THE NAVIGATOR

IN THIS ISSUE

Phishing Fraudulent Wire Transfer Not Covered by Insurance

Cyber risks are a daily threat to all business operations. Ever increasing cyber threats are the norm. Police authorities have warned about the most common cyber risk that involves fake emails. The scam is carried out by sending a fake email (phishing) targeting businesses that perform wire transfer payments. For example, an email that appears to be from a legitimate supplier's executive is sent to an employee of the buyer's company asking that payments of their invoices now be directed to a different bank account. Such a transfer was found not to be covered by insurance in the case of *The Brick Warehouse LP v. Chubb Insurance Company of Canada,* 2017 ABQB 413 (*The Brick v Chubb*).

In August of 2010 an individual called The Brick Warehouse LP's (the "Brick") accounts payable department and spoke with an employee. The caller indicated he was from Toshiba and that he was missing some payment details. He indicated that he was new to Toshiba and the Brick employee, being helpful, faxed some payment documentation to a number provided by the caller.

On August 20, 2010, a different individual in the Brick accounts payables department received an email from an individual with the name "R. Silbers" and an email address of silbers_toshiba@eml.cc. The individual claimed to be the controller of Toshiba Canada and indicated that Toshiba had changed banks from the Bank of Montréal to the Royal Bank of Canada. It indicated all payments should be made to the new account and provided the necessary information to transfer money into the account.

On August 24, 2010 a person phoned the Brick's accounts payable department. That individual spoke to the same employee who received

FIRM AND INDUSTRY NEWS

- The 12th edition of ***Best Lawyers in Canada*** **(2018)** has just been released. **Rui Fernandes** and **Gordon Hearn** have been listed for Maritime Law and Transportation Law, **Kim Stoll** has been listed for Maritime Law, **Louis Amato-Gauci** has been listed for Aviation Law and Transportation Law and was named "Lawyer of the Year" in Transportation Law for Toronto Ontario.
- **Comite Maritime International** Assembly, September 7-8, 2017, Genoa Italy.
- **Canadian International Freight Forwarders Association** Golf Day, September 14th, 2017, Toronto.
- **Ontario Trucking Association** Golf Day, September 19th, 2017, Oakville Ontario.
- **RIMS Canada** Conference, September 24-27, 2017, Toronto.
- **Canadian Ferry Association** Annual Conference, September 24-26, 2017, Halifax.
- **Canadian Society of Customs Brokers** Annual Conference, September 24-26, 2017, St. Andrews New Brunswick.
- **International Congress of Maritime Arbitrators**, September 25-29, 2017, Copenhagen.
- **Gordon Hearn** will be speaking at the **31st Annual Conference on Transportation Innovation & Cost Savings** being held September 26, 2017 in Burlington, Ontario. Gordon will be presenting a paper on "*When the Broker Fails to Pay: Shipper and Consignee Liability for Freight Charges".*
- **International Marine Claims Conference**, September 27-29, Dublin.
- **Women's International Shipping & Trade Association** Annual Conference, October 3-6, 2017, Rotterdam.
- **Association of Average Adjusters of U.S. & Canada** Annual Dinner, October 5, 2017, New York City.
- **Canadian Transport Lawyers Association** Annual Conference, October 5-7, 2017, Ottawa.
- **Surface Transportation Summit**, October 11th, 2017, Mississauga Ontario.
- **Mare Forum USA 2017 (Maritime Transportation of Energy)**, October 17, 2017, Houston
- **United States Maritime Law Association** Annual Conference, October 18-22, Napa California.

INVITATION TO MESA 2018 CONFERENCE

Fernandes Hearn LLP is one of the sponsors for the **Marine & Energy Symposium of the Americas 2018 ("MESA 2018")** conference in Toronto April 18-20, 2018 in Toronto. The following is the program for the conference.

Where? Omni King Edward Hotel, Toronto Canada

When? 18-20 April 2018

Registration: Opens July 1, 2017 http://www.marineenergysymposium.com

Wednesday, April 18, 2018

6:00 - 8:00 pm Registration - Mezzanine, Omni King Edward Hotel
6:30 - 8:00 pm Opening Reception - Palm Court, Omni King Edward Hotel
8:00 pm Dinner on your own - or join us at a pre-arranged restaurant

Thursday, April 19, 2018

8:00 am to noon Registration - Mezzanine, Omni King Edward Hotel

Time	Joint Session - Vanity Fair Ballroom
9:00 to 10:00 am	Arctic Exploration and Shipping / The Polar Code
10:00 to 11:00 am	Seabed Mining
11:00 to 11:15	Coffee Break
11:15 am to 12:15 pm	Offshore Exploration and Exploitation: Liability and Compensation Issues

12:15 pm to 1:15 pm Lunch - Keynote Address

Concurrent Session Time	Session A - Vanity Fair	Session B - Kensington
1:15 to 2:15 pm	Application of Jurisdiction Clauses in Different Countries	LNG Contracts and Transportation
2:20 to 3:20 pm	Arrest of Vessels in Various Jurisdictions & Alternatives	Update on HNS Convention
3:25 to 4:25 pm	Issues Arising from Project Cargo	Port Security and Liability

