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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.

Intellectual property

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- ISPs ordered to block access to P2P sites
- polo match
- romance novelist fails in infringement claim against Harlequin
- use of seven-second TV clip in musical does not infringe; fair use, say 9th Circuit

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- BC to implement online dispute resolution

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Privacy

- fleeting reference to starlet in song not a misappropriation of personality
- Google search autofill function does not give rise to claim for privacy claim, says 7th Circuit

Real property/valuation

- Oz judge rejects ghostly presence as legitimate element in valuation

Torts/corporate/directors' liability

- director not liable because acts did not exhibit a separate identity or interest from the corporation

Torts/defamation

- blog platform could be liable for not ensuring that defamatory posts removed quickly enough

Torts/expropriation

- public utility does not trump injurious affection claim; reasonableness of interference must be established

Unjust enrichment

- Ontario CA confirms that 'lowest intermediate balance' rule is default method for tracing ill-gotten gains

CANON LAW

Cardinals prohibited from using recording devices during papal conclave

Seems it's not just jurors who need to be reminded about these things. Cardinals locked up in the Sistine Chapel until there is white smoke were prohibited by an apostolic letter of 22 February from using 'any audio or video equipment capable of recording anything which takes place during the period of the election within Vatican City, and in particular anything which in any way, directly or indirectly, is related to the process of the election itself', on pain of excommunication (which is way more than a judge can do). Interestingly, there was no specific prohibition on the use of mobile communications devices or tweeting, but the letter's general direction to maintain 'absolute and perpetual secrecy with all who are not part of the College of Cardinal electors concerning all matters directly or indirectly related to the ballots cast and their scrutiny for the election of the Supreme Pontiff' presumably covered it.

[Link available **here**].

Legal authority for the papal resignation

In case anyone asks (and you're qualified to give an opinion on this sort of thing):

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

CIVIL PROCEDURE/JUDGMENTS

Circumstances under which a judge can reverse an oral judgment before perfection

Judges used to be able to go back and vary or discharge perfected orders, but this was abolished by the *Judicature Acts* of 1873 and 1875. But what about backtracking on an oral judgment that has not yet been written up and thus 'perfected'? The UK Supreme has had the opportunity to consider this question in a family case, *In the matter of L and B (Children)*, [2013] UKSC 8.

S, a child, was admitted to hospital with serious injuries. It emerged from fact-finding hearings over several months that the injuries were not the result of an accident and must have been caused by S's mother, her father or both. The judge gave a brief oral judgment attributing blame to the father, inviting the parties to make further submissions if they wished, in anticipation of a final hearing. The oral judgment was formally sealed by the court on 28 February 2012, but on 15 February the judge delivered a written judgment in which she held that blame could not be attributed conclusively to either parent, ordering an assessment of the father as a potential carer of S. The mother's appeal of the written judgment was allowed: the Court of Appeal quashed that judgment and ordered the results of the oral one to stand. The father appealed.

The UKSC unanimously allowed the father's appeal, restoring the written judgment. Lady Hale stated that it has 'long been the law that a judge is entitled to reverse his decision at any time before his order is drawn up and perfected'. That general power was, however, narrowed as a result of *In re Barrell Enterprises*, [1973] 1 WLR 19 (CA), which held that only 'exceptional circumstances' would justify a judicial change of mind. Later cases have questioned *Barrell* – and Lady Hale pointed out that her court was not obliged to follow it in any event. Provided no party has acted to its detriment on an unperfected judgment before it is written up, there should be a general power to revisit earlier reasons; a 'carefully considered change of mind can be sufficient' in terms of justification, but every case will 'depend on its particular circumstances'. The power to revisit must be exercised judicially, not capriciously, and in accordance with the overall objective of the proceedings. Fresh evidence may well justify a revised order; but the analysis will be more 'finely balanced' when the judge has, 'on mature reflection' merely changed his or her mind as to the merits of the case. There is more latitude for revision in family cases, especially those involving children in protection, given the potential consequences of getting things wrong. In this particular case, it would have been better to have had a full and reasoned (and final) judgment from the start, from which the party to whom blame was attributed could simply have appealed.

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CONTRACTS

Acceptance of repudiation must be clear and unequivocal for contract to be terminated

Back in 1953, the Township of Thurlow agreed with a local farmer perpetually to maintain and repair a storm drainage system the township had constructed on the farmer's land. Six years later, the township stopped maintenance and repair work. Fast forward to 1980, when the Pleiziers, subsequent owners of the land, tried to enforce the agreement: the township unilaterally repudiated it. Fast forward again to 2003, when the Browns, the new owners of the land, asked the City of Belleville (which had absorbed Thurlow) to honour the original obligations. Same result: unilateral repudiation in 2004. The Browns sued for specific performance of the contract or damages; the city argued that the agreement was unenforceable. The parties then agreed to seek the court's opinion on various questions related to the agreement, which resulted in holdings that (a) the Browns' claims were not statute-barred, (b) the Browns were entitled to enforce the agreement and (c) the agreement was not void as a fetter on the city's discretion to make decisions about public roads.

