OCTOBER 2012

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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ADMINISTRATIVE LAW

Does the duty of fairness extend to non-parties affected by a regulatory decision?

Up to a point, said the Manitoba Court of Appeal in *2127423 Manitoba Ltd o/a London Limos v Unicity Taxi Ltd*, 2012 MBCA 75. London Limos applied for, and was granted, taxi licences by the provincial taxicab board. The application was opposed by two competitors, Unicity and Duffy's Taxis. They challenged the board's decision on the grounds that they had received only summary information about the London Limos application (they were denied access to detailed information, specifically the business plan of their competitor) and that the board had failed to provide reasons for its decision. This, they contended, amounted to a breach of natural justice and the regulator's duty of fairness to them.

The Manitoba Court of Appeal held that while the board clearly owed a duty of fairness to parties in proceedings before it, any duty owed to non-parties like the objectors was of a lesser character. The board was not required under its governing legislation to hear their objections at all, although it allowed them to participate. It was misconceived for the objectors to expect the same level of disclosure that a party would receive, given that they did not have to make or defend a case that was being adjudicated. Not being directly affected by the licensing decision, they could expect 'reasonable' disclosure of what London Limos was asking for – but it was unreasonable for them to demand confidential business information. The fact that the objectors had failed to ask for written reasons when they first challenged the board's decision was not fatal to their case, but it was a relevant factor that suggested they understood the rationale for the decision without needing written reasons. In the circumstances, a simple order from the board was enough.

[Link available **here**].

ARBITRATION

What happens when the parties' choice of arbitral seat doesn't exist?

An unsatisfactory result in this case, anyway: *Control Screening LLC v Technological Application and Production Co (Tecapro), HCMC-Vietnam* (3d Cir, 26 July 2012). Control Screening, a New Jersey company, agreed to supply X-ray machines to Tecapro, an enterprise owned by the government of Vietnam. Their agreement had an arbitration clause stating that disputes that could not be resolved between the parties would be arbitrated at the 'International Arbitration Center of European countries'. Herein lay the problem when the parties wanted to invoke the arbitration clause: there is no such thing as the International Arbitration Center of European countries (or Countries, even). Tecapro initiated arbitration proceedings in Belgium; Control Screening did so in New Jersey – and sought to enjoin the Belgian arbitration.

The New Jersey district court concluded that 'the only reasonable interpretation' of the arbitration was that either party could seek to arbitrate in its home jurisdiction, granting Control Screening's motion. On appeal by Tecapro, the 3d Circuit relied on the New York Convention, which both the US and Vietnam have ratified, and which provides that an express agreement to arbitrate will be found unenforceable where it is 'null and void' because of some underlying mistake. The reference to the non-existent forum was clearly such an error, although it did not vitiate the parties' intent to arbitrate *somewhere*; the forum-selection clause was severable from the rest of the agreement. The Federal Arbitration Act, which also applied, permits a district court faced with an agreement that specifies no forum to compel arbitration only within its own jurisdiction – so the court below was correct to say the arbitration had to proceed in New Jersey. But wasn't it clear that the parties wanted arbitration to occur in Europe, presumably as a compromise between Vietnam and New Jersey?

BANKING/CONTRACTS

Bank fees can be penalties, even where not related to customer's breach

The High Court of Australia has stated that bank fees – even where they do not arise on breach of contract by the customer – may still be penalties (and thus unenforceable): *Andrews v Australia and New Zealand Banking Group Ltd*, [2012] HCA 30. The plaintiffs in this class action sought the recovery of various fees charged by the bank: 'honour' (processing), dishonour, non-payment and over-limit fees, as well as late payment charges. Late payment charges, being payable upon breach of contract, were clearly penalties and were not at issue before the High Court. The judge at first instance found that the other charges were *not* payable on breach or as a result of an event which the customer had an obligation or responsibility to avoid, concluding that it was not necessary to consider whether they were capable of being characterised as penalties. The plaintiffs argued that they should be characterised in that way, because they were imposed on the occurrence of events and were 'out of all proportion' to any loss or damage incurred by the bank, for services that were essentially 'with no content'.

Reaching back to Roman law and the historical development of equity, the High Court noted that the penalties doctrine operates even where there is no express contractual promise to perform a condition. A promise that a condition will be satisfied may, in substance, be a penalty – and subject to equitable relief. That said, contracting parties may agree on a higher payment for further rights or services, and such an 'alternative stipulation' will not be considered a penalty. An example comes from an older Australian case where a contract for a single screening of a film provided that any additional screenings were subject to a fee that was four times the original one, but which was not a penalty: *Metro-Goldwyn-Mayer Pty Ltd v Greenham*, [1966] 2 NSWR 717. Whether the specific fees charged by the bank in *Andrews* were in relation to valid alternative stipulations or were, in substance, penalties was not decided by the High Court but remitted to the Federal Court for determination.

