TAB 4

05.16-2298

2006 CarswellOnt 3986
Ontario Superior Court of Justice

Itak International Corp. v. CPI Plastics Group Ltd.

2006 CarswellOnt 3986, [2006] O.J. No. 2637, 149 A.C.W.S. (3d) 595, 20 B.L.R. (4th) 67

Itak International Corp. (Applicant) and CPI Plastics Group Limited and Peter F. Clark (Respondents)

C. Campbell J.

Heard: May 19, 2006
Judgment: June 21, 2006
Docket: 05-CL-6182

Counsel: Matthew J. Latella for Applicant
W. Paul Huston for Respondents, CPI Plastics Group Limited and Peter F. Clark

Subject: Corporate and Commercial
Related Abridgment Classifications
Business associations
III Specific matters of corporate organization
III.2 Shares
III.2.a Share capital
III.2.a.iv Repurchase or redemption (decrease)
III.2.a.iv.C Miscellaneous
Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.ii Relief from oppression
III.3.e.ii.D Orders for relief
III.3.e.ii.D.2 Order for purchase of shares
Headnote
Business associations --- Specific corporate organization matters — Shares — Share capital — Repurchase or redemption (decrease) — General principles
Holding company had owned approximately 20 percent of predecessor to plastics company — Upon reverse takeover of plastics company, agreement was reached that portion of holding company's common shares would be converted into retractable preference shares, which could be retracted by holding company on demand — Rights and conditions attached to preference shares included that if plastics company could not, by insolvency provisions "or otherwise" redeem all shares, plastics company was only required to redeem maximum number of shares determined permissible by directors of plastics company — Holding company gave written notice of redemption to plastics company — Plastics company relied on "or otherwise" statement in contract and legal opinion to refuse retraction of shares, based on opinion that retraction would affect banking arrangements, and that plastics company was experiencing financial pressures due to seasonal nature of business, rising cost of resin, and falling US dollar — Holding company brought application for order that plastics company purchase all preference shares held by holding company in accordance with contract between companies — Application granted — Lawyer's opinion letter could not be regarded as careful, comprehensive, considered legal opinion as it contained limitations — Plastics company was required by contract to retract holding company's preference shares, and such contractual right was not subject to bank financing — Common sense dictated that financial risk to plastics company in complying with redemption was required to be risk of severe

05.16-2298

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05.16-2299

financial distress approaching insolvency — No evidence existed that risk to plastics company was severe — Business judgment of directors of plastics company lacked touchstone of informed reasoned judgment as there was no dialogue with holding company, and no offer to make partial payment or time-frame as to when retraction right could be honoured.

Business associations --- Specific corporate organization matters — Shareholders — Shareholders' remedies — Relief from oppression — Orders for relief — Order for purchase of shares

Holding company had owned approximately 20 percent of predecessor to plastics company — Upon reverse takeover of plastics company, agreement was reached that portion of holding company's common shares would be converted into retractable preference shares, which could be retracted by holding company on demand — Rights and conditions attached to preference shares included that if plastics company could not, by insolvency provisions "or otherwise" redeem all shares, plastics company was only required to redeem maximum number of shares determined permissible by directors of plastics company — Holding company gave written notice of redemption to plastics company — Plastics company relied on "or otherwise" statement in contract and legal opinion to refuse retraction of shares, based on opinion that retraction would affect banking arrangements, and that plastics company was experiencing financial pressures due to seasonal nature of business, rising cost of resin, and falling US dollar — Holding company brought application for order that plastics company purchase all preference shares held by holding company in accordance with contract between companies — Application granted — Agreement between parties constituted best evidence of parties' reasonable expectations — Parties' rights were defined in documentation which created security interest upon which claim was based — Effect of refusal to honour retraction rights of holding company was to give preferential treatment to one class of shareholder over another.

Table of Authorities

Cases considered by *C. Campbell J.*:

Catalyst Fund General Partner I Inc. v. Hollinger Inc. (2006), 2006 CarswellOnt 1416, 15 B.L.R. (4th) 171, 208 O.A.C. 55, 79 O.R. (3d) 288, 266 D.L.R. (4th) 228 (Ont. C.A.)

First Edmonton Place Ltd. v. 315888 Alberta Ltd. (1988), 40 B.C.R. 28, 60 Alta. L.R. (2d) 122, 40 B.L.R. 28, 1988 CarswellAlta 103 (Alta. Q.B.) — considered

Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board) (2006), 2006 CarswellOnt 13, 12 B.L.R. (4th) 189, 206 O.A.C. 61, 263 D.L.R. (4th) 450, 79 O.R. (3d) 81 (Ont. C.A.) — considered

Kerr v. Danier Leather Inc. (2005), 2005 CarswellOnt 7296, 11 B.L.R. (4th) 1, 77 O.R. (3d) 321, 205 O.A.C. 313, 261 D.L.R. (4th) 400 (Ont. C.A.) — referred to

Linamar Corp. v. Wescast Industries Inc. (2004), 1 B.L.R. (4th) 253, 2004 CarswellOnt 2329 (Ont. S.C.J.) — considered

