or framed in another way, that it would be wasting corporate assets not to do so): *Seinfeld v Slager* (Del. Ch. 29 June 2012).

The correct view is that there can't be such a duty, because there may be a variety of reasons why a company may or may not choose to take advantage of tax-planning opportunities. This is a decision best left to the business judgment of management. While overpayment of taxes could conceivably be a breach of fiduciary duty, there is no freestanding duty to minimise taxes, and failure to do so is not automatically a waste of corporate assets.

COURTS

Just when you thought the Privy Council's jurisdiction was on the wane

Canada abolished appeals to the Judicial Committee of the Privy Council in 1949 (although the last Canadian case – *Ponoka-Calmar Oils Ltd v Earl F Wakefield Co*, [1960] AC 18 – to go to London wasn't actually decided until 1959). Australia followed suit in 1986, New Zealand in 2003. Commonwealth members of the Caribbean Community have decided to set up a Caribbean Court of Justice to hear final appeals, although it isn't fully operational. This has left the poor old Board with a shadow of its former imperial jurisdiction, hearing appeals from the likes of Antigua and Barbuda, the Channel Islands, Mauritius (of which more in its place) and South Georgia, plus some domestic UK stuff like ecclesiastical appeals and professional discipline cases involving veterinarians.

But now in a weird development, the Privy Council will be in a position to hear appeals from Honduras as a result of a constitutional deal between that country and PC-attorning Mauritius. Honduras – not even a Commonwealth country – plans to set up special enterprise zones in order to attract foreign investment, which will be governed by Mauritian law, with the result that appeals in cases originating in Honduras may find their way to London.

[Link available **here** and **here**].

CRIMINAL

Be careful what you tweet

Although his conviction was eventually overturned, Paul Chambers found out the hard way that 140 characters or less can cause a whole world of trouble. He wanted to fly to Belfast to spend some time with a woman he had met (through Twitter, incidentally), only to find out that Robin Hood airport (for real, as Ali G would say) in South Yorkshire was closed because of heavy snowfall. Frustrated, he tweeted to his 600 followers (in jest, he consistently maintained): 'Crap! Robin Hood airport is closed. You've got a week and a bit to get your shit together otherwise I'm blowing the airport sky high!!' A week later he was arrested for having sent a message of a 'menacing character' over a public network, which is an offence under the *Communications Act 2003*. He was tried and convicted; he also lost his job and a subsequent one on account of his offence.

A panel of three judges heard Chambers's appeal, concluding that there was no evidence upon which he could be convicted: *Chambers v Director of Public Prosecutions*, [2012] EWHC 2157 (QB, Div Ct). His tweet could hardly be said to have been 'menacing' because there was no underlying threat of terrorism – or any kind of threat. The message's language and punctuation were inconsistent with an intention to be taken seriously, and the twitterer was readily identifiable (not generally a feature of terrorist threats). Obviously 'a joke, even if a poor joke in bad taste'.

But what if he had left out the exclamation marks?

[Link available **here**].

'Momentary' holding of phone while stopped at light is OK, says Ontario judge

A police officer caught Khojasteh Kazemi holding her mobile phone while stopped at a red light in Toronto. Kazemi was charged under the Highway Traffic Act, which prohibits 'holding or using a hand-held wireless communication device ... that is capable of receiving or transmitting...' Kazemi fought the charge, saying that she had merely picked up the phone from the floor of the car where it had fallen and was not actually using it. The officer had not, furthermore, even bothered to verify whether the phone was turned on.

While many of Kazemi's arguments were rejected, she still got off: R v Kazemi, 2012 ONCJ 383. The statutory provisions do make a distinction between 'holding' and 'using', so strictly speaking it is not necessary for a person charged with the offence actually to have been making use of the device, nor is it necessary for the police officer to check whether the device is operating – it just has to be capable of operating. On the other hand, the judge concluded that 'holding' couldn't mean simply touching the phone, which would criminalise having it in a pocket next to the body or handing it to a passenger. 'Momentary' handling of a mobile phone does not fall within the meaning of 'holding' for the purposes of the offence.

The correctness of the decision is doubtful: surely the statutory language means what it says and is intended to forestall bogus 'I wasn't texting; I was just momentarily holding the Blackberry' kinds of arguments.

[Link available **here**].