The city appealed: *Brown v Belleville (City)*, 2013 ONCA 148. On (a) the limitation period, the city argued that the Pleiziers had accepted the 1980 repudiation of the agreement through their subsequent inaction, with the result that the applicable limitation period for a contract claim had expired in 1986; or, that if the Pleiziers had not accepted a repudiation the Browns had in 2004, with a similar result (whether the applicable limitation period was six years or two). The city had not pleaded acceptance of a repudiatory breach or anticipatory repudiation of the agreement, which proved fatal to its case; for the motions judge, its acknowledgment that it was bound by Thurlow's obligations and the perpetual nature of the contract were a bar to a limitations defence, and the Court of Appeal agreed. The real issue was whether the repudiation of the contract had been accepted, either in 1980 or 2004. The Court of Appeal agreed that inaction on the part of the Pleiziers in the face of the 1980 repudiation fell short of the 'clear and unequivocal communication' required to accept that repudiation, with the effect that the agreement was not terminated. Nor was there enough evidence to suggest that the parties had simply abandoned the contract. Similarly, the motion judge was correct in concluding that the Browns had not accepted the city's 2004 repudiation. On (b), the Court of Appeal agreed that the Browns had standing to enforce the agreement, if not as 'successors to the agreement' at least as third-party beneficiaries under the new, principled exception to the doctrine of privity, by virtue of the contract's enurement clause. The city also lost on point (c): there was no evidence to suggest that its discretion regarding the future use of roads was in fact fettered or impeded.

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Refundable instalments or non-refundable deposit?

Lord Denning (when a mere appeal court justice) framed the issue with characteristic clarity in *Stockloser v Johnson* [1954] 1 QB 476: 'Suppose a buyer has agreed to buy a necklace by instalments, and the contract provides that, on default in payment of any one instalment, the seller is entitled to rescind the contract and forfeit the instalments already paid. The buyer pays 90 per cent. of the price but fails to pay the last instalment.' If the seller then sells the necklace for a higher price, is the original would-be purchaser relieved against forfeiture of the money he did pay? 'Surely' thought Denning LJ, equity would come to his aid. In *Cadogan Petroleum Holdings Ltd v Global Process Systems plc*, [2013] EWHC 214 (Comm), the contract was for the purchase of pre-fabricated gas plants, not a necklace; and, unlike the hypothetical necklace, the gas plants remained unsold after the failure of the purchase transaction. GPS agreed in 2009 to take the gas plants off Cadogan's hands (as part of a larger settlement, other purchasers having failed to make good on their commitments), paying by instalment. Cadogan was to retain title until the final payment was made. GPS had made instalment payments of $7.5 million by June 2011, when Cadogan notified it that if the final payments of $20 million were not made within 14 days, the contract was at an end. No further money was forthcoming. Cadogan claimed that it was entitled to retain the $7.5 million already paid and to recover the $20 million as a debt. GPS naturally took the opposite view and, in the event that Cadogan was correct, also sought relief from forfeiture.

GPS submitted that the parties could not have intended the payments to have constituted forfeitable deposits; they were clearly refundable instalments. It would not be fair to let Cadogan have its cake and eat it too, by keeping the money as well as the gas plants. As a matter of construction, however, Eder J of the English Commercial Court found that the contract did give Cadogan the right to retain the instalments and recover the outstanding payments. He rejected GPS's argument that there had been a total failure of consideration arising from part-performance of the contract, given that the purchase was part of a larger settlement. And the instalments, if forfeited, could not be characterised as a penalty, since they were not triggered by breach. Nor was GPS relieved against forfeiture, which is very difficult to establish in a commercial setting involving a freely negotiated contract. This result was not inequitable, given that Cadogan had a *prima facie* contractual right to the money, the gas plants (unlike necklace) remained unsold and it was uncertain whether an eventual sale would yield their present value. Cadogan could have its cake and eat it too.

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CORPORATE/DIRECTORS' DUTIES

Benchslap from Chancellor Strine

When you read the oral argument and the ruling of the ever-entertaining Chancellor Strine in *Re Puda Coal Inc Stockholders Litigation* (Del Ch, 6 February 2013), you can feel counsel sweating as the learned judge puts them through their paces, calling their arguments 'Kafkaesque' and likely (if accepted) to expose Delaware corporate law 'to ridicule'. Puda Coal, domiciled in Delaware but with assets and operations entirely in China, had been the victim of a massive fraud by its Chinese chairman and CEO. Claims were brought against the former independent Delaware directors for breach of their fiduciary duties. The hapless lawyers sought to have claims against the three former independent directors dismissed.