[Link available **here**].

CIVIL PROCEDURE/CLASS ACTIONS/SECURITIES

Ontario judge breathes new life into claim for secondary market liability

Limitation periods are intended to offer 'repose' to potential defendants, and they do – but, as often as not, they generate confusion and legal bills. In September 2006, Silver and Cohen commenced an action against IMAX Corp. and IMAX executives, alleging that the company had made misrepresentations in its secondary market disclosure. The plaintiffs advanced common law claims and indicated in November 2006 that they would seek leave to bring statutory claims under Part XXIII.1 of the Ontario *Securities Act* (OSA). The motion to seek leave for the OSA claims was served on the defendants in February 2007 and subsequently amended. Delays ensued, apparently because of the voluminous and complex nature of the motion record and because the leave motion was heard with other motions, including one to certify the action under the *Class Proceedings Act* (CPA). In December 2009, leave for the Part XXIII.1 claims was granted and the class action certified. Leave to appeal those decisions was ultimately denied in February 2011. In December 2011 the plaintiffs amended their statement of claim to include the statutory causes of action under the OSA, pleading new facts which had arisen since 2006 but generally along the lines of their November 2006 notice of motion. The defendants asserted that the Part XXIII.1 claims were barred by the three-year limitation period in the OSA, relying in part on the decision in *Sharma v Timminco Ltd*, 2012 ONCA 107, where it was held that leave to bring such a claim must have actually been granted in order to invoke the provisions of the CPA which suspend a limitation period that would otherwise apply.

Van Rensburg J distinguished *Sharma* on its facts: there, the plaintiff had not even brought a motion for leave under the OSA; in the *IMAX* case, the plaintiffs had moved expeditiously, delivered their notice of motion and argued the motion itself within the three-year period. Any delay was outside the control of Silver and Cohen and the parties seemed to have operated under the assumption that the limitation period had been suspended. If it hadn't, the plaintiffs argued that the court had the discretion to grant leave retroactively, under the 'special circumstances' doctrine, and to amend the statement of claim to make it effective within the limitation period. The defendants also relied on *Green v CIBC*, 2012 ONSC 3637, where Strathy J declined to apply the doctrine of special circumstances in a similar case. Van Rensburg J rejected the plaintiffs' argument that there was no limitations issue at all: they clearly needed to have obtained leave for a Part XXIII.1 claim, not merely to have pleaded it. The judge agreed, however, that she had the inherent jurisdiction to back-date the leave order to make it effective within the limitation period and thereby avoid injustice, distinguishing *Green* on the facts of its chronology. She also disagreed with Strathy J that this jurisdiction was displaced by the statutory scheme under Part XXIII.1. The doctrine of special circumstances did not need to be invoked. Retroactive relief was warranted on the facts before the judge, and leave to amend the leave order and the statement of claim granted as of December 2008, when the leave motion was concluded.

Given the departures from *Green* and *Sharma*, this one will probably go to the Court of Appeal.

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

CONFLICT OF LAWS

Tort claims arising from events in Iran dismissed

Zahra Kazemi, a photojournalist with dual Canadian and Iranian citizenship, was arrested at a protest in Teheran and treated brutally during her detention. She died some weeks later. Her son, Stephan Hashemi, sued the Islamic Republic of Iran, its supreme leader and two officials who were alleged to have overseen and participated, in an official capacity, in her interrogation and torture. The claims were made on behalf of Kazemi's estate and by Hashemi personally.

The Quebec Superior Court dismissed the estate's claims on the grounds that the *State Immunity Act* (SIA) granted the defendants full immunity from suit, but allowed Hashemi's personal claims for emotional distress and loss of a close relation to proceed. The Iranian state appealed, on the grounds that the SIA also barred Hashemi's personal claims: *Islamic Republic of Iran v Hashemi*, 2012 QCCA 1449. Hashemi argued that his claims fell under an exception in the SIA which provides that a foreign state is not immune where the proceedings relate to injury, or damage to or loss of property that occurs in Canada. The constitutionality of the SIA was also challenged.

In the Quebec Court of Appeal, Morissette JA observed that the trial judge was certainly correct that the estate's claims could not be advanced in Canada, since they related to events which occurred in Iran. The trial judge was also correct to hold that the SIA is a complete code and does not admit of further exceptions even where these would be consistent with customary international law, international conventions on torture, the *Bill of Rights* and the *Charter*. State immunity applies to acts of torture. The wording of the exception relied on by Hashemi is not crystal-clear but it seems to apply to breaches of physical integrity and resulting psychological injury, not the latter alone. Sovereign immunity clearly applied to the Islamic Republic and its supreme leader; less certain was its application to the two named officials, although in the end Justice Morissette concluded that they were also immune, even where their official acts involved torture. The SIA withstood constitutional scrutiny. The judge obviously felt some discomfort with the result: 'On the facts as alleged, Zahra Kazemi, a blameless Canadian, fell victim to a pattern of vicious misconduct by the agents of a rogue state. Such a situation causes instant revulsion in anyone who adheres to a genuine notion of the rule of law. But these acts took place in Iran and what consequences they had in Canada do not set in motion the exceptions to state immunity.'