DERIVATIVES/COMPETITION LAW

Financial services firm to disgorge profits from use of derivatives to facilitate anti-competitive behaviour

USA v Morgan Stanley (SDNY, 7 August 2012) represents the US government's first successful attempt to get a financial services provider to disgorge profits made from derivatives transactions that facilitated anti-competitive behaviour. Morgan Stanley (MS) allegedly (it admitted no wrongdoing) helped KeySpan, an electricity provider, to acquire an interest in its largest competitor, Astoria Generating. Under a swap agreement, KeySpan gained a right to revenue that Astoria earned at auction when the market price for electricity generating capacity exceeded a certain price. This effectively made it unnecessary for KeySpan to bid competitively during the sale of its own generating capacity to retailers, driving up prices for retail consumers. As counterparty to the swap transactions, MS earned approximately $21.6 million. KeySpan settled with the feds earlier this year, and the US government moved to enter a consent decree that would require MS to disgorge $4.8 million in net revenues from the transactions.

Pauley J of the southern district of New York granted the motion, rejecting the arguments from public commenters that the government should have sought restitution for consumers of the higher prices they paid as a result of the swap transactions, rather than disgorgement of MS's profits payable to the US treasury. The judge had misgivings that the amount of the disgorgement order was a 'relatively mild sanction' and an insufficient deterrent to future misconduct, but ultimately refused to second-guess the wisdom of the decision to seek disgorgement instead of restitution.

DERIVATIVES/CORPORATIONS

Was it hedging or speculation, and did that really matter anyway?

The difference isn't always clear. Hedging (that is, taking steps to reduce exposure to risks, usually associated with market fluctuations) may have aspects of speculation (entering into transactions in the hope of making a profit, while risking adverse market movements), and *vice versa*. How to characterise some particular commodity options transactions arose in *Standard Chartered*

Bank v Ceylon Petroleum Corp, [2012] EWCA Civ 1049. Ceylon Petroleum owed Standard and Chartered US$166 million under the options contracts (which was not how the company had hoped things would turn out), but argued that it lacked the corporate capacity to have entered into them in the first place. Ceylon Petroleum conceded that it had the capacity to hedge risks in oil markets to which it was exposed, but not to speculate in those markets with a view to profit (or to be exposed to the kinds of losses for which it was liable to the bank if the contracts were enforced).

The English Court of Appeal, having observed that hedging can be more or less speculative, and speculation more or less hedged, concluded that the whole thing was a false question – and one which will not be subject to objective criteria in any event. The real issue was whether the company had the corporate capacity to enter into these kinds of transactions (whether they were speculative hedges or hedged speculations). The legislation establishing Ceylon Petroleum in 1961 provides that the company's objects are essentially commercial in character, specifically to function as the national importer and refiner of crude oil for Sri Lanka (formerly Ceylon). While there is a public interest aspect to the company's objects, the legislature clearly intended Ceylon Petroleum to enter into the full range of transactions that any other oil importer and refiner would, which included the capacity to enter into the derivatives transactions with Standard and Chartered. It was also asking the wrong question to consider whether or not the transactions were prudent or imprudent, as the company appeared to be attempting to do. Judging the transactions in light of the meltdown in credit markets in 2008, which made them particularly unfavourable to the company, was 'the wisdom of hindsight'; 'if we were all as wise as hindsight teaches us to be, we would always prosper, but history relates a different lesson', in the words of Moore-Bick LJ.

[Link available **here**].

EVIDENCE/CIVIL PROCEDURE

Waiver of privilege through data dump

It's difficult to avoid a data dump when producing electronic documents for the purposes of litigation, but if *Blythe v Bell*, 2012 NCBC 42, teaches anything it's 'think before you dump'.

The plaintiffs asked for the production of documents from the defendants in this North Carolina case, eventually having to file a motion to compel production. To move things along, the plaintiffs provided a list of search terms to assist the other side in identifying relevant computer files, noting that the plaintiffs were in no way assuming the defendants' discovery obligations and that the list of keywords might be under- or over-inclusive. The defendants responded with what looked like a data dump, prepared by an external consultant who seems to have used the plaintiffs' search terms without modification. It appeared that there had been 'minimal effort' on the defendants' part to review the documents, much less to exclude privileged communications (apart from segregating some e-mails to and from their lawyer's account). The plaintiffs were fairly sure, however, that privileged material was included in the 307 million files that were produced, but there was no way to verify this without opening each document individually. The defendants' lawyer indicated that there had been no intent to produce privileged communications, and that any such production was inadvertent, but without providing specifics. A subsequent batch of documents was then produced, from which privileged documents had been removed and logged. The plaintiffs continued to review the original batch but implemented procedures to segregate potentially privileged material, which they did not review. The defendants were informed of this but did not request the return of the documents originally produced. The plaintiffs, frustrated by the whole process, ultimately took the position that privilege had been waived over the original batch

of documents. The defendants moved to compel the return of the material, accusing the plaintiffs of 'reprehensible conduct' in taking the position they did.