6:00 PM MESA 2018 Cocktail Reception and Dinner – Hotel

MESA 2018 CONFERENCE

Friday, April 20, 2018

Concurrent Session	Session A - Vanity Fair	Session B - Kensington
9:00 to 9:55 am	Limitation of Liability by Statute - Conventions and in Contracts	Impact of Climate Change on Shipping and Energy Projects
10:00 to 10:45 am	Autonomous Ships and Equipment	Cyberterrorism in Transportation and Energy Projects
10:45 to 11:00 am	Coffee	Coffee
11:00 to 11:45 am	Roles and Risks for Forwarders in the Next Decade	Pipeline Technologies, Development Issues and Litigation
11:55 am to 12:45 pm	Emerging Issues in Insurance in Marine and Energy	Wind Turbine Litigation

12:45 pm to 2:00 pm Lunch – Presentation on Arbitration in Canada

MESA 2018

the August 20 email. The individual wanted to confirm the transfer of banking information.

After the phone call, the employee changed Toshiba Canada's bank information on the Brick's payment system to reflect the Royal Bank account information. The employee followed the Brick's standard practice on changing account information and the paperwork was reviewed by another Brick employee. Nobody from the Brick ever took any independent steps to verify the change in bank accounts. Nobody contacted the Royal Bank, and nobody contacted Toshiba.

As a result of the change in banking information, payments that should have gone to Toshiba Canada were now going to the mysterious Royal Bank account. A total of ten Toshiba invoices were paid. The total amount transferred to the Royal Bank account was $338,322.22.

The scam was discovered when Toshiba Canada called The Brick asking why their invoices had not been paid.

The police discovered that the Royal Bank account belonged to an individual in Winnipeg who was also the victim of fraud. He had been convinced by an individual purporting to be in Dubai to receive the money as part of the business investment and then transfer some of the money to the individual in Dubai. As a result of the investigation, the Brick was able to recover $113,847.18 of the fraudulently transferred funds.

The Brick made a claim to Chubb Insurance for $224,475.14. This represented the total amount transferred less the amount recovered. Chubb Insurance denied coverage. The Brick contended that its loss should be covered as it fell under the umbrella of funds transfer fraud. The policy defined funds transfer fraud as follows:

> Funds transfer fraud means the fraudulent written, electronic, telegraphic, cable, teletype or telephone instructions issued to a financial institution directing such institution to transfer, pay or deliver money or securities from any account maintained by an insured at such institution without an insured's knowledge or consent.

The court referred to some U.S. decisions on the issues raised, noting at paragraph 21 and 22:

> The defendant [Chubb Insurance] in this action seeks to have the court follow the decision of an American case from the United States District Court for the Central District of California, *Taylor and Lieberman v Federal Insurance Company*, 2:14-cv-03608, unreported. I note that Federal Insurance Company is related to Chubb Insurance. In the case, the Ninth Circuit Court of Appeals examined a case with very similar facts. Emails were sent to a company employee who then acted upon them, transferring money out of the insured's account. The emails were fraudulent. The court held that the insurer was not liable because the Taylor and Lieberman employee requested and knew about the transfers. Although the employee did not know that the email instructions

> were fraudulent, the employee did know about the transfers.
>
> There are other similar pending cases in the United States. It is notable all of the decisions absolving the insurance company of liability seem to involve Chubb Insurance or one of its affiliated companies.

The Brick contended that the policy provision stated that Chubb Insurance would pay for direct loss resulting from funds transfer fraud by a third-party, and that the focus should be on the fraud itself and not on the fraudulent instructions. The judge noted that, while it is true that the clause in question did state that, the clause must be examined in conjunction with the definition of fund transfer fraud contained in the contract. That definition included the words "insured's knowledge or consent". There was no definition in the contract of either the term "knowledge" or "consent". There was no mention anywhere in the insurance policy of the term "informed consent". The judge noted that if the policy contained these words, again it was unlikely that the parties would be before the court. The judge reiterated that, where a word or a term is undefined, the word should be given its "plain, ordinary and popular" meaning, "such as the average policy holder of ordinary intelligence, as well as the insurer, would attach to it."

The Court held at paragraph 25:

> Even if the Brick did not consent to the funds transfer, there is still the issue of whether the transfer was done by a third party. Certainly, the emails with the fraudulent instructions were from a third party. The actual transfer instructions; however, were issued by a Brick employee. There was no one forcing the employee to issue the instructions, there were no threats of violence or other harm. The employee was simply a pawn in the fraudster's scheme. Therefore, the transfer was not done by a third party.

One of the decisions from the U.S. examined by the Court was *Medidata Solutions, Inc. v. Federal Insurance Company*, No. 1:15-cv-00907 (S.D.N.Y. Mar. 10, 2016) that was pending before the in New York. Employees at Medidata Solutions Inc. ("Medidata") were deceived into transferring $4.8 million to a foreign bank account based on emails appearing to come from a Medidata executive. Federal Insurance Company insured Medidata under a crime policy providing coverage for computer fraud, forgery, and funds transfer fraud. The policy provided coverage against loss from "the unlawful taking of fraudulently induced transfer of money" resulting from "fraudulent electronic … instructions" directing a financial institution to pay funds without the knowledge or consent of the organization purportedly issuing instructions.

Federal Insurance Company denied coverage stating that its policy covered involuntary transfers affected by hackers, forgers and imposters, not voluntary transfers effected by authorized signatories.