[Link available **here**].

State-owned airline can't claim sovereign immunity in competition proceedings

PT Garuda Indonesia is 95.5% owned by the Republic of Indonesia, with the rest of its shares held by government-controlled entities. Its executive is composed mostly of Indonesian government officials. So, when the Australian Competition & Consumer Commission (ACCC) went after Garuda for an alleged anti-competitive arrangement with other airlines to impose surcharges on commercial freight services, the airline pleaded sovereign immunity. The ACCC took the position that Garuda's alleged acts were part of commercial activity that was not protected by the sovereign status of its owners. Two levels of court dismissed Garuda's motion for summary dismissal of the ACCC proceedings, and the High Court of Australia agreed: *PT Garuda Indonesia Ltd v Australian Competition & Consumer Commission*, [2012] HCA 33. The court reviewed US, Canadian and English jurisprudence on the exception to sovereign immunity that the law now makes for commercial activity or transactions, concluding that Garuda's activities in the conduct of commercial airline freight services to Australia were clearly of 'a commercial, trading and business character', and thus not subject to the principle of sovereign immunity.

[Link available **here**].

CONTRACTS

Hyperlinks are the new fine print

As a result, making some onerous condition accessible – or rather, relatively inaccessible – through a link may make the condition unenforceable. The Second Circuit found this to be the case in *Schnabel v Trilegiant Corp* (2d Cir, 7 September 2012), a proposed class action. The underlying dispute arose from online purchases of services from a variety of merchants. Once a transaction was completed, the consumer was given the option to click on a link to receive cash back from the purchase: doing so signed the consumer up for a discount programme offered by Trilegiant, a third party, which then billed the consumer's credit card monthly (and which the plaintiffs objected to). Trilegiant sends a confirmation e-mail to each new customer it obtains in this way (although one of the plaintiffs claims he never received the e-mail). The e-mail contains a hyperlink to Trilegiant's terms and conditions, including a waiver of the right to bring class proceedings in the event of a dispute, which must go to arbitration instead.

The specific issue was whether the arbitration clause could be enforced. Trilegiant argued that while the arbitration clause was not one the plaintiffs had expressly assented to, they had been put on notice of it and that was enough. Uh no, said both the district court in Connecticut and, on appeal, the Second Circuit. This wasn't like a shrinkwrap licence, where the consumer has a realistic opportunity to read the terms he or she is agreeing to. A person can assent to terms without reading them, but it has to be clear to him or her that there are terms and that they can be adopted by a course of conduct (typically, using and not returning the product). Here, the arbitration clause was hidden in a document that was not obviously contractual in nature, and the consumer wasn't even aware it was there. There are situations where previous dealings between the parties may make it reasonable to say that one party is on notice that it should check out additional terms that arrive after the contract is formed, but this wasn't one of them: 'Trilegiant effectively obscured the details of the terms and conditions and the passive manner in which they could be accepted.' Continuing to pay for Trilegiant's services didn't amount to acceptance either. The plaintiffs had not agreed to arbitrate their disputes with Trilegiant and could pursue their class claim.

CONTRACTS/TORTS/EVIDENCE

The biggest civil claim *ever* dismissed in its entirety

A claim by one Russian oligarch against another for US$5.6 billion (yup, that's *billion*) has been dismissed by Mrs Justice Gloster in the Chancery court in London: *Berezovsky v Abramovich* (action 2007, folio 942; for now, only a summary of the decision is available, with reasons to follow). Boris Berezovsky (oligarch B) alleged that he, Roman Abramovich (oligarch A) and a third, since deceased oligarch (oligarch D) had entered into an oral agreement about the holding of their ownership interests in Sibneft, an oil company. Oligarch B claimed that he had been forced to sell his interests to oligarch A at a significant discount, backed up by threats that failure to co-operate would oblige oligarch A to ask his good buddy Vladimir Putin to expropriate oligarch B's holdings and make life generally unpleasant. Oligarch B complied, and oligarch A sold his Sibneft holdings for a massive profit. A second claim by oligarch B was that he, oligarchs A and D, and yet another oligarch had entered into a further oral agreement with respect to the pooling of ownership interests in RusAl, an aluminum company, on some sort of trust, and that oligarch A had breached his fiduciary obligations by selling his interests without oligarch B's consent.

