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BLG MONTHLY UPDATE

Borden Ladner Gervais

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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BUSINESS CORPORATIONS/ NOT-FOR-PROFIT CORPORATIONS

A new hybrid in California: the flexible purpose corporation

California has enacted legislation providing for 'flexible purpose corporations' (FPCs), essentially a hybrid of a business corporation and a not-for-profit (NFP), which will allow both charitable/ public and business activities to be carried on by the same entity.

The articles of a FPC might, for example, require its business objectives to be achieved in accordance with environmental principles. The fiduciary duties of the FPC's directors would not be defined solely in terms of maximising shareholder value (in a monetary sense), although they would not require favouring the non-business purpose.

The legislation provides for merger or conversion of business entities into a FPC and for the conversion of FPCs into NFPs.
[Link available **here**].

CIVIL PROCEDURE/ARBITRATION

Stopping the tail from wagging the elderly elephant: an end to a vexatious proceeding in Alberta

An 'endless repetition of failed litigation' appears to have come to an end in *Karaha Bodas Company LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 2011 ABCA 291. The case arose from an arbitral dispute in 2000 between Kraha Bodas Company (KBC), a Caymans LLC owned by US power companies and investors, and two Indonesian government energy companies, Pertamina and PLN (P and P, for short), over a geothermal project. KBC was awarded US$260 million and sought to enforce the award in the US, Hong Kong, Singapore and Alberta. An Alberta master obliged in 2004. P and P appealed but did not pursue things, preferring to try to have the arbitral award overturned in Switzerland on the basis of fraud. They were unsuccessful and the award was enforced in full in the US.
[Link available **here**].

KBC applied to have the Alberta appeal dismissed as moot, but P and P posted for security for costs in 2007. Although the issue of enforcement of the award was moot, the issue of costs remained live – until KBC abandoned its claim for them. P and P persisted, apparently hoping that they could have the underlying award overturned in Alberta with a view to influencing courts elsewhere.
[Link available **here**].

The Alberta Court of Appeal appears to have put an end to this, observing that 'the word "relitigation" is quite inadequate to describe what has gone on for over 11 years.' P and P were essentially using enforcement proceedings in Alberta to reopen the fraud issue that had been decided conclusively elsewhere; not only was this vexatious but also 'an attempt to have the tail wag an elderly elephant'. Significant costs were awarded against P and P, compounded by their counsel's 'obvious subterfuge' in exceeding the factum page-limit.
[Link available **here**].

CIVIL PROCEDURE/PROFESSIONAL ETHICS

Don't be an ostrich and bury your head (or an unhelpful case) in the sand

Posner J of the Seventh Circuit is a very fine judge. He's also funny – but not someone you want to mess around with when it comes to your brief of authorities. This is, however, just what counsel for the appellants did in *Gonzalez-Servin v Ford Motor Co.* (7th Cir 23 November 2011): they deep-sixed a case unhelpful to their client's case that was decided on 'nearly identical' facts (or so Justice Posner assumed from their seeming attempt to pretend it didn't exist).

In the judge's words: 'The ostrich is a noble animal, but not a proper model for an appellate advocate. [...] The ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless'. To drive the point home, the judgment includes a photograph of an ostrich burying its head in the sand and another of man in a suit (presumably a lawyer) doing the same.

CONTRACTS

Beware the boilerplate: unused definition leads to unintended consequences

Rayford Homes granted security to two lenders, its trustee shareholder and the Bank of Scotland (BoS). The parties entered into an intercreditor agreement (ICA) using the BoS standard form. In a schedule to that agreement was a definition of the term 'BoS Priority' over 'BoS Debt' up to a monetary limit. The amount was not filled in, nor was the term 'BoS priority' actually used in the ICA. BoS advanced a further £4 million to Rayford and suggested that that amount should be entered manually in the clause; the trustee shareholder agreed to this, presumably not thinking it mattered given the fact that the definition itself was not in the main part of the ICA.

Rayford subsequently went into receivership, resulting in a priority contest. BoS asserted that the £4 million figure merely recorded the amount of the advance, and that it could look to other provisions of the ICA which put it in a better position. The trustee naturally argued that the limit was just that and that BoS could not claim a further £13.5 million from the receiver.

Richards J of the Chancery division held that the definition must have some meaning, although there was 'no single commercially sensible construction': *Rayford Homes Ltd v Bank of Scotland,* [2011] EWHC 1948 (Ch). The insertion of the £4 million figure strongly suggested that the parties intended to limit the extent of BoS's security, as the trustee argued; the purpose of the inserted amount could not simply have been to record it. But the inclusion of the term in a BoS standard form suggested that its intent was confer benefits on BoS, not other parties and, read in connection with the rest of the ICA, the bank's security under other provisions was not limited – and ranked ahead of the security held by the trustee. [Link available **here**]

Probably not the result that either party entirely expected: such are the perils of over-reliance on precedents.