The chancellor thought it 'perfectly conceivable' that claims against the independent directors would succeed, taking a particularly dim view of the fact that, 'rather than sue, they [the independent directors] quit, then come to court and seek to use 23.1 [dismissal] and, frankly, disable the derivative plaintiffs from even going after the bad guys'. The three had left the bad guys in control and were essentially attempting to immunise themselves from suit. The independent directors also failed to meet their fiduciary duties because they took an approach that was far too hands-off: 'if you're going to have a company domiciled for purposes of its relations with investors in Delaware and the assets and operations of that company are situated in China ..., in order for you to meet your obligation of good faith, you better have your physical body in China an awful lot'. That, plus a system of controls, adequate language skills and proper advice from lawyers and accountants. Ouch.

CORPORATE/SHAREHOLDER REMEDIES

Double or multiple derivative claims

Interesting issue in *Universal Project Management Services Ltd v Fort Gilkicker Ltd*, [2013] EWHC 348 (Ch): can the shareholder of a shareholder of a company bring a derivative action on the company's behalf – or on the specific facts of the case itself, can a member of the partnership which is the sole shareholder of the company do so? The answer, it appears, is yes, although the question is 'not the subject of any reported English authority'. Fort Gilkicker Ltd (FGL) was incorporated to redevelop a disused coastal battery. All of its shares were owned by Askett Hawk Properties LLP, a limited liability partnership in which Universal Project Management Services (UPMS) and Ian Pearce were the only members. UPMS alleged that Pearce had formed another company which purchased Fort Gilkicker on precisely the terms that had been made available to FGL. UPMS, although not actually a shareholder of FGL, applied to bring a derivative claim on FGL's behalf for misappropriation of that opportunity.

The first part of the task for Briggs J of the Chancery division was to determine whether the 'multiple' derivative action was known to the common law before the codification of the derivative remedy in the *Companies Act 2006*. He concluded that it was, on the basis of some cases where there had been no huge objection to a derivative claim by the shareholder of a company's holding company, and given that the derivative action at common law was intended to provide relief from the rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189, that only the company has standing to sue for wrongs against it. The judge then went on to consider whether the codification of the common-law derivative claim in the UK companies statute removed the ability to invoke this kind of 'multiple' derivative claim. It did not expressly, nor could it be said clearly to have done so by implication. The fact that the proposed claimant was a limited liability partnership and not a company was not a bar, and UPMS had made out a sufficient case for the necessity of its bringing an action on behalf of FGL.

The relevance of all of this for us in Canada? While double derivative actions are expressly contemplated under Canadian business corporations legislation, there is not much case law out there on them; the account given by Briggs J of the English common law, the legislative history of the new UK statutory provisions and the surrounding academic commentary could be helpful in fleshing out our own statutory derivative remedies.

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ENVIRONMENTAL/REGULATORY

Building owners establish due diligence defence in bird-strike prosecution

In the urban forest that is Toronto, over 3,000 birds meet their deaths each year by crashing into the windows of buildings – and this in spite of efforts to reduce 'bird-attractive light cast from the inside of high-rise buildings'. Podolsky, an activist with Ecojustice, took the unusual step of initiating a private prosecution against the owners and managers of a complex in northern Toronto which borders on wooded land in the midst of a migratory flight-path. Podolsky alleged that the defendant corporations had committed offences under the provincial *Environmental Protection Act* (EPA), the federal *Species at Risk Act* (SARA) and the *Ontario Society for the Prevention of Cruelty to Animals Act* (OSPCAA): *Podolsky v Cadillac Fairview Corp Ltd*, 2013 ONCJ 65.

Green J, in a careful and really interesting judgment, doubted that the OSPCAA applies to wildlife and focused on the EPA and SARA. He found that there was ample evidence to show that the defendants had permitted the discharge or emission of light causing an adverse effect, which is an offence under the EPA; and for the purposes of the SARA, had killed or harmed a threatened species. The *actus reus* of each offence was made out. The defendants did, however, satisfy the judge that they had exercised due diligence to minimise bird deaths, even though some of their efforts were clearly a response to the threat of prosecution for environmental and animal welfare offences. They had worked with the Fatal Light Awareness Program (or FLAP), a local bird advocacy group, and taken steps to reduce nocturnal light emission and, less successfully, daytime emission (which is actually the cause of more avian deaths than nighttime lighting). Recognising that there are 'no quick fixes to the problem' and legitimate concerns about the cost of installing window treatments that would be more effective in reducing bird strikes, the judge held that the defendants had exercised the diligence of a reasonable person in the circumstances and should be acquitted of the charges against them.