While previous aspects of the case have generated some interesting legal analysis, Mrs Justice Gloster's decision turns solely on the credibility of the main witnesses. Hard evidence was lacking, as oligarchs tend to make oral agreements (usually at the Dorchester Hotel in London) in order to keep records of ownership interests to a minimum (expropriation and mysterious death being endemic to this sphere). The judge found that oligarch A was a 'careful and thoughtful witness', not afraid to give answers that did not serve his interests, 'truthful, and on the whole, reliable…' Oligarch B, in contrast was an 'inherently unreliable' witness who 'regarded truth as a transitory, flexible concept' who 'would have said almost anything to support his case'. It also emerged that some of oligarch B's witnesses stood to gain financially in the event he was successful. The judge concluded that there were no agreements in relation to either Sibneft or RusAl. Oligarch B's claim to have been threatened by oligarch A was not supported by evidence. His 'blame the lawyers' strategy also backfired. The claims against oligarch A were dismissed in their entirety.

It is understood that oligarch B's solicitors have racked up over £100 million in fees under some form of contingency arrangement, with third-party insurance. It will be interesting to see how that plays out, especially if the insurance has an exclusion for litigation that is wholly without merit.

[Link available **here**].

FASHION LAW/INTELLECTUAL PROPERTY

Louboutin wins and loses on red-soled shoes

Fashionistas, take note. As we reported back in September 2011, the shoe designer Christian Louboutin attempted to prevent Yves Saint-Laurent (YSL), the fashion house, from selling red shoes with red soles, on the grounds that Louboutin had registered a trade-mark in red-soled shoes. The District Court in Manhattan doubted that a single colour could be the subject of an enforceable trade-mark, and declined to issue an injunction. Louboutin appealed, with mixed success: *Christian Louboutin SA v Yves Saint Laurent Holdings Inc* (2d Cir, 5 September 2012).

The Second Circuit reasoned that the judge below had erred in thinking that a single colour could never be the subject of trade-mark protection, having misunderstood earlier case law and the concept of 'aesthetic functionality' (which sounds like a contradiction in terms, but whatever...) Louboutin's red-soled shoes are distinctive and his trade-mark in them clearly enforceable, but this is predicated on there being a contrast between the red of the soles and the colour of the shoe's upper. Louboutin's rights in the red-sole mark do not prevent someone else (like YSL) from producing a shoe that is red from top to bottom, with no contrast between upper and sole.

HEALTH AND SAFETY

Having a garage sale? *Caveat venditor*

If you're not careful, you may be committing an offence under the *Canada Consumer Product Safety Act*. Don't try to flog products that are banned from sale in Canada: baby walkers, infant self-feeding devices, lawn darts with elongated tips, polycarbonate baby bottles containing BPA or products made from jequirity beans – whatever those are. Be aware of labelling requirements for stuff like baby gates and cribs, cosmetics, garden torches, window coverings with cords and hockey helmets, and potential safety issues arising from children's jewellery containing lead, toys with sharp edges or points and the like. Watch out for microwave ovens with damaged doors. Stereos should have instructions and working volume controls, so buyers don't end up with hearing loss. Yes, we live in a nanny state. Further info at the link.

[Link available **here**].

INTELLECTUAL PROPERTY

No longer any cause for dispute about banana album cover?

Back in February 2012, we reported on the Velvet Underground's suit against the Andy Warhol Foundation over the latter's use of the banana image from the cover of the band's first album.

In response to the VU's claims, the Foundation gave a covenant that it would not sue the band for copyright infringement, which had the effect, in the mind of Nathan J of the Southern District of New York, of eliminating any actual controversy between the parties over the banana design and depriving her of jurisdiction to enter a declaratory judgment in favour of the VU: *The Velvet Underground v The Andy Warhol Foundation for the Visual Arts Inc* (SDNY, 9 September 2012). The band's assertion that it had continuing infringement claims was merely the expression of 'an intangible worry, unanchored in time', insufficient to support actual or imminent injury and thus unjusticiable.

The Foundation struck back a few days later with a claim against the VU for trade-mark, rather than copyright, infringement.

INTELLECTUAL PROPERTY/ WILLS AND ESTATES

Something's got to give

'Domicile' and 'estoppel': not, perhaps, words one immediately associates with Marilyn Monroe, but the central issues in *Milton Greene Archives Inc v Marilyn Monroe LLC* (9th Cir, 30 August 2012). Marilyn Monroe LLC (MM LLC), a corporation established by the executrix of Monroe's estate, asserted rights of publicity in photographs of the actress owned by Milton Greene Archives (MGA). The California district court found in favour of MGA, on the grounds that at the time Monroe made her will the law did not allow the testamentary disposition of publicity rights. The California legislature responded to that decision by passing a law retroactively extending rights of publicity to anyone who died before 1985. But did California law apply to Monroe's will?