Interpretation of ambiguous commercial contracts: will common sense prevail?

In England, yes; in Australia, apparently not.

England first. Jinse Shipbuilding agreed with six customers that it would refund instalment payments made for the purchase of ships, under certain circumstances. The payments were guaranteed by Kookmin Bank under repayment bonds. Quite what the bank's obligations were was not entirely clear, however: the relevant clause in the bonds referred to the refund of 'all such sums' due to the buyers under the contracts, but left in doubt whether that referred to a clause about the repayment of pre-delivery instalments paid prior to termination of the contract or a total loss of the vessel or, in the alternative, to another clause dealing with insolvency events. The buyers (or rather Rainy Sky, the assignee of their rights under the bonds) argued that insolvency was the trigger (Jinse having entered Korean insolvency protection and defaulted on the supply contract). The bank argued that it was the other clause. Which was to prevail? Ultimately it was up to the UK Supreme Court to decide: *Rainy Sky SA v Kookmin Bank,* [2011] UKSC 50. [Link available **here**].

Lord Clarke stated the general proposition that where contractual language is unambiguous, the court must apply it. Where, as here, there are multiple possible meanings in a commercial contract, the court must adopt the one that is most consistent with business common sense and the commercial purpose of the agreement – but it isn't necessary to demonstrate that one of the possible interpretations would result in absurdity before being able to do that.

In this case the arguments on both sides were 'finely balanced' (the buyers couldn't actually come up with a compelling reason for the inclusion of the clause they relied on), but common sense tipped the balance in their favour; it would make no commercial sense to exclude the builder's insolvency from situations that would trigger the bank's obligation to refund advance payments, given the underlying business purpose of the bonds.

Compare *Jireh International Pty Ltd v Western Export Services Inc* [2011] HCA 45, in which Australia's highest court has refused leave to appeal the decision of the NSW Court of Appeal holding that only an absurd – not a commercially unreasonable – result justifies a departure from the 'plain meaning' rule of interpretation. [Link available **here**].

We should go with the English on this one.

CONTRACTS/RESTITUTION

If you pay a non-refundable deposit but the underlying contract is void, can you get the deposit back?

Not always. And not on the facts of *Sharma v Simposh Ltd,* [2011] EWCA Civ 1383, where the parties agreed orally that Sharma would pay a £55,000 non-refundable deposit in exchange for a promise that Simposh would complete construction of a real estate development, sell it to Sharma at a price to be determined later and not offer the property to anyone else in the mean time. Because all of this was oral and not written,

it was not a valid contract under real property legislation. Simposh proceeded to complete the project anyway but Sharma backed out when the property market tanked in 2007 – and wanted his money back.

The trial judge said he could have it: the deposit was paid under an ineffective transaction and therefore failed as consideration for the bargain; to let Simposh keep it would be unjust enrichment. The Court of Appeal didn't entirely disagree but reached a different result. While an ineffective transaction will result in a failure of consideration, there was no such failure here. Sharma got what he paid for, which was Simposh's commitment to complete the project and not to shop it to other buyers. In the absence of a valid contract, the parties were still free to specify whether a non-contractual payment was refundable or not – and in this case it wasn't, making the deposit a kind of sanction against the kind of withdrawal that Sharma ended up making. Simposh could keep the £55,000.
[Link available **here**].

DEFAMATION

Credible reasons for not pursuing libel claim accepted; no abuse of process

In 2007, the New Musical Express, a British music weekly, ran a story based on an interview with Morrissey, the former lead singer of The Smiths (ah, The Smiths...). The singer claimed the article portrayed him as a racist; there was wide press coverage of the furore. He sued within a few days of publication, claiming that his words had been distorted for effect. The plaintiff didn't exactly proceed with dispatch after that, for a variety of reasons: his management took their time in responding to formal requests for information, the singer was touring or recording, he and his management then fell out, litigation with the ex-manager ensued... In April 2011, the defendants sought to have the case dismissed as an abuse of process.

Tugendhat J declined to oblige: *Morrissey v McNicholas* [2011] EWHC 2738 (QB). While it was true that the case would turn on how the article was edited back in 2007, which might be difficult for the defendants to recall, they failed to make out a case that they would not receive a fair trial. The singer's reasons for not being able to prosecute his case were credible (especially since his former manager was an important witness on his side and couldn't be expected to be co-operative while they were still in litigation). The words complained of were serious, had wide readership and, if defamatory, would continue to affect the plaintiff's reputation. The action was permitted to proceed.
[Link available **here**].

