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ROSSITER BUSINESS LEGAL ADVISER

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This resource is a practice-oriented how-to guide to business transactions. It features commentary, materials and precedents covering: the buying and selling of a business; the family trust; shareholders' buy-sell agreements; Investment Canada; tax implications of a business purchase/sale; incorporation; executive compensation, and employment law. It also refers to pertinent sections of the *Income Tax Act* and Interpretation Bulletins.

This release features updates to the commentary in the following Chapters: 1 (Choice of Business Form), 2 (Purchase and Sale of Going Concern), 6 (Investment Canada), 9 (Employment Law), 10 (Business Practices), and 11 (E-Business Law).

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Highlights:

- **Choice of Business Form – Corporation – Economic Tort Liability – Conspiracy-Related Liability – International Fraud Conspiracy – Saudi Arabia Victimized – Directing Mind in Ontario – Non-Resident Defendants Connected to Fraudulent Scheme – Ontario Court Having Jurisdiction –** The assessment of jurisdiction factors against each defendant in a commercial fraud case was unnecessary when they were alleged to have conspired under a single controlling mind in Ontario. In this case, the plaintiffs were corporations established and funded by the Kingdom of Saudi Arabia to pursue domestic counterterrorism activities. They alleged they were victims of a fraud orchestrated by the former Saudi Crown Prince, MBN, together with SKA, a former high-ranking government official. The plaintiffs claimed that SKA, now a Toronto resident, who was the chief architect of the fraud, misappropriated $3.5 billion USD from them, using family members, particularly his son, MA, and close business associates, and nominee shareholders, to conceal his ultimate control and beneficial ownership of the misappropriated assets. The plaintiffs alleged that the misappropriated assets had been hidden in jurisdictions throughout the world through a web of corporate structures, including the defendant corporations, said to be controlled by MA, and other nominees on behalf of SKA. The defendants, who had no presence in Ontario, contested the Superior Court of Justice's jurisdiction over them. They moved to have the action permanently stayed or dismissed against them.

  In dismissing the motion, the judge found a real and substantial connection between the subject matter of the action, the defendants, and Ontario. The plaintiffs characterized their claim as an action in conspiracy to defraud, which began with a misappropriation of assets in Saudi Arabia and continued with manipulation of assets from Toronto by SKA, with the assistance and cooperation of others, particularly his son, MA. SKA claimed he was in Turkey when the Crown Prince was imprisoned, and fearing his own imminent assassination, he gifted substantially all of his worldwide assets to his son MA through a gift deed that he prepared himself in Turkey on June 21, 2017, without legal advice. The plaintiffs marshalled evidence of post-gift transactions and patterns of transactions by SKA and MA that they argued called into question the validity of the gift. The judge found that the case of *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 (S.C.C.) identified four

presumptive connecting factors: a) the defendant was domiciled or resident in Ontario; b) the defendant carried on business in Ontario; c) the tort was committed in Ontario; or d) a contract connected with the dispute was made in Ontario, and only one needed to be established to ground jurisdiction. The motion judge found connections between the defendants, the subject matter of the litigation, and Ontario, based on contracts made in Ontario, property located in Ontario, and what she termed "jurisdiction over the claim as a whole", with the tort of conspiracy located at the heart of the claim. The defendants appealed, and their appeal was dismissed.
The inferences that the motion judge drew - including that MA had less apparent involvement in the management of the assets than the motion judge would have expected from someone whose full-time job was managing those assets - were available to the motion judge on the evidence before her, and her failure to expressly mention other evidence that the defendants argued supported a contrary inference did not mean the motion judge ignored or misapprehended that evidence. The motion judge did not proceed on the basis that a finding of jurisdiction over one defendant would always be sufficient to ground jurisdiction over any others. The finding of jurisdiction over MA, and the corporate defendants was tightly connected with the allegation of a conspiracy, and the parties' respective roles in carrying out the conspiracy from Ontario. The Court of Appeal ruled that assessing jurisdiction factors against each defendant in a commercial fraud case was unnecessary when they were alleged to have conspired under a single controlling mind. The motion judge found connections through the four presumptive factors. For the defendants to succeed on the appeal, it would be necessary therefore to find that the motion judge erred with respect to all four. The motion judge did not err in finding that the gift deed was sufficiently related to the conspiracy, and the fraudulent scheme to ground jurisdiction over both SKA and MA, the recipient of the gift. Given the centrality of the claim of conspiracy within the claim as a whole, the motion judge's focus of analysis was appropriately not on the actions of individual defendants in isolation, but on their actions — sometimes separate, sometimes together — in working towards a common end: *Sakab Saudi Holding Company v. Jabri*, 2022 ONCA 496, 2022 CarswellOnt 8952, [2022] O.J. No. 2904 (Ont. C.A.).