The North Carolina superior court recognised that the volume of electronic documents can make detailed privilege review unrealistically expensive, and that a balancing of interests needs to be undertaken. The defendants in this case could not be said, though, to have made reasonable efforts to protect their privilege: you can't insist on protections to safeguard privilege after the horse has left the barn, as it were. Efforts to protect privilege were 'limited' and 'not commensurate with the value of the privilege'. There was no real oversight of the consultant, the search methodology was not up to snuff and what limited privilege review there was had failed to isolate all privileged communications. Waiver of privilege was the result of the defendants' failure to take reasonable precautions in advance of production.

New privilege recognised for union-employee communications

Not often do we hear (much less care) about decisions from the courts of Alaska, but this one is interesting and may have wider implications for evidence and labour law. Russell Peterson, an employee of the Alaska state government, was dismissed. He challenged his termination in grievance proceedings with the help of his union representative, but without success. He then sued the state for wrongful dismissal. In the course of those proceedings, the state's lawyers demanded production of Peterson's union grievance file. Peterson asserted that the file was privileged, a claim rejected by the trial court on the grounds that it was not covered by attorney-client privilege (the union rep was not a lawyer) or by any other recognised category of privilege.

The Alaska supreme court upheld Peterson's claim of privilege: *Peterson v State of Alaska* (Alaska SC, 20 July 2012). The file could not be privileged as an attorney-client communication on the facts, but the court was prepared to recognise a new category of privilege for union-employee communications in the context of a grievance. Winfree J pointed to decisions of the National Labor Relations Board and two New York cases which have effectively recognised such a privilege, and found that its existence was implied in Alaska public employment legislation.

Whether other states follow suit remains to be seen – but if they do, there may be pressure on Canadian courts to recognise a similar union-employee privilege.

INSURANCE

You can step away from the vehicle to avoid being hit by a truck and still be covered

That was the issue the South Carolina courts grappled with in *South Carolina Farm Bureau Mutual Insurance Co v Kennedy* (SCSC, 25 July 2012). Kennedy ran an errand for his employer, a chicken feed supplier, using the employer's truck. When Kennedy stood by the truck (with the ignition on and Kennedy's dog on the front seat) outside a restaurant on the highway to chat with his half-brother, two pick-up trucks collided and one of them came careering towards the two men. Kennedy said he was pinned to the employer's truck; in any event, he suffered injuries and made a claim for damages, medical costs and lost wages which exceeded the liability coverage of the driver of the pick-up truck which hit him. Was Kennedy entitled to his employer's uninsured motorist (UIM) coverage, though, which required him to be 'upon' (and thus 'occupying') the employer's vehicle?

The trial court thought so, accepting Kennedy's statement that he had his hand on the employer's truck (and was therefore 'upon' it) up to the point when it was obvious he needed to get out of the way of the on-coming pick-up. The South Carolina appeal court reversed, concluding that he was not actually in contact with the employer's vehicle

when he was struck and could not claim under the UIM provision, which would provide coverage only where there was a causal connection between his use of the truck and the accident. The state supreme court allowed Kennedy's appeal. The appeal court erred in disregarding the trial judge's factual findings (Kennedy's hand was on the employer's vehicle until just before the pick-up came at him, and he was pinned against the vehicle) and in thinking that the accident had not occurred during Kennedy's use of the vehicle for the employer's errand. To say that Kennedy was entitled to UIM coverage only if he had remained in constant contact with the vehicle was absurd: it was enough that he had been 'upon' it until the last minute – and reasonable for him to try to avoid being crushed by a rapidly approaching truck. Overly literal construction of the policy was rejected in favour of extending coverage (as would be the case in Canada).