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EVIDENCE/TORTS/INSURANCE

Civil standard of proof: most likely cause of loss, not least unlikely

A fire broke out at a recycling plant owned by the Milton Keynes municipal council, causing a second fire. Nulty, a self-employed electrical engineer, was working at the plant at the time of the fire and claimed under his professional liability insurance policy. The insurer denied coverage on the grounds that Nulty had failed to make prompt notification of his claim, and then brought proceedings seeking a declaration that it had no liability under the policy. The council also sued Nulty, who died before the action (and the insurer's proceedings) came before a judge. Edwards-Stuart J reviewed the facts exhaustively, concluding that the second fire was caused by the failure to extinguish the first fire properly. The causes of the first fire were harder to pin down. The judge canvassed various possibilities but narrowed them down to two, having rejected arson by an unknown intruder: either an unextinguished cigarette discarded by Nulty or a disused but live electric cable that was lying around. Edwards-Stuart J didn't think either possible cause was 'inherently likely' on its own, but found the disused cable theory 'very much less likely' than the discarded cigarette theory.

Was this an error in law? Yes, said the English Court of Appeal: *Nulty (decd) v Milton Keynes Borough Council*, [2013] EWCA Civ 15. The approach used by the judge in weighing the various possibilities was not only 'over-formulaic' but also 'intrinsically unsound'; this should not be an exercise in ascribing a probability factor to each of a number of possible causes in order to determine which of them is 'the least unlikely cause of loss' by a process of elimination. Causation is instead to be determined on a preponderance of the available evidence, and the judge must ultimately be satisfied that one particular explanation is more likely than not to be true – even though the result may (as on the facts of this case) be the same as under the incorrect, process-of-elimination approach.

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INSOLVENCY/CONTRACTS

Contractual provision indirectly triggered by insolvency may be unenforceable, says Ontario CA

At common law, the principle of 'fraud upon the bankruptcy law' will render unenforceable a contractual provision that is triggered only in the event of the bankruptcy or insolvency of one of the parties, on the grounds that enforcement would unduly divert value to one creditor at the expense of others. The Ontario Court of Appeal has extended that principle in *Aircell Communications Inc v Bell Mobility Cellular Inc*, 2013 ONCA 95. Aircell's dealership contract with Bell gave the latter the right to terminate the agreement if Aircell failed to remedy non-payment within 30 days of being notified that it was in default. Aircell defaulted but – unbeknownst to Bell – had already filed a notice of intention to make a proposal under the Bankruptcy and Insolvency Act, and was deemed a bankrupt before the expiration of the 30-day cure period.

Could Bell rely on the contractual provision to terminate the contract and withhold commissions it owed to Aircell? No, said the trial judge and the Court of Appeal. Both levels of court reasoned that the termination clause was triggered – albeit indirectly – by Aircell's insolvency and, if enforced, would be 'contrary to the overriding public policy that requires equitable and fair distribution among a bankrupt's creditors'. Advise extreme caution, then, where your client proposes to enter into a contract with another party which is at risk of becoming insolvent!

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INSURANCE

Duty of good faith unsettled in Canada

On a pleadings motion, Perell J of the Ontario Superior Court struck out a number of claims by a proposed class of purchasers of universal life insurance policies. Essentially viewing their proposed class proceeding as one founded on alleged misrepresentations by Sun Life, Justice Perell struck claims based on breach of a duty of good faith and fair dealing, breach of contract, breach of fiduciary duty, and deceit and fraud. The plaintiffs also alleged that Sun Life had procured releases from some class members without disclosing that it had sold them policies on the basis of misrepresentations.

The plaintiffs appealed most of these rulings: *Kang v Sun Life Assurance Co of Canada*, 2013 ONCA 118. Laskin JA held that Justice Perell took too narrow a view on many of the issues, in thinking they were untenable as a matter of law. It is clear that an insurer owes its customer a duty of good faith and fair dealing, independent of any contractual obligations, but that the contours of this duty are unsettled in Canada in the law of insurance and as a matter of contract law more generally (in contrast to the US, where there is a large body of case law). It is not certain, for example, whether an insurer can be acting in bad faith even though it is complying with the contractual terms of the policy. The plaintiffs in this case might have an uphill battle on that point, but the argument was not doomed to failure. The terms of the policy were not as clear as Perell J thought they were, so the claim for breach of contract was restored. And the judge was wrong to reject a claim of deceit and fraud in the administration of claims, which he seems to have conflated with a claim for misrepresentation in the marketing materials for the universal life product. He did get it right on the releases, though, because the plaintiffs had made no claim for rescission or declaratory relief, merely asserting that the releases were tainted by misrepresentation, bad faith, deceit and/or fraud.

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INTELLECTUAL PROPERTY

Australian court prepared to accept that isolated DNA and RNA are patentable

Australia's Federal Court has held in *Cancer Voices Australia v Myriad Genetics Inc*, [2013] FCA 65, that a valid patent may be granted, under the category of 'a manner of manufacture', for naturally occurring nucleic acid (either DNA or RNA) that has been 'isolated' – which is to say, 'removed from the cellular environment in which it naturally exists and separated from other cellular components also found there'. This is a significant and controversial point, which will also come before the US Supreme Court (and is likely to be appealed in Australia to the High Court).