No, said the Second Circuit. Monroe's estate had consistently maintained at the time of her death and afterwards that while she died in California, she was domiciled in New York. Monroe had bought a house in Los Angeles to use while filming what, had it been completed, would have been her last movie, but owned an apartment, employed staff and kept the bulk of her possessions in New York. It was important for the estate to say that New York law governed in order to avoid the payment of significant death duties in California. It also proved useful in barring the claims of a woman who alleged she was Monroe's illegitimate daughter, but whose cause of action was not recognised under New York law. Having relied for so long on New York as the governing law of Monroe's will and succession, MM LLC could not now assert that it was California law that governed after all. This was 'a textbook case' for the application of judicial estoppel, the principle that you can't rely on a position inconsistent with one you have used as the basis for successful litigation in the past. In rejecting the estate's submissions, the court cited a remark attributed to Monroe: 'If you're going to be two-faced, at least make one of them pretty.' The estate could not therefore assert rights of publicity in Monroe's image because New York law did not recognise that such rights could have been transmitted by the actress's will. Don't feel too sorry for MM LLC, though: it earned US$27 million in 2011 from intellectual property rights that had been validly transmitted under the actress's will.

LAWYER REGULATION

'Esquire' has many meanings

In the UK and WASPier parts of Canada, 'Esquire' is just a polite way of saying 'mister' on an envelope. In the United States – for reasons which have never been entirely clear to us – it designates a lawyer (sorry, attorney), whether male or female.

It proved a problematic honorific for John Mark Heurlin, who held himself out as being entitled to practise law while suspended by the California state bar for serious misconduct. Heurlin described himself in correspondence and court filings as 'John M. Heurlin, Esq.', referred to himself as an attorney and had 'Law Offices of John M. Heurlin' on his letterhead. One of Heurlin's arguments in his fourth round of discipline proceedings was that 'the word "Esquire" has many meanings, including that of property owner and subscriber to the magazine Esquire' (the decision doesn't mention the Anglo-Canadian understanding of the word, *supra*). Epstein J of the state bar court didn't buy Heurlin's argument: *In the Matter of John Mark Heurlin* (case 09-0-10774, 7 August 2012). Huerlin's intent was to mislead people as to his status and to practise when he couldn't. Dude was disbarred.

[Link available **here**].

MERGERS AND ACQUISITIONS

Controlling shareholder does not have to sacrifice own interests to those of minority

Minority shareholders of Synthes alleged that Hansjoerg Wyss, the company's controlling shareholder, breached fiduciary duties owed to them in rejecting a merger offer that would have seen the minority cashed out but required Wyss to remain as an investor, based on the application of the 'entire fairness' standard: *in re Synthes Inc Shareholder Litigation*, 2012 Del Ch LEXIS 196. Wyss had instead negotiated a deal with Johnson & Johnson (J&J) consisting of the 65% stock and 34% cash.

The Delaware Court of Chancery determined that there was no conflict between Wyss's interests and those of the minority: he had more incentive than anyone to maximise the sale price of the company and was not under any duty to penalise himself in order to make a better deal for the others. As long as the minority were afforded *pro rata* treatment, the decision to go with the J&J offer could be justified under the business judgment rule. The court also rejected the contention that the transaction was subject to a *Revlon* duty to obtain 'the highest immediate value reasonably obtainable' *(Revlon v MacAndrews & Forbes Holdings Inc*, 506 A2d 173 (Del 1986)), which would be applicable only if there was a change in control of the company – not (as here), where control will remain in 'a large, fluid market'. Even if *Revlon* duties did apply, there was no evidence that Wyss and the board of Synthes had failed to ensure that shareholders would receive the highest value reasonably attainable. The court also rejected the argument that measures taken to protect the J&J deal were unreasonable and preclusive of a better third-party bid.

PERSONAL PROPERTY

Oh no, here we go again!

Ontario's first attempt at unclaimed intangible property legislation was enacted in 1998, never proclaimed in force and repealed in 2011. The Ontario government wants to have another go at it, along the lines set out in a consultation paper recently released by the Attorney General. The starting point would be the Uniform Law Conference's *Uniform Unclaimed Intangible Property Act* of 2003, which forms the basis for legislation currently in force in Alberta and Quebec. The stated objective would be to 'enable Ontarians to be reunited with their intangible property once it has been unclaimed' – and until it has been claimed, it would be 'used for the benefit of Ontarians' (or, a cynic might say, simply disappear into the black hole of the Consolidated Revenue Fund).