INTELLECTUAL PROPERTY

Don't mess with these monks

Or, more to the point, with their intellectual property rights. The plaintiffs in *Society of the Holy Transfiguration Monastery Inc v Archbishop Gregory of Denver, Colorado*, 2012 US App LEXIS 16025, are monks of an Eastern Orthodox order located in Brookline, Mass. Their principal work consists of translating Greek liturgical texts into English, which they have made available to Orthodox parishes on the condition that no further copies would be made. The monks wished to meet the need for religious texts by the faithful but also to solicit commentary on what they considered works in progress. The defendant left the monastery in Brookline to found his own monastery in Colorado. He also created a website were he made available, free of charge, texts which had been translated by his former colleagues. The Brookline monks sued for breach of copyright and breach of an earlier settlement under which Archbishop Gregory agreed not to duplicate or disseminate the translations.

The Massachusetts district court found in favour of the Brookline monks, rejecting the archbishop's arguments that the works were in the public domain and failed to be 'original' works that would be protected by copyright. The 1st Circuit agreed. It dispatched the argument that any copyright in the works was transferred by operation of law to the Russian Orthodox Church Outside of Russia when the Holy Transfiguration monastery seceded from its jurisdiction in the 1980s, on the basis of common law and the statutes of the monastery itself. The contention that the works were in the public domain because the monks had failed to include a copyright notice on them also failed, because the works had not been made available through 'general publication' but only on a limited basis. The translations qualified for copyright: the level of originality that is required is extremely low and the works clearly surpassed it, given that their translation required the exercise of 'careful literary and scholarly judgment' (and even if not, US copyright legislation expressly extends to derivative works). There was ample evidence that the archbishop had copied the translations and had directed them to be placed on his website (the fact that a lowly monastic factotum had actually done the posting was not fatal to the claim against the archbishop). The archbishop also failed to establish that his acts constituted fair use, largely because he had profited (non-monetarily, it must be said) from posting the works at the expense of the plaintiffs. The judge also rejected the argument that the plaintiffs were somehow trying to create a monopoly over the texts at issue, given that they were available elsewhere in other translations.

LAWYERS

Law firm's vicarious liability for lawyer serving on client board

Strathy J has declined to dismiss a claim against Weir Foulds LLP (WF) for the alleged misrepresentations made by Aspen Group, a firm client. Egan, a partner of WF, acted for the company

in preparing a take-over bid circular and also served as one of its directors: *Allen v Aspen Group Resources Corp*, 2012 ONSC 3498.

The judge took the view that it was arguable that a lawyer acting as counsel and who also sits on the client's board 'may well be acting in the ordinary course of the law firm's business when he or she takes a seat at the boardroom table.' If so, then the firm would be liable for the acts or omissions of its partner. The evidence supported such a conclusion in this case. It was foreseeable that shareholders would suffer damage if the circular contained misrepresentations and that a duty of care on the part of both the lawyer and WF could arise. There might be policy reasons to negative such a duty, but a summary judgment motion was not the place to decide them. Justice Strathy also didn't buy the argument that vicarious liability of a firm for its partner under the law of partnerships could not extend to a statutory cause of action for misrepresentation under s 131 of the *Securities Act*; there was nothing in the *Act* to exclude the possibility of vicarious liability, but again this was an issue best left for trial on a full record.

Time to rethink those directorships?

[Link available **here**].

SECURITIES

No insider trading because no 'special relationship', but trades still contrary to public interest

Staff at the Ontario Securities Commission (OSC) may have thought they had a compelling case that Paul Donald, a vice-president at Research in Motion (RIM) had violated s 76(1) of the *Securities Act*, which makes it an offence for a person to trade in the securities of an issuer with which the person is in a 'special relationship' on the basis of a material fact or material change about the issuer that has not been generally disclosed. Donald had been out golfing with another RIM exec, who told him that RIM was interested in acquiring Certicom, with which it had been in discussions, and that he thought Certicom's shares were undervalued. Donald bought a bunch of Certicom shares the next day, later claiming that he had conducted his own research which confirmed that the company was undervalued.

The OSC hearing panel concluded that Donald had traded on three material undisclosed facts: RIM's interest in acquiring Certicom, the fact that there had been talks between the companies and the undervalue of Certicom's shares based on information not available to the public. The panel did not agree, however, with the argument that Donald (or the other RIM exec) was in a special relationship with Certicom. This would have arisen if RIM had been 'proposing' to make a bid for Certicom or to enter into some other combination with it, but the requisite level of involvement and approval of RIM's senior management was lacking. People at RIM may have been interested in acquiring Certicom, but this fell short of 'proposing' for the purposes of the definition of 'special relationship' in s 76(5). The panel did find that Donald had acted contrary to the public interest even without having engaged in insider trading. He should not have traded in Certicom shares on the basis of facts which were not generally known, which was an abuse of the capital markets.