Interestingly, less than a month after *Brick v Chubb* was rendered, the *Medidata* decision was handed down by the Southern District of New York (see *Medidata Solutions Inc. v Federal Ins. Co*, Case No 15-CV-907 (SDNY July 21, 2017). The Court in *Medidata* held that while the employee did knowingly carry out the transfer in this case, the Court found that the 'funds transfer fraud' insurance still applied. In the Court's opinion, stealing through a trick is still stealing, and the

fraudster being a step removed from the actual transfer was not sufficient to deny coverage.

Cyber coverage litigation is relatively new and it remains to be seen whether the reasoning in *Brick v Chubb* or the *Meditata* decision will eventually prevail.

In the meantime, companies should implement some practical steps to avoid falling victim to these scams:

a) Always verify any requested changes. Contact your vendors/customers using your old contact information.

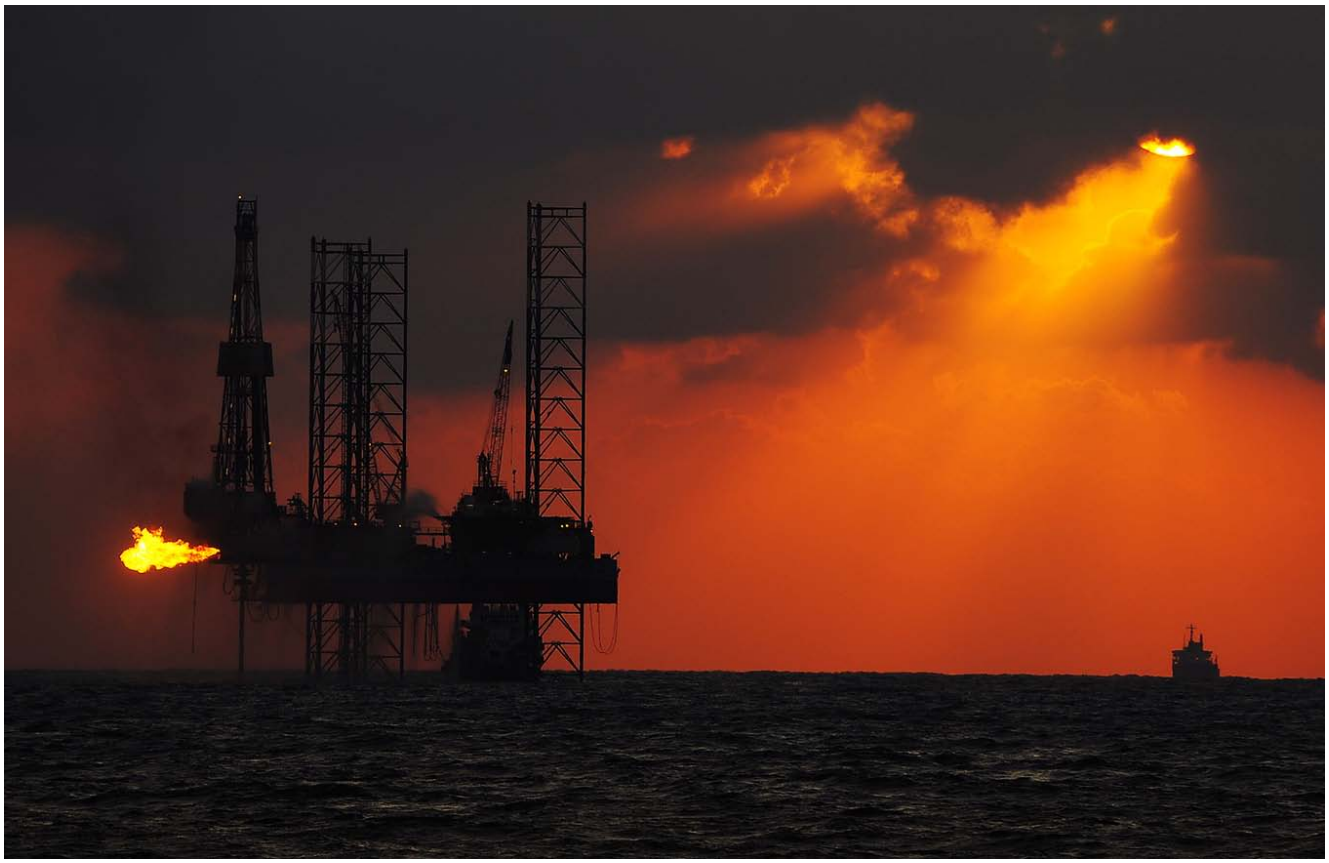
b) Emails directing payment should get special attention and scrutiny. Examine email addresses closely. Beware of emails with extensions that are similar to the company email but not exactly the same. For example, ".co" instead of ".com".

c) Be wary of requests for secrecy or urgent action.

d) Establish protocols for wire transfers and data privacy. Train your employees on those protocols.

Rui M. Fernandes

Follow *Rui M. Fernandes on Twitter @RuiMFernandes* and on Linkedin. See also his blog at http://transportlaw.blogspot.ca



2. Obstructive Docks

The recent decision in *Day v. Valade*, (*1) demonstrates the difficulty in establishing that a waterfront dock is a nuisance and affects a "neighbour's" use and enjoyment of their property.