Naneff v. Con-Crete Holdings Ltd. (1995), 23 O.R. (3d) 481, 85 O.A.C. 29, 23 B.L.R. (2d) 286, 1995 CarswellOnt 1207 (Ont. C.A.) — followed

Pente Investment Management Ltd. v. Schneider Corp. (1998), 1998 CarswellOnt 4035, 113 O.A.C. 253, (sub nom. *Maple Leaf Foods Inc. v. Schneider Corp.)* 42 O.R. (3d) 177, 44 B.L.R. (2d) 115 (Ont. C.A.) — considered

People's Department Stores Ltd. (1992) Inc., Re (2004), (sub nom. *Peoples Department Stores Inc. (Trustee of) v. Wise)* 244 D.L.R. (4th) 564, (sub nom. *Peoples Department Stores Inc. (Bankrupt) v. Wise)* 326 N.R. 267 (Eng.), (sub nom. *Peoples Department Stores Inc. (Bankrupt) v. Wise)* 326 N.R. 267 (Fr.), 4 C.B.R. (5th) 215, 49 B.L.R. (3d) 165, [2004] 3 S.C.R. 461, 2004 SCC 68, 2004 CarswellQue 2862, 2004 CarswellQue 2863 (S.C.C.) — referred to

UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc. (2002), 2002 CarswellOnt 2096, 214 D.L.R. (4th) 496, 32 C.C.P.B. 120, 27 B.L.R. (3d) 53, 19 C.C.E.L. (3d) 203 (Ont. S.C.J. [Commercial List]) — followed

UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc. (2004), 250 D.L.R. (4th) 526, 42 B.L.R. (3d) 34, 32 C.C.E.L. (3d) 68, 40 C.C.P.B. 114, 2004 CarswellOnt 691, (sub nom. *UPM-Kymmene Corp. v. Repap Enterprises Inc.)* 183 O.A.C. 310 (Ont. C.A.) — referred to

Waxman v. Waxman (2002), 2002 CarswellOnt 2308, 25 B.L.R. (3d) 1 (Ont. S.C.J.) — referred to

Waxman v. Waxman (2004), 186 O.A.C. 201, 44 B.L.R. (3d) 165, 2004 CarswellOnt 1715 (Ont. C.A.) — referred to

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16

s. 248 — considered

s. 248(1) — pursuant to

05.16-2299

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05.16-2300

With the above limitation, the lawyer's letter cannot be regarded as a careful, comprehensive, considered legal opinion.

19 The board of directors apparently considered two matters when it reached a conclusion that the "or otherwise" language supported a decision not to accept retraction within the time set out in the agreements.

20 The first consideration was that the language "or otherwise" would permit CPI to enter into banking arrangements, including negative covenants containing "debt to working capital ratios" without consideration of the retraction rights.

21 The second consideration is as set out in paragraph 18 of the CPI factum:

> At the time CPI received the redemption notice, the Company was experiencing financial pressures which included, the seasonal nature of the business, the rising cost of resin and the falling American dollar relative to the Canadian Dollar. It was felt that it was financially prudent to decline to redeem Itak's shares in these challenging financial circumstances. CPI's 2005 Q3 2005 year end results reflect these challenges.

22 The Applicant challenges that statement and its bona fides, particularly in the circumstances of its timing and of the opinion sought and obtained from outside counsel.

23 In the view I take of this Application, it is not necessary to decide all the issues of bona fides or the lack thereof. There does not appear to be any issue that CPI is contractually required to retract the First Preference Shares of the Applicant.

24 The question more appropriately put, is the following: Is the failure of CPI to retract the Applicant's shares based on the judgment of its Board of Directors that it would not be prudent to do so exercising their business judgment in the context of negative banking covenants and adverse market conditions oppressive conduct within the meaning of the provisions of the *OBCA* for which a remedy is appropriate?

25 A subsidiary question arises, namely, assuming CPI was entitled to exercise business judgment in respect of its obligation, was it exercised reasonably?

26 It is most often difficult to reach findings of fact based on affidavits and transcripts without the benefit of seeing the witnesses and hearing their evidence. In the view I take of the matter, it is not necessary to make specific findings of credibility or intent. There is sufficient objective evidence on which to reach a conclusion regarding the exercise of business judgment.

27 On the material before me, there is nothing to support the suggestion that the contractual right to retraction was specifically subject to any bank financing. The banking covenants that appear to have arisen after the rights arose do not specifically refer to such rights. The Applicant was neither consulted nor asked for consent regarding the banking arrangements after the notice of retraction was sent.

28 I agree with the submission of the Applicant that what has come to be known as the *ejusdem generis* rule would appear to apply to the "or otherwise" term as it appears in the contractual provision at issue. This legal concept was not considered by counsel retained to give the legal opinion relied on.

29 The *ejusdem generis* rule is defined in *Black's Law Dictionary*, 7th Edition, West Group, St. Paul Minnesota, 1999 at page 535, as:

> A canon of construction that when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed. For example, in the phrase, horses, cattle, sheep, pigs, goats or any other barnyard animal, the general language or any other barnyard animal — despite its seeming breadths — would probably be held to include only four-legged, hoofed mammals (and thus would exclude chickens.)

There are a myriad of legal decisions that have adopted that description of the canon with similar illustrations.

05.16-2300