[Link available **here**].

Not necessary to establish aider and abettor was proximate cause of harm, says 2d Circuit

The SEC pursued Joseph Apuzzo, the CEO of Terex Corp., for his role in two fraudulent sale-leaseback transactions orchestrated by United Rentals, a customer of Terex. The allegation was that Apuzzo had helped United Rentals in inflating its revenue figures while disguising the risks it was exposed to and the extent of its obligations. The New York district court found that while Apuzzo clearly knew of the scheme and its intent to mislead, he had not 'substantially assisted' in it and was not liable as an aider and abettor under the *Securities Exchange Act*

of 1934. The district court reasoned that because Apuzzo was not the proximate cause of the injury that resulted from Terex's fraud he had not provided substantial assistance to the underlying scheme.

This was wrong, said Rakoff J of the 2d Circuit on appeal: *SEC v Apuzzo* (2d Cir, 8 August 2012). 'Proximate cause' is the language of private tort actions but is an inappropriate touchstone in the context of an enforcement action by the SEC, which is not required to prove injury. Deterrence is the objective in enforcement proceedings, not restitution. The real test for aider and abettor liability, established by Justice Learned Hand in *US v Peoni*, 100 F2d 401 (2d Cir, 1938), is whether the defendant associated himself with the venture, participated in it as something he wished to bring about and sought by his action to make it succeed. This test is 'clear, concise, and workable' and has, moreover, stood the test of time. To require causation to be established would undermine the very purpose of aider and abettor liability, as the activities of someone who assists in another's fraud are rarely the direct cause of any resulting injury. On the facts, it was clear that Apuzzo had aided and abetted the fraudulent scheme, given his high degree of knowledge of what Terex was up to.

The decision will clearly make it easier for SEC enforcement staff to go after alleged aiders and abettors. Amendments under the *Dodd-Frank Act* which lower the level of intent required for aiding and abetting from 'knowing' to 'reckless' misconduct, but which were not in effect when *Apuzzo* was filed, will also help the SEC in pursuing those who assist in the securities violations of third parties.

STATUTORY INTERPRETATION

Interpretation of a bilingual statute

Where you have a Canadian statute in both official languages, the unambiguous English (or French) version is generally preferred to its ambiguous counterpart in the other language. *Canada v 'MV Stormont' (The)*, 2012 FCA 93, marks a bit of a departure from that principle. Truck ferry companies argued that they were not liable for ice-breaking fees charged by the Canadian Coast Guard for journeys between Windsor and Detroit (and that the Windsor Port Authority, not the Coast Guard, had the jurisdiction to impose fees for the service). They rested their case on the wording of the French version of the federal fee schedule, which states that ice-breaking fees are payable for all vessels which effect '*un transit dans la zone des glaces*'. The English reads slightly differently: the fees apply to 'all ships that transit the ice zone'. They argued that use of the verb 'transit' in the English left it unclear whether the vessel's movements had to be entirely within the ice zone; the French was clear that it did. They also pointed to the fact that the definition of 'transit' in the French version required there to be an intervening area of ice between both ports for the fees to be payable, whereas the English definition referred to 'any movement of a ship which includes one port of departure, one port of arrival' – which was clearly different. According to the normal rule the more precise French should prevail, the companies contended, with the result that on the facts their transits were not subject to the fees.

Not so, said the Federal Court of Appeal. Federal legislation is no longer drafted in one official language and then translated into the other; two sets of drafters work independently in each language based on the same set of instructions. The issue, then, is not whether a particular version is an accurate translation of the other, but whether any given version reflects the underlying legislative intent. This intent was plain – in both languages – from another section in the fee schedule, which provides that fees are payable on 'each transit to and from a Canadian port located in the ice zone' ('*chaque transit à destination ou en provenance d'un port canadien situé dans la zone des glaces*'), which caught the ferry companies either way you looked at it. The jurisdiction argument also failed.

[Link available **here**].

TORTS

Law school grads fail in suit against their dodgy alma mater

The Thomas M. Cooley Law School is, shall we say, not the finest in the United States: as the judge stated in *MacDonald v Thomas M Cooley Law School* (SD Mich, 20 July 2012), it has 'the lowest admission standards of any accredited or provisionally-accredited law school in the country' and (not surprisingly) finds itself 'in the bottom tier [in] every major law school ranking' in the US. The ranking information it produces itself is met with 'great skepticism, if not outright ridicule'. Perfect case, one would have thought, for a misrepresentation claim by a group of 12 disgruntled Cooley grads, who alleged that the law school had manipulated employment and salary statistics to suggest that its alumni fared better in the job market than they actually did.