EMPLOYMENT LAW

Employer not vicariously liable for reprisals by whistleblower's colleagues

Ms Fecitt, a nurse, was concerned that Swift, one of her colleagues at a walk-in clinic, had exaggerated his credentials. She confronted him; he acknowledged that he had exaggerated to his colleagues but not to their employer. Not satisfied, Fecitt pursued the matter and Swift was suspended, but not without having

filed a harassment complaint against Fecitt (not sustained, but critical of Fecitt). Their fellow nurses were divided: some thought Fecitt was engaged in a witch-hunt, others supported her, others wished to remain neutral. Fecitt, for her part, made a formal complaint under whistleblowing legislation, alleging that she had been the subject of hostile acts from certain of her colleagues. The relevant legislation prevents an employee from being subjected to 'any detriment' by his or her employer as a result of making disclosure and prevents the employer from dismissing an employee for having made a complaint. Fecitt had been assigned to another clinic to defuse the tension.

The legislation doesn't expressly cover situations where the employee's colleagues are the ones alleged to have undertaken reprisals for the disclosure, as here. Could the employer be vicariously liable for those acts?

The Employment Tribunal found that the employer had not breached its obligations for failing to prevent co-worker harassment, nor had it redeployed Fecitt away from her employment as a result of her disclosure. On appeal, the employer was found vicariously liable for its employees' acts. The English Court of Appeal disagreed: the employer could be vicariously liable only if the acts of the other employees constituted an actionable legal wrong, which they did not (even if they may not have been very nice): *NHS Manchester v Fecitt,* [2011] EWCA Civ 1190. [Link available **here**].

EVIDENCE/CLASS ACTIONS

Your expert witness really does need some qualifications and has to offer more than unverifiable Google results – oh, and your claim needs a factual basis

Strathy J makes a number of interesting points in his decision to refuse to certify class proceedings in *Williams v Canon Canada Inc,* 2011 ONSC 6571. The claim arose from an alleged error, commonly known as the E18 error, which according to the plaintiffs rendered their cameras unusable. [Link available **here**].

Certification was denied because the plaintiffs' so-called experts had no proper qualifications and their evidence was inadmissible hearsay – their testimony amounted to unverifiable Googling on the E18 error.

After usefully surveying products liability cases which have and have not been certified, Justice Strathy concluded that this one fell into the latter category. Because Canon sold through retailers, there was no privity of contract between it and the plaintiffs; the plaintiffs' breach of warranty claim and *Consumer Protection Act* (CPA) warranty claims had to fail. The E18 error may have been a defect in the cameras, but there is no CPA duty to disclose defects in goods. Canon might have been in breach of its warranty to service the cameras, but no facts were pleaded in respect of this. Canon's use of the slogan 'you always get your shot' was not a representation, merely an advertising pitch (which didn't offend the *Competition Act* either).

The plaintiffs' claim that retailers acted as Canon's agents was not backed up by any material facts. Unjust enrichment also failed (any enrichment only indirect; contracts between plaintiffs and retailers, retailers and Canon a juristic reason for it anyway), as did waiver of tort (no predicate wrongdoing).
[Link available **here**].

EVIDENCE

Limited initial review by counsel of opposing party's privileged documents not grounds for injunction

Enyo Law LLP, a firm of solicitors, acted for the claimants in a case involving an allegedly fraudulent investment scheme and, through disclosure in those proceedings came into possession of electronic files belonging to Stiedl, one of the defendants in that litigation. (Exactly how his personal files came to be on the server of the corporate defendant in the litigation is somewhat unclear.) Junior lawyers and paralegals at Enyo Law had undertaken a preliminary and superficial review of the documents with a view to determining their relevance in the investor action and whether any were privileged. Most of those involved in the review were no longer on the file.

Stiedl's application to restrain Enyo Law from continuing to act for the claimants in the investor action and from making use of the documents was denied: *Stiedl v Enyo Law LLP,* [2011] EWHC 2649 (Comm). Beatson J concluded that there was no real risk that the documents would be used to the investors' advantage or Stiedl's disadvantage, given that no substantive information had been gleaned or was recallable considering the lapse of time and the stage of the proceedings. Many of the documents contained information Stiedl had already disclosed, was known from other sources, framed in such general terms as to be innocuous, or otherwise unlikely to be prejudicial to Stiedl. The application was denied, with the proviso that Enyo Law could not make use of any documents identified on their face as being privileged. [Link available **here**].