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

PRIVACY

Federal privacy commissioner launches online complaint form

Found your financial records in a dumpster? Unhappy about the new privacy settings for your social media accounts? You can now file a complaint about *Privacy Act* or *PIPEDA* breaches with the federal privacy commissioner using the following link, which requires registration (by providing an email address) each time you wish to make a complaint. The second link is the press release announcing the new form.

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

New California legislation to protect social media accounts of employees and students

In response to 'quickly evolving technologies', California has passed legislation preventing employers and public and private post-secondary educational institutions from requiring or requesting an employee or a student, prospective student or student group to disclose 'personal social media information', including user names and passwords, or from accessing personal social media information in the presence of the employer or the institution's employee or representative, as the case may be. Disciplinary action may not be taken against an employee or student for a refusal to disclose social media information, although this does not affect existing rights to protect against and investigate alleged misconduct or violations of the law, or to take adverse action for any lawful reason.

So, Facebook photos of what happened on that day off or at the frat house are off-limits – but then again, maybe not.

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

Yup, walking down the red carpet at a Hollywood event can be consent to use of the photos taken

Corbis Corp. maintains a large database of images, which it licenses through a website displaying sample images. The plaintiff in *Jones v Corbis Corp.* (CD Calif., 25 May 2011) objected to Corbis's use of her image, taken as she walked down the red carpet at some Hollywood event, on the grounds that it breached her rights of publicity without consent. (For those old enough to remember, the plaintiff is Shirley Jones, the bus-driving mum of *The Partridge Family*.)

Wilson J of the US District Court for the Central District of California disagreed with Jones. She consented to the taking of the pictures and knew the photographer would distribute them to commercial entities like Corbis. It was also open to her to enter the event through a private door, without proceeding down the red carpet. A notice was posted at the beginning of the carpet stating that any photos that were taken would be disseminated. Jones's consent to distribution was therefore implicit. Not even Corbis's use of the sample image on its website could be objected to: Jones had effectively consented to that too. The 9th Circuit has recently dismissed Jones's appeal: 2012 US App LEXIS 14543. Corbis operated 'within well-known and established customs in the industry' and Jones gave her 'apparent consent' to its use of the images, based on the objective determination of a reasonable person.

PRIVACY/INTELLECTUAL PROPERTY/ CIVIL PROCEDURE

IP address not a personal identifier, says NY court

Four makers of pornographic films claimed that more than 80 'John Doe' defendants had infringed their copyright through illegal downloading from peer-to-peer sites. The plaintiffs wanted to compel the defendants' internet service providers to disclose the identities of their unnamed customers: *In re BitTorrent Adult Film Copyright Infringement Cases* (EDNY, 1 May 2012).

Brown J of the Eastern District of New York took a realistic view of things, noting that all an IP address does is identify the location of the person who pays for an internet connection, not necessarily who uses it, and that the proliferation of wireless routers makes it much less likely that a specific user could be identified. One of the defendants represented, in fact, that she used an unsecured wireless router and lived next to a public parking lot, making access to her IP address a simple matter for third parties who did not share her moral and religious objections to pornography. Likewise for the octogenarian defendant who stated that he had 'neither the wherewithal nor the desire' to download this stuff. As a judge observed in a similar case, the downloader is less likely to be the lady of the house than her teenaged son, her boyfriend or the creepy guy in the next apartment. The plaintiffs' motions to compel disclosure were denied except in relation to one defendant. The fact that the plaintiffs had engaged in abusive litigation tactics in order to extract settlements from certain defendants certainly didn't help their case.

PROFESSIONAL LIABILITY/TORTS

Professional was negligent but off the hook because no causal link with plaintiff's loss

A useful reminder in *Platform Funding Ltd v Anderson & Associates Ltd*, [2012] EWHC 1853 (QB). Platform Funding, a mortgage provider, retained Anderson & Associates, a firm of chartered surveyors, to provide a valuation of an apartment in a new development that was being purchased with a loan from Platform. The purchaser defaulted and the apartment was sold at a significant loss. Platform sued the surveyors, alleging they had been negligent in not following the standard practices set out by the governing body for chartered surveyors in England: they had failed to consider any incentives that had been offered to purchasers in the development or the value of apartments in comparable developments.

The judge concluded, however, that the firm's negligence was, on a balance of probabilities, not the cause of Platform's loss on the sale; and even if the valuation had been performed with appropriate care and skill the result was likely to have been the same. The real source of Platform's loss was a dishonest vendor who had sold apartments in the development at a price that was significantly above market value, provided inflated valuation information on comparable apartments to the surveyors and colluded with Platform's solicitors in a scheme to 'ramp up the sale price so as to mislead third parties' (including the solicitors' own client, Platform). The solicitors had ceased to practise by the time of trial and their insurer had repudiated coverage. While Platform's claim failed, Anderson & Associates obtained judgment against the solicitors in contribution proceedings.