- **Franchise – Licence Agreement – Termination Provision - Where Licensee "Threatens to Cease to Carry on Business"– Objectively Credible Threat Required – Emotional Response to Licensor's Mistaken Interpretation – Threshold Not Met to Terminate Agreement –** Where the termination provision in a license agreement

provided that the licensor could terminate the agreement if the licensee "threatens to cease to carry on business", such provision required an objectively credible threat to cease carrying on business, and the licensee's emotional response to the licensor's mistaken interpretation of their loan agreement did not meet that threshold. The conclusion that the licensor acted in bad faith in terminating the agreement was not justified. In this case, the licensor held the rights to the "Tokyo Smoke" cannabis brand that it licensed to retail operators such as the licensee. The licensee had won a provincial lottery to open a retail cannabis store in Toronto. The parties entered into a series of agreements for the operation of a Tokyo Smoke-branded cannabis store, including a licence for use of the brand and a sublease whereby the licensee rented the retail premises from the licensor. In addition, the licensor offered a loan of $1.5 million for start-up costs and rent, and a branding inducement fee of $2 million payable upon the licensee's receipt of its retail store authorization from the Alcohol and Gaming Commission of Ontario.

Two days prior to opening the store, a dispute arose over the licensor's payment of the licensee's rent from the loan funding. The licensee advised it would not open the store due to nonpayment. The licensor determined that the licensee's principal's threat to cease business operations was an event of default under the license agreement and was a breach of the parties' agreement. The licensor terminated the relationship, and refused to pay the branding fee. The licensor brought an application seeking a declaration that the licensee had breached the various agreements, that the branding fee was not payable, and that the licensee must vacate the rented premises. The application judge found the licensee had no basis to terminate the agreements, and had acted in bad faith. The licensor was ordered to pay the branding fee. The licensor appealed. The finding of bad faith was set aside; the appeal was otherwise dismissed.

The application judge did not err in finding that the licensor's termination of the licence agreement was invalid. The judge reasonably interpreted the termination provision "threatens to cease to carry on business" as requiring an objectively credible threat to cease carrying on business. The provision was directed towards credible threats to cease to carry on business, which would require licensor to take action to preserve its intellectual property rights. Three communications from the licensee to the licensor did not constitute a threat to cease to carry on the business that would entitle licensor to terminate the agreement. The judge reasonably characterized the licensee's statements as emotional frustration rather than a threat triggering termination. The frustration was caused by the licensor mistakenly indicating that the initial loan

draw did not fully cover the first month's rent. When viewed in context, the statements did not meet requirements of the parties' termination clause was reasonable. There was no objective intent. A real risk that the principal's threats would be carried out was required and was not shown. However, the judge erred in finding that the licensor breached its duty of good faith, as there as no basis for finding any dishonesty or that the licensee was knowingly misled about the licensor's intentions. There was no basis for finding that the licensor's change in position was capricious or arbitrary. The finding that the licensor sought to "pounce" on an opportunity to end its relationship with the licensee and avoid the branding fee was insufficient to justify a finding of bad faith: *2161907 Alberta Ltd. v. 11180673 Canada Inc.*, 2021 CarswellOnt 12553, 2021 ONCA 590, 34 R.P.R. (6th) 177, 462 D.L.R. (4th) 291 (Ont. C.A.), affirming 2020 CarswellOnt 17496, 2020 ONSC 5409 (Ont. S.C.J.).

