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COURT OF APPEAL FOR ONTARIO

RE:	**UPM-KYMMENE CORPORATION (Plaintiff (Respondent)) – and – UPM-KYMMENE MIRAMICHI INC., F. STEVEN BERG, CLIFFORD M. SIFTON, STEPHEN W. PHILLIPS (Defendants (F. Steven Berg, Appellant) (UPM-Kymmene Miramichi Inc., Respondent))**
BEFORE:	**ROSENBERG, MACPHERSON JJ.A. and LANE J. (*ad hoc*)**
COUNSEL:	**Sheila Block and Andrew Gray for the appellant F. Steven Berg** **R. Paul Steep and Lara Teoli for UPM-Kymmene Miramichi Inc.** **Ronald Slaght and Kirsten Crain for the respondent UPM-Kymmene Corporation**
HEARD:	**FEBRUARY 16, 2004**

On appeal from the judgment of Justice Joan L. Lax of the Superior Court of Justice dated June 20, 2002, reasons for judgment reported at [2002] O.J. No. 2412 (QL) and [2002] O.J. No. 4137 (QL).

E N D O R S E M E N T

[1] We agree with the reasons of the trial judge and her conclusion. We add these comments to address certain of the issues raised by the appellant.

[2] The appellant's principal submission was that this was not an appropriate case for the use of the oppression remedy. Counsel for the appellant submits that the oppression remedy should only be available to shareholders who are unable to use the normal corporate machinery. She points out that in this case, the aggrieved minority shareholder, TD Asset

Management Inc. ("TDAM") was able to join forces with the controlling group and oust the appellant and the Board that had approved the employment contract. She submits that it would then have been open to the new board to sue the former Board members, and presumably the appellant, for negligence. She argues that in the absence of proof of fraud, which the trial judge did not find, it was wrong for the trial judge to grant a rescission remedy.

[3] In our view, the oppression remedy in s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, cannot be so limited. There is nothing in the section that would lead the court to read in that limitation. As is pointed out in Dennis H. Peterson, *Shareholder Remedies in Canada*, looseleaf (Ontario: Butterworths, 1989) at §2.36, limiting the oppression remedy to shareholders that do not have majority voting control fails to recognize that "at a fundamental level, [the statutory remedies] address abuse of power in the corporate context." It was open to the trial judge to find that the conduct of the affairs of the company by the appellant and the Board of Directors was oppressive or unfairly prejudicial to, or unfairly disregarded the interests of, the shareholders within the meaning of s. 241 of the Act. As the trial judge said at para. 201, "[T]he oppression remedy is available to rectify conduct by directors that amounts to self-dealing at the expense of the corporation or other shareholders".

[4] We also point out that this limitation on the availability of the oppression remedy was not argued at trial. Rather, the focus of the trial was on whether the appellant had breached his fiduciary duty to the company and whether the decision of the Board fell within the parameters of the business judgment rule. The trial judge made findings of fact that support her conclusions that the appellant breached his duty to the company, that the process by which the Board came to approve the contract was seriously flawed, and that the Board's decision fell outside the range of reasonableness.

[5] While the appellant did not seriously challenge the trial judge's findings of fact, counsel submits that the trial judge, in effect, substituted her view of the reasonableness of the compensation package for that of the Board. It is argued that she subjected the contract and the procedure that led to its approval to a microscopic *ex post facto* examination. The appellant submits that a better measure of the reasonableness of the contract is the view of the experienced board member, Mr. Cohen, who was one of the members of the Board that approved it, and the view of Mr. Whitman, who represented the controlling shareholder and made no comment about the contract.

[6] We do not agree with this characterization of the trial judge's reasons. The trial judge was well aware that the court is not entitled simply to second-guess the Board's decision. As the trial judge said, the court looks to see whether the Board made a reasonable decision, not a perfect decision. She stated that the business judgment rule "recognizes the autonomy and integrity of a corporation and the expertise of its directors" since they are "in the advantageous position of investigating and considering first-hand the circumstances that come before it and are in a far better position than a court to understand the affairs of the corporation and to guide its operation". [Reasons para. 152.]