Background

The Valade and the Day families own adjacent waterfront properties on a self contained lake located near Bedford, Nova Scotia. The Days' property was located east of the Valades' property within a small cove. The Valades installed a seasonal wharf and dock that extended 57 feet into the lake. The Days claimed that the wharf and dock infringed their right to access the lake with their sailboat, was a nuisance as it affected the use and enjoyment of their property, and created a potential safety issue for their young daughter who would be learning to sail. The Days sought an order requiring the removal of the wharf and dock and sought damages for the infringement of their rights, which had occurred to date.

Riparian Rights and Public Navigation

The Days argued that the wharf and dock interfered with their riparian rights to access the waters of the lake. Justice Wood reviewed various cases and concluded that, "the riparian right of access entitled the land owner to get to navigable waters from every point on their shoreline without having to travel around a manmade obstruction"(*2). Justice Wood explained that the definition of navigable waters is dependent upon the circumstances. In this case, the lake was to be used for a variety of recreational purposes including fishing, swimming, and boating. Mr. Day's sailboat drew three feet of water when its centerboard was down, therefore the Days' riparian right of access entitled them to place the boat in the lake at any point along their shoreline and travel directly out to reach a depth of at least three feet. Based on the evidence submitted by the Days, which included a sounding plan prepared by a professional engineer and land surveyor as well as various photographs, Justice Wood found that the Days were able to access navigable waters without any interference by the wharf and dock.

Although the Days did not argue that the wharf and dock interfered with their public right of navigation, Justice Wood thought it wise to distinguish riparian rights from the public right of navigation, and referred to a passage from *Chaplin & Co. Ltd. v. Westminster Corpn*., reproduced in *Nicholson v. Moran*, [1949] B.C.J. 102.

> A person who owns premises abutting on a highway enjoys as a private right the right of stepping from his own premises on to the highway, and if any obstruction be placed in his doorway or gateway, or if it be a river, at the edge of his wharf, so as to prevent him from obtaining access from his own premises to the highway that obstruction would be an interference with a private right. But immediately he has stepped on to the highway and is using the highway, what he is using is not a private right but a public right. (*3)

Once the Days were in navigable waters, they were exercising their public right of navigation and could only sustain a claim if they could prove special damages. Justice Wood found that the evidence before him did not suggest that the

wharf and dock interfered with the Days' public right of navigation resulting in special damages to them. Only 14% of the total distance of the channel used by the Days to access the greater lake was blocked by the wharf and dock. This limited restriction was found not to support a claim for special damages.

Nuisance

The Days argued that the wharf and dock interfered with the use and enjoyment of their property in a manner that was both substantial and unreasonable. Justice Wood concluded that any impact of the wharf and dock on the public right of navigation was not an interference with the Days' property interests. The Days further claimed that the wharf and dock affected their privacy as people on the dock had a better vantage point to see into their backyard. On this point, Justice Wood found that anyone exercising the public right of navigation on the lake would have the same or better opportunity. The Days' evidence did not demonstrate a substantial interference in their property interests, and thus did not meet the threshold requirement to establish a nuisance.

Negligence

In a final attempt at having the wharf and dock removed, the Days argued that the Valades owed a duty of care as neighbouring land owners, and that their conduct in installing the wharf and dock breached that duty. Justice Wood found that the Days did not establish that they had suffered any injury or damage as a result of the wharf and dock, and thus their claim in negligence failed.

The Days did not establish a legal basis for the removal of the wharf and dock or for damages, and as a result the application was dismissed.

Andrea Fernandes

Endnotes

(*1) *Day v. Valade*, 2017 NSSC 175.

(*2) *Day v. Valade*, 2017 NSSC 175 at para 30.

(*3) *Chaplin & Co. Ltd. v. Westminster Corpn.*, [1901] 2 Ch 329, as reproduced in *Nicholson v. Moran*, [1949] B.C.J. 102.

3. False Exculpatory Statements: Drawing a Grey Line Between Disbelief and Fabrication

On March 15, 2014, a truck driver named Craig Wright left for Florida with a load of shampoo and cosmetics. On March 20, 2014, he returned to Canada with an ordinary load of okra. However, on inspection, the Canada Border Services Agency ("CBSA") found that he was also carrying 68 kilograms of marijuana and a magazine of ammunition. He was charged with respect to the marijuana, but not the ammunition (for unknown reasons).

When the CBSA officers interrogated Mr. Wright, he said that he simply did not know about the marijuana. He said that was not involved with loading the cargo and that he had never opened the refrigerator ("reefer") unit, where the contraband had been hidden. In effect, it was a mystery to him as to how it got there.

Mr. Wright did not testify in his own defence at trial. Thus, he was never cross-examined on the witness stand. Presumably, though, his story had not changed: the presence of the marijuana was left unexplained.(*1)

The trial judge in *R. v. Wright* rejected Mr. Wright's story on the basis that Mr. Wright's fingerprints were found on the reefer unit, which he had told the attending CBSA officers, and later the RCMP, would be barren of his prints. Effectively, the trial judge branded his testimony as that of a self-serving liar.

In support of the trial judge's conclusion, Mr. Wright's inaccurate exculpatory statements with respect to the reefer had been rather definitive, as illustrated by the following exchange, which was read into evidence at trial:

RCMP officer: Uhm, then I, I, just want to make sure, I'm going to ask you one more time. You've never ever opened that reefer, ever?