[Link available **here**].

PROPERTY/TORTS/ INTELLECTUAL PROPERTY

Injunction to prevent alteration of e-mail footer

The default e-mail signature used by the Insurance Corporation of British Columbia (ICBC) included the trade-marked phrase 'Building Trust. Driving Confidence'. The union representing ICBC office employees in a dispute over their collective bargain thought it would be an effective strategy if its members replaced that slogan with a partisan message that included the line 'We Work. You Drive. We Both Deserve Better'. In the space of 5 days, some 19,000 e-mails went out with the substituted wording. ICBC sought an injunction, claiming that the union had engaged in tortious or illegal conduct in the form of passing off, conversion, interference with contractual relations and civil conspiracy, and had interfered with its trade-mark and copyright.

Willcock J granted the injunction but on one ground alone, that of conversion: *ICBC v Canadian Office and Professional Employees Union, Local 378*, 2012 BCSC 1244. What the union did was not passing off because it had in no way appropriated the name or goodwill of ICBC. There was no evidence of interference with ICBC's contractual relations. The conspiracy claim also failed: if altering the footer was tortious, that claim was enough; if it was not, there could be no conspiracy to do it. It was doubtful that there was misuse of ICBC's intellectual property. The judge was prepared to say, however, that ICBC had a proprietary interest in its e-mail correspondence and it was a triable issue whether the union had wrongfully converted that interest by encouraging its members to handle ICBC's messages in a way that was inconsistent with its rights in them.

[Link available **here**].

SECURITIES/ADMINISTRATIVE LAW

BC Securities Commission went too far in making reciprocal order

The Lines brothers entered into a settlement with the SEC under which they agreed to disgorge $1.3 million in profits from alleged misconduct, paid civil penalties and undertook not to trade in penny stocks on certain platforms. The terms of the settlement were incorporated into final judgments filed with the Southern District in New York. As is the case in SEC proceedings (but not currently in Canada), the respondents did not admit or deny any of the underlying allegations of fact, and the settlement clearly stated that while it could have 'collateral consequences' elsewhere, it did not extend to trading in foreign securities on foreign exchanges. The BC Securities Commission (BCSC) subsequently used its power to make reciprocal orders and barred the Lineses from trading in *any* securities in British Columbia for a certain period of time. They challenged this on the grounds that the BCSC did not have a sufficient evidentiary basis for an order that was 'substantially more onerous' than those they agreed to in the States.

The BC Court of Appeal agreed that the BCSC had gone too far: *Lines v British Columbia (Securities Commission),* 2012 BCCA 316. The Lines settlements did not indicate why they were to disgorge funds or why the US ban extended to penny stocks, nor did it state whether the penalties were for alleged conduct that was intentional or merely negligent. The BCSC, in making a supposedly reciprocal order of 'extremely wide sweep', had ignored the fact that there had never been a determination that the Lineses had broken any laws; it was a 'leap in logic' to say that consent to sanctions without admitting wrongdoing made it necessary to bar the brothers from any kind of trading in British Columbia. In Madam Justice Newbury's words, 'The evidence relied on did not, and could not, justify the more onerous order' that the BCSC had imposed.

[Link available **here**].

TORTS

Limits on a professional's liability to third parties

Useful stuff in *Arrowhead Capital Finance Ltd v KPMG LLP*, [2012] EWHC 1801 (Comm). Arrowhead, an investment fund, loaned money to Metro II LLC, a special-purpose vehicle, which in turn made a loan to Dragon Futures, which traded in grey-market mobile telephones. Dragon bought phones and resold them, claiming back from the revenue authorities the sales tax (VAT) it paid on the original purchase as an input tax. Dragon's business model depended, in fact, on being able to recover the VAT on purchases, so it retained KPMG to implement a strategy to ensure it could continue to do so. The KPMG strategy was referred to in documents provided to potential investors, including Arrowhead. As it turned out, Dragon's VAT claims were denied, it went out of business and left Arrowhead with some US$53 million in unpaid debt. Arrowhead sued KPMG in tort, alleging that because the firm knew that Dragon would relay the fact that it had been advised by KPMG to investors, KPMG owed both Arrowhead and Metro a duty of care in providing the services to Dragon. KPMG had, it was argued, made assurances that Dragon had proper systems in place and had been negligent in not detecting fraudulent transactions.