Case dismissed, said Quist J of the southern district of Michigan. First, Cooley students don't enrol in law school for the pleasure of reading Supreme Court jurisprudence; they do so in order to purchase a legal education that will result in 'a lifestyle that they believed (perhaps naively) would be more pleasing to them' – but which failed to materialise. This was a business purpose, so their claim for violations of Michigan's consumer protection legislation had to fail. As for the common-law misrep claims, there was nothing objectively false in the Cooley employment stats, which reported percentages of graduates employed (not just in law, and not just in law firms). It was, in any event, unrealistic for the plaintiffs to have relied on the employment numbers and expected 'bustling full-time legal practices immediately upon graduation' from 'arguably the lowest-ranked law school in the country'. Graduate salary information provided by Cooley was 'inconsistent, confusing and inherently untrustworthy', but reliance on it was also unreasonable given that these internal contradictions were self-evident: 'the bottom line is that the statistics provided by Cooley... were so vague and incomplete as to be meaningless and could not reasonably be relied upon'. There can be no fraud where a person has the means to determine that a representation is not true, according to Justice Quist. In the end, this was a case where 'hope and dreams triumph[ed] over common sense and experience'.

No liability for welly-wanging accident

Welly-wanging, for those not in the know, is a pastime at outdoor events in England which involves throwing a wellington boot backwards through the legs. The longest throw wins. (The English have to resort to this sort of thing when the Olympics aren't on.) Glenn Blair-Ford, a rugby-playing 40-year-old, took part in some welly-wanging during an activity course for pupils at the school where he taught, but with very unfortunate consequences. He appears to have chucked the boot so hard that he lost his balance, falling forward and hitting his head on the ground. He was rendered quadriplegic. Blair-Ford sued the organisers of the event, claiming that they had asked him to perform the toss in a way which they ought to have known was unsafe and for failing to have taken an adequate assessment of the risks involved. The defendants replied that Blair-Ford's accident was a tragic but freak occurrence and that their risk-assessment was reasonable and would not have raised concerns that such an accident was likely to happen.

Globe J of the Queen's Bench reviewed the somewhat conflicting evidence, but was satisfied that the event organisers were professional and efficient, their activities correctly licensed and regulated. Their safety record was otherwise impeccable. A formal risk-assessment had not been undertaken with respect to the welly-wanging component of the activity course, but the organisers did engage in a 'dynamic' assessment of potential risks (*e.g.* was anyone likely to be hit by a flying boot?). The

evidence suggested that Blair-Ford threw the boot in an unusual way (almost straight up in the air, with his head quite close to the ground), making his fall – and his injuries – equally unusual and thus unforeseeable. His claim therefore failed: *Blair-Ford v CRS Adventures Ltd*, [2012] EWHC 2360 (QB).

[Link available **here**].

TORTS/CIVIL PROCEDURE

A little Elvis-related law

Elvis Presley died 35 years ago last month (if he really did die and isn't eating a cheeseburger somewhere as you read this). To commemorate the King (wherever he is), a recent Elvis-related decision: *Estate of Nell G. Pepper v Whitehead* (8th Cir, 31 July 2012). The case concerns a large collection of Elvis memorabilia amassed by the late Gary Pepper of Memphis, a personal friend of the singer and president of his fan club. Among the items were hair cuttings dating from the King's army days, used handkerchiefs, wedding photographs and dried roses from his funeral ('funeral'?). At auction in 2009, the stuff fetched just over US$250,000 (including 600 bucks for the hankies). But whose property (and whose quarter-million) was it? The estate of Pepper's late wife Nell claimed that the collection had been wrongfully converted by Nancy Whitehead, who had cared for Gary and Nell's disabled son in Memphis and then taken him (and the loot) to her home in Cedar Rapids, Iowa, during Nell's incapacity resulting from severe depression and periodic mania after the death of her husband. The Iowa district court granted summary judgment for Whitehead on a limitations defence. This was recently reversed by the 8th Circuit appeals court, which concluded that conflicting facts about when the claim might have been discovered created genuine issues which ought to be resolved at trial.