Myriad Genetics and an Australian licensee have been seeking patent protection for mutations of the human gene that indicates a hereditary risk of breast or ovarian cancer. The applicants in the Australian litigation are concerned that ownership of IP rights in the gene may inhibit research and testing by third parties. The court reasoned that the gene was a product consisting of 'an artificial state of affairs' with 'a new and useful economic effect' (which would be the valid subject of a patent) rather than something that was 'not materially different to nucleic acid found in nature' (which, as a 'product of nature' or 'mere discovery', would not). It was not a claim to the patentability of DNA or RNA as they occur naturally in the cells of the human body, or to the underlying genetic information. The process of isolating nucleic acid necessarily resulted in the 'artificial state of affairs' upon which a patent for 'a manner of manufacture' must be predicated, given the high degree of human intervention that is required to achieve this.

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

ISPs ordered to block access to P2P sites

A group of what the judge rather quaintly calls 'record companies' brought a claim against a group of ISPs representing 94% of the UK market, seeking orders requiring the ISPs to 'take measures to block or at least impede their customers' access to three peer-to-peer ... file-sharing websites': *EMI Record Ltd v British Sky Broadcasting Ltd*, [2013] EWHC 379 (Ch). Arnold J granted the orders.

He reasoned that users of the P2P websites, which operate as bittorrent indexing sites, infringed the claimants' copyrights through copying material by downloading and communicating it to the public by uploading. Next, he concluded that the operators of the websites themselves also infringed the claimants' rights – in spite of some rather lame assertions that they would remove content on receipt of a notice of copyright infringement, which the judge described as 'mere window-dressing'. The reality is that the very purpose of the sites is to facilitate infringement, the website owners have the ability to remove content and monitor users (but probably never really do) and they actively educate users about how to infringe; 'on any view', this was to sanction, approve and countenance infringement by users of the sites. So, on to the ISPs. The infringers clearly used the services of the ISPs for their wrongful activities, and it was clear that the ISPs knew this. Justice Arnold ordered the ISPs to block or limit access to the sites, rejecting arguments by the ISPs that this would involve disproportionate costs, could be circumvented by clever users or was not an effective deterrent (the evidence being to the contrary on that last point).

[Link available **here**].

Polo match

The US Polo Association has been the sport's governing body south of the border since 1890, with a registered mark consisting of two mounted players. 'Hey,' the Association thought, 'let's use our mark to sell fragrances and related products'. You can see where this is going, but the Association had some grounds to think there wouldn't be an issue from another seller of scent who uses a polo-player as a logo. In 1984, the Association obtained an order affirming its right to use its mark in connection with retail licensing; and a further order in 2006 which concluded that that other polo-themed mark was not infringed by clothing with the Association mark, provided the latter was accompanied by the initials USPA.

Where the Association went too far, though, was in thinking that use of the mark and initials on bottles of men's cologne was not an infringement of the rights of the owner and licensee of the Ralph Lauren brand. The 1984 order, in the 2d Circuit's view, merely stated that the Association could use its mark and initials, provided they were used in a way that was distinctive from the Ralph Lauren mark; and the 2006 order was confined to use of the Association's marks in connection with clothing, not scent. Use of the USPA marks for the latter purpose could well infringe the Lauren trade-marks if used in a similar way – and in the 2d Circuit's view it did when the Association started selling a men's fragrance in a dark blue package that bore confusing similarities to Ralph Lauren's Polo Blue (which had appeared in the marketplace first). The 2d Circuit therefore declined to set aside the permanent injunction granted by the New York district court with respect to use of the Association's marks in connection with fragrances and related products: *United States Polo Association Inc v PRL USA Holdings* (2d Cir, 11 February 2013).

[Link available **here**].

Romance novelist fails in infringement claim against Harlequin

Romance novels (or bodice-rippers, as they are called in the UK) are all the same, right? Basically, said the US district court in Houston: *Rucker v Harlequin Enterprises Ltd* (SD Tex, 26 February 2013). Kelly Rucker submitted an unfinished story (chapter 1 plus a plot synopsis for the remainder of the book) called *How to Love a Billionaire* to a Romantic Writers of America contest in 2009. The story was about 'a green-eyed, red-haired beauty and a tall, dark, handsome wealthy man'; the pair overcome a series of obstacles and are united at the end. In 2011, Harlequin Enterprises published *The Proud Wife*, a tale of 'a green-eyed, red-haired beauty and a tall, dark, handsome wealthy man' who after overcoming a series of obstacles etc etc etc. Rucker claimed that a Harlequin employee serving as a judge in the contest had essentially lifted her idea and turned it into *The Proud Wife*.

Rosenthal J made a side-by-side comparison of the two works and found that while there were some general similarities (not least 'a green-eyed, red-haired beauty'), there were significant differences in plot, theme, mood and characters. Both works contained generic elements found 'in many romance novels', but these are not subject to copyright protection, which is concerned with an author's original creations. There is, in the end, no monopoly in the 'tall, dark and handsome' but troubled male protagonist and the heroine who wins his love. Think *Fifty Shades of Grey* or, more edifyingly, *Jane Eyre*.