Appellant: No I have no reason for going up and opening it?

RCMP officer: Your fingerprints would never, ever be on that reefer then?

Appellant: No…

RCMP officer: Correct?

Appellant: …I'm going to say no.

The trial judge also considered circumstantial evidence in order to test the veracity of the claim, including that Mr. Wright was the only person with access to the truck, that the reefer was not accessible from the outside, and that the reefer was also inaccessible from the inside while it was loaded with cargo (thus eliminating the possibility that the contraband was loaded during the northbound journey from Florida without Mr. Wright being aware of it). Other circumstantial evidence included the fact that Mr. Wright appeared nervous and that he fainted before being interviewed.

At trial, it was concluded that Mr. Wright was a party or an accessory to the loading of the marijuana. He was convicted accordingly.

Mr. Wright appealed on the basis that the mere presence of his fingerprints did not support a conclusion that he touched the unit specifically in connection with the offence. The Court of Appeal for Ontario disagreed with the proposition that the evidence was useless because it did have probative value. However, the Court of Appeal felt that it ought not to have

been elevated to an inference of criminality in the circumstances.

In coming to its conclusion, the Court of Appeal reiterated its position in earlier cases, such as *R. v. O'Connor*, (*2) *R. v. B.(P.)*, (*3) and *R. v. Coutts*, (*4) which all drew a distinction between exculpatory statements that were merely unbelievable from ones that were actually fabricated or concocted for the purpose of avoiding liability.(*5) Following those cases, the merely unbelievable statements were given no weight as evidence at trial. Only the deceitful statements could support a judicial inference of criminal guilt. In each case, the burden to prove the fabrication rested on the Crown.

In proving fabrication, the case law posits that the Crown must lead some evidence independent of the evidence that discredited the exculpatory statement. In other words, the Crown's position has to be supported by some other evidence.

In most cases, the independent evidence necessary to obtain an adverse judicial inference would be circumstantial evidence, such as the fact that the reefer was inaccessible to other people in Mr. Wright's case. This is because hard extraneous evidence – such as a video from a loading dock, for example – would not generally be available.

The trouble is that the case law does not tell us which circumstantial pieces of evidence will be sufficient to prove falsification, as distinguished from mere disbelief. In Mr. Wright's case, inaccessibility by any other person to the reefer unit was not enough for the Court of Appeal to infer that he had concocted the story, but it had been sufficient for the trial judge. It begs the question: what evidence would have been sufficient for the Court of Appeal, short of actual extraneous evidence like a video from a loading dock?

Unfortunately, once a statement has been determined to be false, it would seem probable that the same trier of fact (either a judge or a jury) would be predisposed to finding a rationale that the accused was deliberately concocting a falsehood in the circumstances. This is what apparently happened to Mr. Wright.

This is particularly concerning for truck drivers, who are generally reliant on bills of lading, commercial invoices, or other documents to know the contents of their cargo, even where they have been present for loading. In some cases, the Crown might try to fashion their denials of culpability as "fabrications" that could support a judicial inference to the contrary. In the ensuing courtroom battle, lawyers will need to argue about what circumstantial evidence is sufficient to elevate a merely inaccurate statement to a "fabricated" one.

Alan S. Cofman

Endnotes

(*1) *R. v. Wright*, 2017 ONCA 560 (trial reasons are unreported).

(*2) (2002), 62 O.R. (3d) 263 (C.A.).

(*3) R. v. B.(P.), 2015 ONCA 738.

(*4) (1998), 40 O.R. (3d) 198 (C.A.), leave to appeal ref'd, [1998] S.C.C.A. No. 450.

(*5) The Court of Appeal also noted a similar, recent conclusion by the Supreme Court of Canada in a case concerning a false alibi, *R. v. Laliberté.*(*5) 2016 SCC 17. A similar conclusion was also reached recently in *R. v. Clifford*, 2017 SCC 9, arising from an arson case in British Columbia.

4. Forum Selection Clauses in Contracts and Consumer Protectionism: Are We on a Slippery Slope?

Introduction

Parties enter into written contracts for purposes of clarification and certainty. When parties are in different jurisdictions, the contract might specify what body of law governs in the event of a dispute. The contract might also specify a particular jurisdiction where court action or arbitration is to be commenced to resolve a dispute.

The enforceability of such a term – often referred to as a forum selection clause – has for some time been settled by the Supreme Court of Canada decision of *Z.I. Pompey Industries v. ECU-Line N.V.* (*1) ("*Pompey"*). That decision noted that forum selection clauses are common components of international commercial transactions and that such clauses "have been applied for ages" by the courts. They are "generally to be encouraged by the courts as they create certainty and security in transactions, derivatives of order and fairness, which are critical components of private international law". The enforceability of such clauses reflects the desirability that "parties honour their contractual commitments and is consistent with the principles of order and fairness at the heart of private international law." This decision and line of reasoning has been continually upheld by the various courts in Canada, resting with the recent decision of the Ontario Court of Appeal in the case of *2Source Manufacturing Inc. v. United Technologies Corporation* (*2).

A recent decision of the majority of the Supreme Court of Canada in *Douez v. Facebook, Inc.* (*3) ("*Douez"*) however raises "a potential qualification to the established "landscape" in discerning between commercial and consumer contracts." Before commenting on this development it may be of benefit to further explore the law and the guiding principles firmly in place up to the *Douez* decision.