- **E-Business – Internet Advertising – Portable Backup Hard Drives – Inadvertently Described as Having Incorrect Transfer Speed – Such Speed Currently Impossible - Defence of Mistake Available –** Where the retailer, in an online advertisement, offered portable backup hard drives described as having an incorrect (and impossible) transfer speed, the retailer successfully raised the defence of mistake, on appeal, as the doctrine of mistake related to the question of contract formation, and the evidentiary record before the court was sufficient to address the issue. In this case, the defendant [the respondent] published an online advertisement offering for sale external portable backup hard drives which could transfer data between the device and a computer at a speed of 5,120 MB per second. On the strength of this advertised data transfer speed, the plaintiff [the appellant] purchased four (4) units. It quickly became apparent that the defendant's representations with respect to data transfer speed were incorrect. The manufacturer of the hard drives confirmed that the correct data transfer speed was "up to 120 MB/s" - not 5,120 MB per second, as advertised. In other words, the defendant mistakenly placed the number "5" in front of the actual data transfer speed so that the advertised speed became exactly 5,000 MB per second (almost 43 times) greater that what the external portable backup hard drive could achieve in reality. The defendant offered to refund the plaintiff for the amounts paid if he would return the four (4) external hard drives. The plaintiff refused this offer and, instead brought an action for damages in the Small Claims Court for breach of contract against the defendant. His claim for damages was denied, and he appealed to the Nova Scotia Supreme Court. On the appeal, the defendant raised for the first time the defence of mistake. The defendant was permitted to raise the defence of mistake, and the plaintiff's appeal

was dismissed.

The preliminary issue was whether the defendant should be entitled to raise the defence of mistake on appeal. There did not appear to be any dispute that the defendant did not argue mistake before the Adjudicator, and the Adjudicator did not refer to the doctrine of mistake in her decision. Neither side provided any case law as to when the court should exercise its discretion to entertain issues being raised for the first time on appeal but, in the court's view, this was a preliminary issue which merited attention. In the court's view, the issue being raised by the defendant for the first time on appeal (the defence of mistake) was truly new. The defence of mistake was legally and factually distinct from the issues raised before the Adjudicator. The doctrine of mistake was substantively different from the issues which surround contractual breach and resulting damages. Fundamentally, the doctrine of mistake related to the question of contract formation and raised questions around whether a contract actually came into existence at all (i.e., was the contract void *ab initio*).

In the court's view, this was an example where the evidentiary record before the court was sufficient to address the issue being raised for the first time on appeal. The central evidentiary issue surrounding the doctrine of mistake was whether the technology needed to achieve the data transfer speeds which the plaintiff demanded (and claimed a contractual expectation to receive) even existed. In the court's view, the Adjudicator's findings of fact were sufficiently comprehensive and detailed as to fully and fairly adjudicate the issue of mistake on appeal. In particular, the Adjudicator made specific findings regarding the parties' shared expectations and understanding regarding the contractual data transfer speeds and the availability of technology to achieve those speeds (or lack thereof). The court did not find that the defendant had engaged in bad faith or deployed questionable tactics. On the contrary, the court was concerned that the interests of justice and the proper adjudication of claims outweighed any concerns regarding either prejudice or procedural fairness.

The defendant did not knowingly intend to deceive customers, and the defendant did not act in bad faith. Equally, the plaintiff did not hatch some scheme to purchase the external portable backup hard drives knowing the advertising was wrong with a view to suing the defendant for damages. The N.S. Supreme Court proceeded to analyze and apply the defence of mistake in dismissing the claim for damages: *Lukacs v. Best Buy Canada Ltd.*, 2022 NSSC 178, 2022 CarswellNS 437 (N.S. S.C.).

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