Use of seven-second TV clip in musical does not infringe; fair use, says 9th Circuit

Jersey Boys is a musical about the 1960s pop group The Four Seasons. At the end of the first act, there is a seven-second excerpt from *The Ed Sullivan Show* in which the host of the TV show introduces the band. SOFA Entertainment, owner of the copyright in Ed Sullivan sued the producers of the musical for infringement: *SOFA Entertainment Inc v Dodger Productions Inc* (9th Cir, 11 March 2013).

The 9th Circuit has affirmed a lower court decision which found the use of the clip was 'fair' for the purposes of US copyright law. Use will be fair where it is transformative of the original work, adding some new expression, meaning or message to the material at issue. The use of the Ed Sullivan clip in *Jersey Boys* was just that: it used the segment for its historical significance and imbued it with new meaning on that account; in no way did this use detract from SOFA Entertainment's commercial use of the footage. The clip itself was also more factual than creative, and a relatively insignificant excerpt in the grand scheme.

LAW REFORM/TECHNOLOGY

BC to implement online dispute resolution

Richard Susskind predicts in his latest book, *Tomorrow's Lawyers* (2013), that the way of the future includes virtual courts and online dispute resolution. The British Columbia justice minister has released a white paper that takes a leaf from that, making a commitment to invest in the technology necessary to launch an online Civil Resolution Tribunal for small claims and strata property disputes.

[Link available **here**].

LEGAL PRACTICE

Docketing: there's an app for that

Check it out **here**.

PERSONAL PROPERTY/CIVIL FORFEITURE

Not often the US government sues a dinosaur

Of the tyrannosaurus variety, anyway: *United States of America v One Tyrannosaurus Bataar Skeleton aka Lot 49315 Listed on Page 92 of the Heritage Auctions May 20, 2012 Natural History Auction Catalog* (SDNY, 13 February 2013). As is the way in civil forfeiture proceedings, an action was brought *in rem* against the goods to be seized from an unlawful owner. The skeleton was sold at auction in Texas for over US$1 million, but had been looted from its place of discovery in Mongolia. The US authorities were granted default judgment by the New York district court in Manhattan and will return the specimen to the Mongolian government.

[Link available **here**].

PRIVACY

Fleeting reference to starlet in song not a misappropriation of personality

One might think Lindsay Lohan would be grateful for anything that could prolong the inexplicably persistent shelflife of her minor celebrity, but no: the starlet took umbrage at mention of her in a rap song by Pitbull, claiming that this misappropriated the use of her name, characterisation and personality for advertising, trade or commercial benefit, contrary to New York's *Civil Rights Law*. (The immortal lines at issue are 'So, I'm tiptoein', to keep flowin' / I got it locked up like Lindsay Lohan.' Rather flattering, actually.) The rapper (real name Armando Christian Perez) moved successfully to have the claim dismissed: *Lohan v Perez* (EDNY, 21 February 2013).

Senior District Judge Hurley noted that New York's statutory right of privacy is limited in scope, and will always be trumped by the First Amendment's protection of free speech. Pitbull's song, as a protected work of art, therefore could not violate New York privacy law. Lohan's name and personality were not used for advertising or trade, even though the rapper intended to make a profit from the work in which they were used – and in any event, the reference to her was so 'fleeting and incidental' as not to be offensive under state privacy law. Lohan's claims of unjust enrichment and intentional infliction of emotional distress were also summarily dismissed. In short, get a life, Lindsay.

Google search autofill function does not give rise to claim for privacy claim, says 7th Circuit

Beverly Stayart of Elkhorn, Wisc. describes herself as 'a respected scholar of genealogy and a "positive and wholesome" leader in the animal rights movement'; she also maintains that she is the only Beverly (or Bev) Stayart out there on the interweb, and that her name carries 'significant commercial value'. Imagine her dismay when, after some ego-surfing on Google, she discovered that if you type her name in the search box the autofill function (for no apparent reason, but presumably partly based on previous users' searches) adds the word 'Levitra' and suggests a whole bunch of sites related to male impotence. Stayart sued Google, claiming it had violated her privacy rights under state law by using her name without permission to generate sales revenue from sponsored links and advertising by the manufacturers of Levitra, Cialis and Viagra.

The courts of Wisconsin have dismissed Stayart's repeated misappropriation claims, most recently the US appeals court for the 7th Circuit in *Stayart v Google Inc* (6 March 2013). While Wisconsin common law and legislation recognise a right of privacy, this right has limits. It cannot hinder freedom of communication, including on matters of legitimate public interest. Ironically, Stayart has effectively made the search term 'Bev Stayart Levitra' a matter of public interest through her litigation not only against Google but also Yahoo! Google's profit motive did not undermine its reliance on the public interest exception, and the use of Stayart's name was in any event incidental to the commercial links (which seem to have been triggered by the word 'Levitra' rather than the plaintiff's name).