The Conventional Test for Enforceability

The *Pompey* decision directs a two-stage analysis with respect to forum selection clauses. First, the court must determine whether the forum selection clause is enforceable and applies to the circumstances. Secondly, the court must assess whether there is a "strong cause" in favour of denying a stay, despite an enforceable forum selection clause. Once it has been determined that there is an enforceable forum selection clause that is applicable to the action in question, the burden then shifts to the plaintiff to demonstrate "strong cause" as to why the court should decline to give effect to the clause.

In the *2Source Manufacturing Inc.* decision, the Court of Appeal held that the factors that may justify a departure from the general principle that forum selection clauses are to be enforced are "few":

"The factors that may justify departure from that general principle are few. The few factors that might be considered include the plaintiff being induced to agree to the clause by fraud or improper inducement or the contract is otherwise unenforceable, the court in the selected forum does not accept jurisdiction or otherwise is unable to deal with the claim, the claim or the circumstances that have arisen are outside of what was reasonably contemplated by the parties when they agreed to the clause, the plaintiff can no longer expect a fair trial in the selected forum due to subsequent events that could not have been reasonably anticipated, or enforcing the clause in the particular case would frustrate some clear public policy. Apart from circumstances such as these a forum selection clause in a commercial contract should be enforced: *Expedition Helicopters Inc. v. Honeywell Inc.* (*4)

The Recent Douez v. Facebook, Inc. Decision: What if it Can be Said that the Forum Selection Clause Was in Effect "Foisted" Upon a Consumer?

Facebook, Inc. ("Facebook") is an American corporation headquartered in California. It

operates one of the world's leading social networks and generates most of its revenues from advertising. The plaintiff, Douez, is a resident of British Columbia and had been a member of Facebook since 2007. In 2011, Facebook created a new advertising product called "*Sponsored Stories*", which used the name and picture of Facebook members to advertise companies and products to other members. The plaintiff brought an action in British Columbia against Facebook alleging that it used her name and likeness without consent for the purposes of advertising, in contravention to s. 3(2) of British Columbia's *Privacy Act*. The plaintiff also sought certification of her action as a class proceeding under the British Columbia *Class Proceedings Act*. The proposed class included all those British Columbia residents who had their name or picture used in *Sponsored Stories*. The estimated size of the class was 1.8 million people.

Under s. 4 of the *Privacy Act*, actions under the *Act* must be heard in the British Columbia Supreme Court. However, as part of the registration process, all potential users of Facebook must agree to its terms of use, which include a forum selection and choice of law clause requiring that disputes be resolved in California according to California law.

Facebook brought a preliminary motion to stay the British Columbia court action on the basis of this forum selection clause. The chambers judge declined to enforce the clause and certified the class action. The British Columbia Court of Appeal reversed the stay decision of the chambers judge on the basis that Facebook's forum selection clause was enforceable and that the plaintiff had failed to show strong cause not to enforce it.

At The Supreme Court of Canada: What to do With an Internet Application Form Instructing a Consumer to Click "I Agree" to Terms of Use?

A slim majority of the Supreme Court of Canada (4 judges to 3) found Facebook's forum selection clause to be unenforceable and allowed the plaintiff's appeal, with the result that the action could proceed in the British Columbia courts. Interestingly, two factions of this 4 judge majority reached this result in two different ways.

1) Justices Karakatsanis, Wagner and Gascon

These judges formed the "majority" with Justice Abella. They considered the conventional *Pompey* approach in the context of the consumer contract of adhesion (*i.e.* "sign here") nature of this case. They accepted that, absent legislation overriding a forum selection clause, the two-step approach set out in *Pompey* applies to determine whether to enforce a forum selection clause and stay an action brought contrary to it. With the first step, the party seeking a stay must establish that the clause is valid, clear and enforceable and that it applies to the cause of action before the court. If this party succeeds, the onus shifts to the plaintiff who must show strong cause why the court should not enforce the forum selection clause and stay the action. At this second step of the test, a court must consider all the circumstances, including the convenience of the parties, fairness between the parties and the interests of justice. Public policy may also be a relevant factor at this juncture. As a critical compass bearing for the eventual disposition of the issue, the judges commented that the "strong cause factors have been interpreted and applied restrictively in the commercial context, but commercial and consumer relationships are very different". Noting that the consumer context may provide strong reasons not to enforce forum selection clauses, the judges qualified the *Pompey* approach, suggesting that courts should take into account of all the circumstances of the particular case, including public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake.