For a classic conversion/unjust enrichment claim involving the gold piano from Graceland, see *148 Investment Group Inc v Elvis Presley Enterprises Inc*, 1995 US App LEXIS 10688 (6th Cir, 10 May 1995).

TORTS/EMPLOYMENT

Vicarious liability for acts of someone in relationship akin to employment

In *JGE v English Province of Our Lady of Charity*, [2011] EWHC 2871, MacDuff J was prepared to hold the bishop of a Roman Catholic diocese vicariously liable for the acts of a priest who was not an employee of the diocese or under its control. The judge applied the 'close connection test' from *Doe v Bennett*, 2004 SCC 17, and found the bishop vicariously liable.

The bishop's appeal was dismissed by the English Court of Appeal (at [2012] EWCA Civ 938), although the Canadian cases aren't treated so kindly. Ward LJ (Davis LJ concurring) expressed the view that McLachlin CJC's mere 'exposition of the policy reasons' for extending vicarious liability to relationships akin to employment is no substitute for principled legal reasoning. Pretty short shrift is given to the Supreme Court of Canada's willingness to find vicarious liability on the basis of a 'close connection' ('if anything precedent is against that conclusion').

In order to determine whether vicarious liability should be imposed in a situation akin to employment, a court ought to consider a number of interrelated tests: whether there is control by the 'employer' of the 'employee' or control by the 'employee' over himself or herself (the control test); the degree to which the activities of the 'employee' are a central part of the business of the 'employer' (the organisation test), or integrated into it (the integration test); and the extent to which the

'employee' behaves like an entrepreneur acting on his or her own account (the entrepreneur test). On the facts, the priest in question was more like an employee than an independent contractor, although it was a close one (as Tomlinson LJ's dissent attests).

[Link available **here**].

TORTS/MARITIME

Fisherman intentionally cut underwater cable; liable for full amount of damages

The anchors of Réal Vallée's fishing boat regularly snagged on something deep in the waters of the St Lawrence off Baie-Comeau, where he trawled for crab. Mr Vallée thought he had identified it on a visit to the local history museum, which displayed a map indicating an old underwater cable as *abandonné*. Fed up with the cable, he resolved to cut it once and for all. Not a smart move: he severed an active telecommunications cable owned by Société Telus and Hydro-Québec, which sued Vallée, his company and his ship (*in rem*) for damages.

The Federal Court and then the Federal Court of Appeal found against him: *Peramco Inc v Société Telus Communications*, 2012 FCA 199. Damages ended up at a figure just over $1 million. Ironically, if Vallée had abandoned his own anchor and line, his loss would have been $250, recoverable from the cable's owners. Vallée should have been aware that the cable was a known navigational hazard, and his reliance on the museum's chart was misguided. The cable's owners were not contributorily negligent, and because Vallée's cutting of the cable was intentional he could not avail himself of the $500,000 limitation of liability for maritime claims under the *Maritime Liability Act* and related international conventions. He also disqualified himself from reliance on his insurance policy, which had an exclusion for wilful misconduct causing third-party loss.

[Link available **here**].

TORTS/PET LAW

No recovery for emotional distress from watching traumatic death of pet

Joyce McDougall's Maltese-poodle cross was shaken to death by a much larger dog belonging to a neighbour, Charlot Lamm. McDougall claimed that Lamm had been negligent in not restraining her dog, but also sought damages for emotional distress arising from watching the demise of her pooch. The defence to the second claim was old-school: a dog is personal property and there is no claim at law for emotional distress arising from its destruction. McDougall argued that the principles which allow damages for emotional distress at witnessing the death of a (human) loved one should be extended to situations involving pets, given their special status in people's lives.

Hoens J of the New Jersey supreme court took the traditional view and affirmed the lower court's rejection of McDougall's emotional distress claim: *McDougall v Lamm* (NJSC, 31 July 2012). While there are cases from some US states (Florida, Hawaii and Louisiana) which have recognised such a claim, the majority of state courts have declined to do so. Pets are still personal property, although it may be possible to recover their 'subjective' (affective) value rather than mere replacement cost. But to allow an emotional distress claim would be unsound for reasons of public policy and fairness: if the grisly end of a pet gives rise to damages for emotional distress, what about non-economic damages for the loss of other types of personalty, and how are these losses to be quantified?