Test for assertion of joint privilege by corporate director or officer

Corporate directors and officers who receive legal advice on the company's behalf may think that privilege in the communications is theirs as well as the company's. This is, of course, generally incorrect where there is no joint retainer agreement.

In *Ford (R, on the application of) v Financial Services Authority,* [2011] EWHC 2583, Burnett J has set out the test that must be satisfied in order for a director or officer to be able to assert joint (common-interest) privilege with the company over legal advice provided to the latter. The case itself arose from an investigation by the Financial Services Authority (FSA) into the affairs of Keydata Services Ltd, of which Ford was a director. The FSA's probe later extended to Ford, another director and the company's compliance officer. [Link available **here**].

For privilege to apply to directors or officers in their personal capacity, the following criteria must be satisfied by the person asserting joint privilege with the company (or another party): (a) he or she must have communicated with the lawyer for the purpose of seeking legal advice in an individual capacity; (b) he or she must have made it clear to the lawyer that the advice was being sought in a personal capacity, not only on behalf of the company; (c) those with whom the joint privilege is claimed must have known or appreciated the legal position; (d) the lawyer must have known that he or she was communicating with the officer or director in an individual capacity; and (e) the communication with the lawyer must have been confidential.

On the facts, Ford and the others established all five criteria and the FSA was therefore unable to make use of privileged communications which the regulator had compelled the company's auditors to disclose.

HEALTH LAW

Hospital can require problem patient to seek critical treatment elsewhere

The evidence in *JO c Hôpital Royal Victoria,* 2011 QCCS 5532, amply supported the conclusion that the plaintiff was a problem patient: he was transferred to Royal Victoria for dialysis treatment after having made death threats to a nurse at Montréal General, and once at his new hospital he raised his voice, issued threats, engaged in insult and invective, made unreasonable demands and terrorised the entire medical team, most of whom he refused to see. He also sought an injunction requiring the hospital to perform a kidney transplant. Denis JCS denied the patient's application – and granted that of the hospital to have him transferred yet again, on the grounds that his unreasonable conduct had resulted in the complete break-down of the bond of confidence necessary to maintain the therapeutic relationship. Royal Victoria's obligation to him at this point was to ensure he found treatment elsewhere, which the Centre hospitallier de l'Université de Montréal agreed to do – and where the judge hoped the patient, having 'exhausted his capital' in the Royal Vic's sympathy, would 'see reason'. [Link available **here**].

Suzanne Courchesne and Lynne Chlala of the Montréal office of BLG acted for Royal Victoria Hospital.

INTELLECTUAL PROPERTY

'Keep calm and carry on' – and brace yourselves for the trade-mark fight

Stuart Manley, a second-hand bookseller in the north of England, found an old poster in 2000 and hung it in his shop, behind the till. The poster, with the inspiring words KEEP CALM AND CARRY ON under an imperial crown, was produced in 1939 by the Ministry of Information as wartime propaganda, but never used: in fact, Manley's copy is apparently one of only a handful that survived a decision to pulp the original print run. Manley's customers loved it, so he had reproductions made, and the whole thing went

viral – to the point where the poster now appears on mugs, carpets, T-shirts, condoms. [Link available **here**].

Mark Coop, a producer of 'reality' TV shows, then entered the picture. In 2007 he began selling 'Keep calm' merchandise and recently obtained an EU trade-mark for it, having failed to obtain one in the UK. His European mark, which he has been aggressive in protecting, is now being challenged by a group called Trade Mark Direct, who want it to remain in the public domain. [Link available **here**].

Question for the IP lawyers: Crown copyright would have expired in 1989 if the work had been published; but it wasn't published, at least not by the Ministry – so would the Crown not still own the rights in the poster?

PRIVACY

Don't sign the petition if you want to remain anonymous

Washington is one of those states where voters can challenge laws by referendum. In order to force a vote on a state law, approximately 4% of voters must sign a petition and provide their names and addresses. In 2009, Washington extended marital benefits to domestic partners registered with the state, including same-sex partners. A group called Protect Marriage Washington (PMW) was opposed to the measure and submitted a petition for a referendum, with 137,000 signatures. When the state archives agreed to release copies of the petition, members of PMW sought an injunction on the grounds that disclosure of the names and addresses of signers would expose them to threats, harassment or reprisals.