The English Commercial Court applied three approaches for determining whether a duty of care existed on the facts: (a) was there an assumption of responsibility by KPMG? (b) was a threefold test of foreseeability, proximity and fairness satisfied? and (c) would imposing a duty of care be incremental to previous cases or a more radical departure? (The three approaches come from *Customs & Excise Commissioners v Barclays Bank plc* [2006] UKHL 28.) Under (a) KPMG had clearly assumed responsibility for Dragon, but not for Arrowhead or Metro. While Arrowhead could probably establish foreseeability and perhaps proximity under (b), it would be unfair, unjust and unreasonable to impose liability for Arrowhead's losses, given that the contract between KPMG and Dragon was likely to have expressly limited KPMG's liability to its client and very possibly to third parties. Dragon was engaged in a high-risk business, making it unlikely that KPMG would have accepted any responsibility to Arrowhead even if asked. The judge did not go on to consider (c). Arrowhead's claim was also time-barred.

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

TORTS/BANKING

Market turmoil in 2008 unexpected, but bank liable for losses because customer sought risk-free investment back in 2005

Adrian Rubenstein wanted to park the proceeds from the sale of his house in a risk-free investment for a year, while he and his wife looked for another house. They could not afford to lose their capital, so they liked the sound of the product recommended by an adviser at HSBC, a premier access bond issued by the insurer AIG. The adviser told Rubenstein that the bond was risk-free, like cash in the bank. This was back in 2005, when no one would have thought that AIG would suffer a massive liquidity crisis; but the unthinkable did transpire in 2008, and Rubenstein ended up with a capital loss of £180,000. At trial, the judge found that while the adviser had been negligent, the fate of AIG (and the plaintiff's investment in it) was simply not foreseeable in 2005, with the result that Rubenstein could recover only nominal damages in contract.

The English Court of Appeal has reversed that judgment: *Rubenstein v HSBC Bank plc*, [2012] EWCA Civ 1184. The adviser was negligent in recommending the bond at the time of the investment, when it was clear that Rubenstein wanted a risk-free, short-term instrument. Moore-Bick LJ cited the classic authorities on remoteness, finding that market fluctuations (even of the nature of those that occurred in 2008) were not 'so extraneous to the validity of the investment advice as to absolve the adviser of liability for failing to carry out his duty or duties on the basis that the result was not within the scope of those duties.' The investment itself was unsuitable in 2005 because it exposed Rubenstein to the very kind of risk he sought to avoid, which was loss of capital through market movement. The advice and the loss were therefore 'not disconnected by an unforeseeable event beyond the scope of the bank's duty' to the customer. The court rejected the argument that its duty was limited to events occurring within the one-year period (Rubenstein was unable to find a house during that time and held on to the bond for three years); the need for the investment was always contingent on his finding a house and on the ostensibly risk-free character of the bond.

[Link available **here**].

TORTS/PRODUCTS LIABILITY

Wow, there sure are some colourful cases on the district court docket in Houston

First, *Bridgeman v United Continental Holdings Inc* (2012-49093, filed 12 August 2012), in which Christopher Bridgman and Martin Borger seek damages from Continental Airlines for an incident that occurred when they returned from a vacation in Costa Rica. The couple allege that on arrival in Houston, they discovered that 'a private sex toy' had been removed from their luggage, smeared with 'a greasy foul-smelling substance' and taped to the outside of the bag. They were subjected to the ridicule of onlookers and sued the airline for intentional infliction of emotional distress, invasion of privacy and negligence in the training and supervision of baggage-handling employees.

Secondly, *Carter v Haute Health LLC* (2012-49179, filed 27 August 2012). Adrian Carter, a 29-year-old, claims that he purchased a herbal supplement called VirilisPro, which is marketed as an all-natural enhancer of sexual performance, but which allegedly had some rather unfortunate side effects. Carter says he bought the supplement at a gas station and promptly checked into a motel with his 'paramour'. During the course of their activities, Carter claims he experienced 'significant pain' and swelling down below, followed by 'a large quantity of blood squirting out of his penis'. He was diagnosed at an emergency clinic with a penile fracture and, the claim alleges, was required to have all of the skin on his *membrum virile* removed in order to allow the doctor to reattach his urethra. Carter alleges that he will never have an erection again, be able to father children or urinate without discomfort, and has sued the manufacturers of the supplement and its owners for marketing a dangerously defective product.

WILLS AND ESTATES

Can you bequeath your digital music library?

Interesting piece in the *Wall Street Journal* pointing out that content downloaded from Apple or Amazon is merely licensed to the customer and is (somewhere in the forest of fine print) expressly stated to be non-transferable, presumably including to one's heirs. While some US states have passed legislation to permit access by executors to the e-mail and social media accounts of the deceased, there doesn't appear to be anything allowing them to get their hands on the dear departed's collection of disco classics, death metal or what have you. A Florida lawyer has suggested creating a trust to hold online accounts containing music, e-books and movies as a way to circumvent the problem. What the WSJ article doesn't discuss is what will often constitute the bulk of a late downloader's digital library: stuff he or she just ripped off from P2P sites. *Nemo dat quod non habet*, one assumes.

[Link available **here**].

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