Continuing with the above principles in mind, these judges held that, with respect to the first step of the *Pompey* test, the forum selection clause contained in Facebook's terms of use was enforceable. As to the second step of the test, however, the plaintiff had met her burden of establishing that there was strong cause not to enforce the forum selection clause:

i) most importantly, the claim involved a consumer contract of adhesion between an individual consumer and a large corporation and a statutory cause of action implicating the quasi-constitutional privacy rights of British Columbians;

ii) It was clear from the evidence that there was gross inequality of bargaining power between the parties;

iii) Individual consumers in this context were faced with little choice but to accept Facebook's terms of use;

iv) Canadian courts have a greater interest in adjudicating cases impinging on constitutional and quasi-constitutional rights because these rights play an essential role in a free and democratic society and embody key Canadian values;

v) This matter required an interpretation of a statutory privacy tort and a British Columbia court's interpretation of privacy rights under the *Privacy Act* would provide clarity and certainty about the scope of the rights to others in the province. The British Columbia Supreme Court, as compared to a California one, would be better placed to assess the purpose and intent of the legislation and to decide whether public policy or legislative intent prevents parties from opting out of rights created by the *Privacy Act* through a choice of law clause in favour of a foreign jurisdiction, and

vi) The expense and inconvenience of requiring British Columbian individuals to litigate in California, compared to the comparative expense and inconvenience to Facebook, further supported a finding of strong cause.

Overall, the public policy concerns weighed heavily in favour of a "strong cause" for the plaintiff to be able to advance her claim in British Columbia instead of having to do so in California. Accordingly Justices Karakatsanis, Wagner and Gascon ruled in favour of the plaintiff.

3 + 1 = 4: Justice Abella Weighs In to Form a Majority Ruling for the Plaintiff

As mentioned above there was a second "faction", or element, to the majority judgment. In addition to agreeing with the aforementioned judges on the second step of the analysis (yielding a result that the plaintiff had "shown cause" in favour of not giving effect to the clause), Justice Abella found that Facebook had failed in its initial first step onus of demonstrating that the clause was even enforceable.

Justice Abella noted that, in becoming a member of Facebook, a consumer had to accept all the terms stipulated in the "terms of use", including the forum selection clause without any bargaining or adjustments. Addressing the first test in *Pompey,* Justice Abella took into consideration the notions of public policy, duress, fraud, unconscionability and the lack of bargaining equality. Justice Abella lamented the burden of forum selection clauses on consumers in terms of limiting their ability to access a court system, the notion of added costs together with logistical impediments and delays, while also noting that, when online consumer contracts of adhesion contain terms that unduly impede the ability of consumers to vindicate their rights in domestic courts, public policy concerns outweigh those favouring enforceability of a forum selection clause.

Tied to these concerns was the "grossly uneven bargaining power" of the parties. Facebook is a multi-national corporation, which operates in dozens of countries. In turn the plaintiff is a private citizen who had no input into the terms of the contract and, in reality, no meaningful choice as to whether to accept them given Facebook's undisputed indispensability to online conversations.

Justice Abella noted that the doctrine of unconscionability also applied to render the forum selection clause unenforceable. The inequality of bargaining power between Facebook and the plaintiff in such an online contract of adhesion gave Facebook the unilateral

ability to require that any legal grievances of the plaintiff could not be vindicated in British Columbia where the contract was made, but only in California where Facebook has its head office.

The "Dissenting" Judges: 3 out of the 7

Chief Justice McLachlan and Justices Moldaver and Côté disagreed with the majority of the Court and ruled that the forum selection clause should be upheld. They agreed on the applicable Pompey test, but disagreed as to its application by the majority. They found that the plaintiff had not shown strong cause for not enforcing the forum selection clause to which she had agreed. Accordingly, they found that the action should be tried in California, as the contract required.

With respect to the first step of the *Pompey* test, the dissenting judges found that Facebook had discharged the burden of establishing that the forum selection clause was enforceable and applied in the circumstances:

i) Facebook had established that an enforceable contract could be formed by clicking an appropriately designated online icon;

ii) The contract, on its face, was clear and there was no inconsistency between a commitment to strive to apply the privacy law of British Columbia and an agreement that disputes will be tried in California;

iii) s. 4 of the *Privacy Act* granted the Supreme Court of British Columbia subject matter jurisdiction over *Privacy Act* claims to the exclusion of other British Columbia courts, but nothing in the language of s. 4 suggested that it could render an otherwise valid contractual term unenforceable, and

iv) While a court can refuse to enforce otherwise valid contractual provisions that offend public policy, the party seeking to avoid enforcement of the clause must prove the existence of an overriding public policy that outweighs the very strong public interest in the enforcement of contracts. No such overriding public policy was found on the facts of this case.

The dissenting judges noted that forum selection clauses are not, by their nature, unconscionable or contrary to public policy, but are to be supported by strong policy considerations, serving the important role of increasing certainty and predictability in transactions that take place across borders. These judges also noted this because a contract is in standard form did not presumptively affect the validity of such a clause.

As to the second step of the *Pompey* test, these judges found that the plaintiff had not shown strong cause why the forum selection clause should not be enforced:

i) the facts in the case and the evidence to be adduced did not shift any balance of convenience from the contracted state of California to British Columbia;

ii) the British Columbia "tort" cause of action created by the *Privacy Act* did not require special expertise and the courts of California had not been shown to be disadvantaged in interpreting the *Privacy Act* as compared with the Supreme Court of British Columbia;

iii) Nothing in the plaintiff's situation suggested that the class action she wished to commence could not be conducted in California just as easily as in British Columbia;

iv) There was also no suggestion that Facebook did not genuinely wish all litigation with users to take place in California; and

v) Finally, the plaintiff had not shown that the application of the forum selection clause would deprive her of a fair trial.