TORTS/PRODUCTS LIABILITY

No liability for non-dangerous design defect

Buyers of Whirlpool front-loading washing machines complained that, owing to what they said was a design defect, the machines failed to self-clean

properly. This was alleged to cause a build-up of smelly mould, mildew and bacteria in inaccessible parts of the machine. In the ensuing class action against the manufacturer, it was apparent that very few class members would have claims for damage to property or for personal injuries; the claims were for pure economic losses resulting from the allegedly negligent design of the washing machines: *Arora v Whirlpool Canada LP*, 2012 ONSC 4642. Possible health hazards from the smelly build-up were not the main issue; it was really that negligent design diminished the fitness and value of the machines.

Perell J dismissed the certification motion on the grounds that the plaintiffs had no contractual or statutory claim against the manufacturer. Purchasers might have contractual claims against the retailer they bought from, but had no contractual relationship with Whirlpool apart from a limited warranty which excluded liability for design defects, consequential damages and the implied warranties under the *Sale of Goods Act*. There was no misrepresentation by Whirlpool for the purposes of s 52 of the *Competition Act*, which does not require disclosure of a design defect. The claim in negligence also failed: the case law (reviewed carefully in 88 paragraphs) allows recovery for economic loss only where a product defect relates to safety, which was not the case with the smelly build-up in the washing machines. In the judge's view, 'there is no recovery in negligence for shoddy goods that are not sources of danger directly or indirectly'. Waiver of tort didn't work for the plaintiffs either, whether as an independent cause of action or as an election of remedies (a question the judge did not need to decide).

Tim Buckley and Cheryl Woodin of the Toronto office of BLG represented Whirlpool.

TRUSTS/HEALTH LAW

Limits of liability of trust/hospital to third party

Third-party torts claims against trusts appear to be uncommon, so *Buck v Norfolk and Waveney Mental Health NHS Foundation Trust* (27 March 2012) is significant. Buck was a bus driver whose route included Norfolk and Norwich Hospital. As he drove on to the hospital grounds, a mental patient threw himself under Buck's bus and died. Buck sued the trust which administers the hospital, claiming damages resulting from severe post-traumatic stress disorder.

Yelton J of the English Southeastern Circuit Court (author of *Trams, Trolleybuses, Buses and the Law* (2004) and *Fatal Accidents: A Practical Guide to Compensation* (1998)) ruled that Buck could recover only if he could establish that there was a relationship between him and the trust, and some assumption of responsibility for him on the part of the trust. Although a hospital may be responsible for the negligent release of a patient, no duty is owed to a third party who suffers harm at the hands of the patient unless the third party was an identifiable victim at the time of the release. Buck wasn't and therefore couldn't show that the trust owed him a duty of care.

UNJUST ENRICHMENT/TORTS

What's the deal with waiver of tort? (part 2)

We still don't know. Like the Ontario Superior Court of Justice in *Andersen v St Jude Medical Inc*, 2012 ONSC 3660 (see the BLG Monthly Update for August 2012), the BC Court of Appeal has recently

declined to say whether it's an independent cause of action predicated on wrongdoing (without proof of damages) or a 'parasitic' remedial election that depends on the existence of an underlying tort: *Koubi v Mazda Canada Inc*, 2012 BCCA 310. The BC appeal court did, however, usefully narrow the application of waiver of tort to preclude its use where there is an exhaustive or exclusive legislative scheme to remedy a statutory breach.

[Link available **here** and **here**].

Brad Dixon and Michelle Maniago of the Vancouver office of BLG represented Mazda Canada.

WILLS AND ESTATES

Ch-check it out

Not only Elvis, but the Beastie Boys too. Two interesting facts from the last will and testament of the late and much-lamented Adam Yauch, the Beasties' lead singer, which was filed in New York surrogate court on 6 August. First, the will prohibits the use of Yauch's image, name, music or artistic property 'for advertising purposes'. The prohibition with respect to music and artistic property was added in pencil and it's not clear to what extent other bandmembers have rights in the material, so there may yet be a beer commercial to the strains of 'Fight for your Right...' (But then again maybe not, given the Boys' recent suit for alleged misuse of their music to promote an event sponsored by a manufacturer of energy drinks: *Beastie Boys v Monster Energy Corp*, 1:12-cv- 06065 (SDNY, filed 8 August 2012)). Secondly, an unusual guardianship clause with respect to Yauch's only child, Tenzin, in the event that neither Yauch nor his widow is around to watch over her: if Yauch dies in an even year, his parents will serve as guardians with his wife's parents as back-up; if he dies in an odd year, it will be the other way round.

[Link available **here** and **here**].

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