REAL PROPERTY/VALUATION

Oz judge rejects ghostly presence as legitimate element in valuation

The pseudonymous separating couple in *Descas v Descas*, [2013] FMCAfam 69, had clearly had a rocky marriage; there were problems with gambling, mental health and finances, estranged offspring and allegations of domestic violence. In the course of proceedings to divide up the couple's matrimonial property, the house they had shared was the biggest asset. Mrs D challenged the valuation put forward by her husband, arguing that it failed to take into account a noisy nearby railway line, some shoddy repairs, infestations of slugs and termites, and the presence of a ghostly visitor. She had specifically instructed her solicitors to ask the valuer about all of these issues and their effect on the property. The valuer responded, cheekily, that 'exorcism is not one of our many speciality services' and that the ghost, if there really was one, must have been at lunch when the property had been inspected. The valuer advised that none of the issues raised by Mrs D had any bearing on the valuation.

In the mind of the Australian federal magistrate who had to hear the property settlement application, the claim that the house was haunted was simply 'ludicrous' and, in light of evidence that the wife wanted to keep the house 'whatever it takes', clearly part of an attempt to have the court adjust the value of the house down to a figure at which she could afford to buy out her husband. An attempt which failed, although Mrs D did end up with 65% of the couple's assets on the basis of purely non-spectral factors.

[Link available **here**].

TORTS/CORPORATE/DIRECTORS' LIABILITY

Director not liable because acts did not exhibit a separate identity or interest from the corporation

But it was a close one in *Hogarth v Rocky Mountain Slate Inc*, 2013 ABCA 57. Simonson was one of a number of promoters of a project to exploit a slate quarry in British Columbia, and a director of the general partner of the limited partnership formed in order to finance the venture. The plaintiffs were investors in the scheme, who were induced to buy limited partnership units on the basis of promotional materials and meetings attended by Simonson and other promoters. The quarry failed and the investors sued the general partner and its directors in their personal capacity. The trial judge concluded that the directors were personally liable; Simonson appealed.

Slatter JA, in dissent, wrote what is in some ways the leading judgment in the Alberta Court of Appeal because it reviews the law in the most detail. He thought that representations made to the investors about the qualifications of the management team and about the regulatory compliance of the partnership were either not misrepresentations at all, because they related to future events (which are actionable only in limited circumstances, not made out here) or because the crucial causal link between them and the plaintiffs' losses had not been established. The record supported only the alleged misrepresentation about the the extent of a mining engineer's involvement in the project, but no causal link to loss was proved on that score. Justice Slatter then reviewed in detail the law on the personal liability of corporate directors for torts of the corporation, ultimately concluding that while Simonson was personally involved in the preparation of the promotional materials and would have known the extent of the plaintiffs' likely reliance, there was insufficient proximity to warrant personal liability. O'Brien and Rowbotham JJA agreed in the result, but framed their reasons more narrowly: the mining engineer's involvement had been established and it was enough to show that there had been a negligent misstatement; causation was not an issue in the trial court, nor had it been argued on appeal. The plaintiffs could show that their losses began to accrue as soon as they advanced funds; this began the 'causal chain', although it was open to the defendants to show that damages were not reasonably foreseeable. The majority were also not satisfied that Simonson's conduct was tortious in itself or exhibited a separate identity from that of the corporate general partner. Merely having a personal financial interest in the corporation is not enough to found personal director or officer liability for its torts.

[Link available **here**].

TORTS/DEFAMATION

Blog platform could be liable for not ensuring that defamatory posts removed quickly enough

Payam Tamiz objected to a number of comments made on the London Muslim blog, hosted on Google's Blogger platform. He claimed that he had notified Google of the defamatory material in late April 2011, using the 'report abuse' function on the site, which he followed up with a formal letter to Google in late June. He was told by Blogger staff that his complaint had been forwarded to the London Muslim blogger but that Google itself would not be removing the posts in question. In late July, Tamiz complained of five further defamatory posts, but it was not until mid August that Google indicated that it had relayed Tamiz's complaints to the blogger. Tamiz sought to bring a claim in libel against Google in California, as publisher of the allegedly defamatory material.

Eady J held that the English court should decline jurisdiction and that while the blog comments were arguably defamatory, Google was not the publisher of them, whether before or after notification by Tamiz. Even if Google was the publisher of the comments, it had a defence under the *Defamation Act 1996* because it had taken reasonable steps to notify the author of the comments once notified. And even if Google could be found liable, its liability arose for a period so limited – indeed trivial – that there would be no point in maintaining proceedings against it. Tamiz appealed: *Tamiz v Google Inc* [2013] EWCA Civ 68.