From a general policy perspective, these dissenting judges noted that applying the strong cause test in a nuanced manner or modifying the test to place the burden on the defendant in the context of consumer contracts of adhesion would amount to inappropriately overturning the Court's decision in *Pompey* and substituting new and different principles. Nuancing the strong

cause test by considering the factor of the consumer's lack of bargaining power would conflate the first step of the test set out in *Pompey* with the second step, in a way that profoundly alters the law endorsed in *Pompey*. It is at the first step that inequality of bargaining power is relevant. In this case, Facebook had demonstrated that the forum selection clause was enforceable and the plaintiff had failed to establish strong cause why the forum selection clause to which she had agreed should not be enforced.

Conclusion and the Take Away

In the result, the plaintiff was permitted to continue her action in the British Columbia courts.

From a 'big picture' perspective, it will now remain to be seen whether this decision has the effect (drawing on the stated concerns from the dissent) of conflating or reducing the conventional distinct two part test into one test in the context of a contract of adhesion being entered into, with one party being asked by the other to agree to certain "terms of use" by simply clicking an "I Agree" icon. Certainly, this might be cause for pause in the context of certain classic consumer transactions where there is a true inequality of bargaining power. But what might be said of the commercial context where more sophisticated parties are transacting via the internet? Just exactly where does one draw the line between a commercial relative to a consumer context? While many of the policy concerns cited above will call for specific considerations of the facts of each case, it remains to be seen how this might erode the strong policy consideration of contractual certainty and predictability in transactions that take place across borders.

Gordon Hearn

Endnotes
(*1) 2003 SCC 27 (CanLII), [2003] 1 S.C.R. 450
(*2) 2017 ONSC 4409
(*3) 2017 SCC 33 (CanLII)
(*4) 2010 ONCA 351 (CanLII), 100 O.R. (3d) 241

6. Loss of Amenity of Vacation Not Compensable from Air Carrier

In 1972, Lord Denning forged the principle that a claimant whose holidays were spoiled by reason of a breach of contract was entitled to be compensated for the "disappointment, the distress, the upset and frustration" arising from the breach. In that case, the plaintiff's especial disappointment arose from the absence of the promised English-speaking staff at a vacation hotel in Switzerland (*1).

In *Stuckless and Legge v Air Canada* (*2), the plaintiffs were likewise left in an unenviable situation in Switzerland. In this case, the plaintiffs had flown to Switzerland from St. John's with Air Canada. They were to ski and enjoy New Year festivities in the Alps.

By reason of a series of inexplicable blunders, the plaintiffs' luggage was delayed in arriving to Switzerland. Much worse however, owing to apparent mishandling by the airline's local agents, the baggage was only eventually delivered at 6:30 p.m. on December 31st, some 3.5 days after the plaintiffs arrived. This greatly diminished the enjoyment of the vacation for the plaintiffs, who even missed their New Year's Eve engagement while waiting to receive their bags.

The plaintiffs brought suit and claimed their out of pocket expenses incurred by reason of the delay in delivery of their checked baggage, as well as a portion of their airfare and hotel costs which had been significantly wasted given that they spent more time on the telephone to the airline than they did enjoying their winter vacation.

Prior to trial the airline had compensated the plaintiffs in full for their out of pocket expenses. The claim accordingly proceeded solely in respect of the issue of compensation for loss of enjoyment of their vacation. The Small Claims Division of the Provincial Court of Newfoundland and Labrador spared no grace for the manner of handling by Air Canada. Given the small claims courts' role as a court of equity, with a tendency to be plaintiff-oriented, a bystander may have expected the Court to find in favour of the plaintiff. Indeed there is certainly precedent for small claims courts to abandon established case law in aviation claims and adjudicate the claim in accordance with general legal principles (*3).

This was not the approach of Skanes P.C.J. for the Court. The judge, with the benefit of submissions from legal counsel, who have no rights to appear in small claims court in some jurisdictions, overviewed the array of case law from upper courts across the country, which have considered claims for various types of disappointment, loss of amenity or pain embarrassment by reason of the failure of air carriers to perform the contract of carriage as expected (*4). The line of cases ultimately concludes that, with the Supreme Court of Canada decision in the infamous *Thibodeau* case (*5), where the court held that the plaintiffs could not be compensated for breach of rights under the *Official Languages Act,* since such a head of damage was not prescribed by the *Montreal Convention* (*6), which exclusively governed the airline's liability.

Skanes P.C.J. properly concluded that the case law determines that Article 19 of the *Montreal Convention* governing carrier liability in respect of checked baggage does not provide a basis for awarding non-pecuniary general damages. The out of pocket expenses were compensable under the *Convention*, but had already been indemnified in full, the disappointment, upset and frustration were not, however, compensable under the *Convention* as the exclusive code of liability of the carrier.

Mark Glynn

Endnotes

(*1) *Jarvis v. Swan Tours Ltd.* [192] EWCA 8

(*2) *Stuckless and Legge v Air Canada*, 2017 CanLII 53798 (NL PC)

(*3) *Durunna v. Air Canada*, 2013 ABPC 31

(*4) *Chau v. Delta Airlines* 67 OR (3d) 108 ; *Fares v. Air Canada*, 2012 NSSC 71

(*5) *Thibodeau v. Air Canada*, 2014 SCC 67

(*6) *Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal Convention 1999) in force in Canada pursuant to *Carriage by Air Act*, R.S.C., 1985, c. C-26

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CONTEST

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