Settle DJ held in *Doe v Reed (*WD Wash, 17 October 2011) that the signers (represented by John Doe plaintiffs) failed to produce sufficient evidence of the 'serious and widespread harassment' necessary for their motion to succeed. The John Does, who were all well-known opponents of gay marriage, could muster only speculative or trivial evidence of threats on account of their views – for example, one of them had 'two or three Post-It notes containing vulgar language placed on his vehicle'. There was therefore no reasonable probability that disclosure of the petition would have the effect the plaintiffs contended. [Link available **here**].

The US Supreme Court recently denied the Doe plaintiffs' application for an injunction to prevent disclosure of the petition. [Link available **here**].

TORTS

English court extends boundaries of vicarious liability, following Supreme Court of Canada's lead

A decision of the Queen's Bench division appears to have extended significantly the boundaries of vicarious liability: *JGE v English Province of Our Lady of Charity*, [2011] EWHC 2871. The claimant alleged that she was raped by a priest (since deceased) at a foster home

operated by an order of nuns in the Roman Catholic diocese of Portsmouth. The preliminary issue was whether the bishop of the diocese could be held vicariously liable for the acts of the priest; the nuns' liability was left for another day. [Link available **here**].

The problem for MacDuff J was that cases and texts on vicarious liability focus almost exclusively on the employment relationship; in this instance, the priest was not paid by the diocese but by his parish, the bishop had no effective control over the priest's acts (only an advisory role) and only church authorities in Rome could dismiss him.

The judge applied the 'close connection test' from *Doe v Bennett,* 2004 SCC 17 (where the bishop's extensive control over the priest was 'akin to employment', so more straightforward factually), to determine whether (a) the relationship between the priest and the bishop would give rise to vicarious liability and (b) the acts of the priest were within the scope of the relationship with the bishop. The two prongs become synthesised, in MacDuff J's view, in a fact-specific analysis. Highly relevant (but not to the exclusion of other factors) will be the nature and purpose of the relationship; whether tools, equipment, uniform or premises are provided to assist the performance of the role; the extent to which one party is empowered or authorised to act on behalf of the other; and the extent to which the tortfeasor may be perceived to be acting on behalf of the other party. On the facts, the bishop could be vicariously liable for the acts of the priest.[Link available **here**].

Rugby club failed to inspect pitch; not liable for injury because reasonable inspection would not have revealed risk

Jack Sutton was tackled during a rugby training match. As he fell, his right knee was gashed by a white plastic triangle which had broken off a stake used as a marker for cricket matches. The defendant rugby club admitted that it owed Sutton a duty of care which included inspecting the field before the match to ensure it was safe for play, that it had not conducted such an inspection and that, if it was liable, damages payable to Sutton would amount to £54,000.

At trial, the judge concluded that the club ought to have conducted a fairly careful inspection of the pitch and found for Sutton. The Court of Appeal thought the trial judge went too far: the club had a duty to inspect the field for obviously unsafe conditions (e.g. broken glass or dog excrement) but not to conduct the kind of detailed scrutiny that would have revealed the white plastic marker below the surface of the grass. A requirement for even more careful scrutiny of certain areas (e.g. the touch-down ends) was unworkable. The trial judge was also wrong to conclude that the club's failure to inspect was the cause of Sutton's injuries; to do so would be to 'impose duties of care which would make rugby playing as a whole more subject to interference from the courts than it should be'. Reasonable inspection would not have revealed the marker, so the club's breach of duty was not the cause of Sutton's loss: *Sutton v Syston Rugby Football Club Ltd,* [2011] EWCA Civ 1182. [Link available **here**].

TORTS/SPORTS LAW

Crying ‘fore!’ may not shield you from liability

‘Fore!’ is the traditional cry made when it appears that a golf shot is bad or dangerous. Anthony Phee, a novice golfer with four matches behind him and a set of clubs he picked up at a car boot (= garage) sale, knew that much. But when he heard it at the Niddry Castle Golf Club on 7 August 2007, he had barely enough time to react (not more than 4.5 seconds, according to expert testimony) when a ball hit by James Gordon, an experienced golfer, struck him in the eye and caused serious injuries.

Gordon, who made the shot while playing another hole, claims he also yelled ‘get down’ but this was contested. It was also unclear whether Phee had ducked or looked up on hearing ‘fore!’ Although the judge was inclined to think he had ducked, it was too much to expect an inexperienced player to have reacted perfectly. Gordon, on the other hand, who testified that he had been playing an excellent round, had concentrated on his own shot and, overconfident of his own abilities, had failed to consider the safety of Phee’s foursome on the nearby hole. The golf club was 30% liable for having failed to conduct a formal risk assessment of the course, post signs or improve course design through planting and fencing.
Liability was assessed at a total of £400,000:
Phee v Gordon, [2011] ScotCSOH 181.
[Link available **here**].

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