In the Court of Appeal, Richards LJ held that the judge was wrong to say that Google's role was purely passive; it makes Blogger available and can remove content whenever it wants, although as a practical matter it usually does not. This did not make Google a publisher of the material before Tamiz sent his notification, but the position changed after that, and there was nothing in principle to distinguish Google from the golf club which allowed libellous verses to remain on a bulletin board for members as long ago as *Byrne v Dean* [1937] 1 KB 818. Given that it took Google some weeks to act on the notification, a common-law claim against it as publisher could be made out; the period of inaction was enough to give rise to the inference that Google was at least partly responsible for the blog content. Similarly, Google did not have an 'unassailable defence' under the statute that it had taken 'reasonable' care in relation to the publication of the material on London Muslim. Lord Justice Richards did agree, however, that the period of Google's potential liability was so brief that 'the game would not be worth the candle', and the appeal failed on that basis in spite of the other findings that were favourable to Tamiz's claim.

[Link available **here**].

TORTS/EXPROPRIATION

Public utility does not trump injurious affection claim; reasonableness of interference must be established

Antrim Truck Centre Ltd claimed that highway construction by the Ontario government had unreasonably interfered with access to its land. The Ontario Municipal Board (OMB) ordered compensation of nearly $400,000 for business losses and diminution in the value of the land. This was set aside by the Court of Appeal, which found that interference with the land was not unreasonable in light of the important public purposes served by highway construction, even though that involved permanent interference with use of the land and a significant decrease in its value. The Supreme Court of Canada has unanimously allowed Antrim's appeal: *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13.

Cromwell J held that reasonableness must (not surprisingly) be determined by balancing the competing interests, and by asking whether the claimant has been burdened with a greater share of construction costs than it would be reasonable to impose without compensation. Given the permanent interference with Antrim's land use and permanent financial loss, the OMB reached a reasonable conclusion in awarding compensation; here, 'the individual should not be expected to bear such a loss for the greater public good without compensation'. Under Ontario's expropriation statute, compensation is provided for injurious affection to land where (1) damage results from action taken under statutory authority, (2) the government's acts would give rise to liability but for that authority and (3) damage results from the construction and not the use of the works. At issue in *Antrim* was (2). The claimant argued that it would be entitled to damages for private nuisance, which the OMB – but not the Court of Appeal – accepted. Justice Cromwell reviewed the elements of private nuisance, applying a two-part test which considers whether interference with land is both substantial and unreasonable.

Unreasonableness was the focus of the analysis on these facts, assessed by Justice Cromwell in light of all the relevant circumstances, including the gravity of the harm, the character of the neighbourhood, the utility and nature of the defendant's conduct and the sensitivity of the plaintiff. Public utility can outweigh 'even very significant interferences' with someone's land, but not to the point of requiring the person affected to bear a 'disproportionate share of the cost of procuring the public benefit'. While everyone must put up with 'a certain amount of temporary disruption caused by essential construction', it is another thing to impose permanent disruption. The reasonableness inquiry should not be confined to interferences that constitute material or physical damages, but extends to other considerations such as loss of amenities. On the facts, the Court of Appeal got the reasonableness assessment wrong by treating the relevant factors as a mandatory list and faulting the OMB for leaving out some of them. The OMB made no reviewable error in assessing what was actually reasonable in the circumstances, and it had not erroneously neglected the public utility of highway construction – it merely accorded that factor its due place in the mix.

[Link available **here**].

UNJUST ENRICHMENT

Ontario CA confirms that 'lowest intermediate balance' rule is default method for tracing ill-gotten gains

In a brief judgment the Ontario Court of Appeal has confirmed that the default method for tracing ill-gotten gains is the lowest intermediate balance rule (LIBR): *Boughner v Greyhawk Equity Partners Limited Partnership (Millenium)*, 2013 ONCA 26. Only where LIBR is 'practically impossible' or 'manifestly more complicated and more difficult to apply' should a judge use some other method (for example, on the basis of a claimant's original contribution to the fund at issue).

The claimants in this case were defrauded by a Ponzi scheme masquerading as an investment fund (the proponents of which had trouble in spelling 'millennium'). The court-appointed receiver of what funds remained available for tracing (which naturally fell short of the amounts that had been invested) identified three possible methods for getting money back to those unjustly deprived of it: (1) *pro rata* allocation based on the size of each investor's original contribution; (2) fund unit allocation, based on what each investor's claim would have been if the fund had actually been legit and performed as advertised; and (3) last in, first out (LIFO), based on the chronological order in which investments were made, with the last to invest being the first to receive funds. The claimants agreed that LIFO was not the way to go, but disagreed about which of the other two options was appropriate. Morawetz J reviewed previous cases and concluded that option (2) was the correct one; it was a modified version of LIBR, which previous authorities have endorsed as the default method. Like LIBR, option 2 would recalculate the history of an investor's contributions, using their actual values at the time of commingling. A LIBR calculation was entirely doable, and therefore not to be displaced by some other method of tracing.

[Link available **here**].

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