[7] As we have said, the process by which the Board members came to make their decision was seriously flawed. As just one example, the Board relied upon the recommendation of the compensation committee but that committee did not have the time or expertise to review the contract and its members did not understand its key components. The trial judge found at paragraph 156 that the process leading up to the meeting and proceedings at which the contract was approved "fell far short of the exercise of prudent judgment in the interests of the shareholders that is expected of directors". This finding is supported by the evidence.

[8] At paragraph 193 of her reasons, the trial judge expressly referred to Mr. Whitman's silence. She was entitled to take into account his explanation for his silence. Further, as she pointed out, the resignation of Mr. Jensen, Mr. Whitman's nominee, was intended to make clear Mr. Whitman's disapproval of the contract.

[9] We would not give effect to the submission that the oppression remedy should be limited to circumstances in which the shareholders have no other remedy, nor would we give effect to the submission that the trial judge substituted her view of the reasonableness of the compensation package for that of the Board.

[10] The appellant also submits that the plaintiff purchased the shares of Repap with full knowledge of the contract and that TDAM was able to sell its shares at a premium. Thus, it is submitted there is nothing to show that either the plaintiff or TDAM was oppressed. The trial judge addressed this issue in paragraph 200 of her reasons:

> The fact that UPM paid a premium for the shares of Repap is irrelevant. UPM does not seek damages. It asks that the Agreement be set aside. If the Agreement stands, UPM is bound by it. As assignee of TDAM's cause of action, and as a shareholder of Repap, it is entitled to ask for an Order setting

> aside the Agreement if the effect of the conduct complained of unfairly disregards the interests of TDAM *and other shareholders.* [Emphasis added.]

[11] We agree with that conclusion and would not give effect to this submission. In light of our conclusion that the trial judge properly invoked the oppression remedy, we need not consider the application of s. 120 of the Act.

[12] The appellant sought leave to appeal the costs order in favour of Repap Enterprises Inc. (UPM-Kymmene Miramichi Inc.) because this respondent failed to prove fraud as alleged in its cross claim, which allegation it maintained at trial. The appellant relies upon the statements of Blair J. in *Bargman v. Rooney* (1998), 30 C.P.C. (4th) 259 (Ont. Gen. Div.) at paras. 18 and 19:

> It matters not, in my view, at what stage in the proceedings the unproved allegations are levelled. Because of their extraordinarily serious nature - going, as they do, directly to the heart of a person's very integrity - allegations of fraud and dishonesty are simply not to be made unless there is every reasonable likelihood that they can be proved. The cost sanction exists in these circumstances to help ensure that such will be the case.
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> …
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> The cost sanction should be imposed sharply and firmly by the Courts, in my opinion, at any stage in the proceedings when unsupported and unproven allegations of fraud and dishonesty are put forward.

[13] The trial judge was aware of the normal rule that a successful plaintiff who has failed to establish fraud should be deprived of its costs. The trial judge provided reasons for exercising her discretion in favour of the respondent. We have not been persuaded that she erred in so doing. In this case there was "every reasonable likelihood" that the allegations of fraud would be made out. As it was, the trial judge found that the appellant made false allegations against Mr. Cohen, that his motive for the "Berg Put" was entirely improper, that he threatened to collapse the company's capital structure if his wishes were not carried out, that he completely lost sight of his obligations to the company, that he "failed utterly" in his duties to the company, that his conduct was "exactly opposite to the conduct that the law

required of him as a fiduciary", and that he was "greedy and overreaching and failed miserably in his duties to Repap". Accordingly, leave to appeal costs is refused.

[14] The appeal is dismissed with costs fixed as follows:

> To the respondent UPM-Kymmene Corporation: $39,138.15 inclusive of disbursements and G.S.T.
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> To the respondent UPM-Kymmene Miramichi Inc.: $27,245.75 inclusive of disbursements and G.S.T.

Signed: ____ "M. Rosenberg J.A."

_____ "J.C. MacPherson J.A."

_____ "D. Lane J."