

Indexed as:
**Metropolitan Toronto Corp. 542 v. Canadian Imperial Bank of
Commerce**

Between
**Metropolitan Toronto Corporation 542, A.E. LePage Real Estate
Services Ltd. Dubois & Associates, The Corporation of the City
of Toronto, and Dean Chandler Waterproofing Limited,
plaintiffs, and**
**Canadian Imperial Bank of Commerce, Canlea Ltd., A.E. LePage
Investments Ltd., Gordon C. Gray, Christopher R. Dingle, John
W. Bowden, Richard E. Downey, Andrew Croll, Norman M.V.
Purves, Hugh Sampson, Albert Pace, William A. Dimma, David S.
Colville-Reeves, David R. Gibson, Marcel J. Casavant, Richard
A. McElwain, and William B. Pattison, defendants**

[1996] O.J. No. 3224

Court File No. 96-CU-104881

Ontario Court of Justice (General Division)

Dambrot J.

Heard: August 26, 1996.

Judgment: September 20, 1996.

(6 pp.)

Counsel:

Joyce Harris and Donna E. Campbell for the plaintiff.

Nigel Campbell and Alistair Crawley for the defendants Canadian Imperial Bank of Commerce,
John W. Bowden, Richard E. Downey, Marcel J. Casavant and Richard A. McElwain.

Ronald G. Chapman for the defendants A.E. LePage Investments Ltd., Canlea Ltd., Gordon C.
Gray, Christopher R. Dingle, Andrew Croll, Norman W.V. Purves, Hugh Sampson, William A.
Dimma and David R. Gibson.

David Zarek for the defendant Albert Pace.

Julian D. Heller for the defendant David S. Colville-Reeves.

David Bell for the defendant William B. Pattison.

1 DAMBROT J.:-- The defendants Gray, Dingle, Croll, Purves, Sampson, Dimma, Gibson, Bowden, Downey, Casavant, McElwain and Pattison have brought a motion to strike the statement of claim and dismiss this action as against each of them on the ground that the claim discloses no reasonable cause of action against them. The action arises out of the restructuring by the Canadian Imperial Bank of Commerce ("CIBC") of its interest as a shareholder and creditor of Canlea Ltd., ("Canlea"). From the end of 1984 to the end of 1987, CIBC reduced its interest in Canlea through the sale of its shares and the transfer of Canlea's assets. In its statement of claim, the plaintiff seeks \$2,504,926.93 in special damages, \$500,000 in punitive damages, an accounting, and declarations that:

- (1) various conveyances to CIBC were fraudulent under the Fraudulent Conveyances Act and offended the Assignment of Preferences Act; and
- (2) directors and officers of Canlea and A.E. LePage, and John Bowden of CIBC, by approving the conveyances, and other transfers of money, breached s. 134 of the Ontario Business Corporation Act, and the Assignment of Preferences Act.

2 The moving parties argue that the action should be dismissed against them because:

- (1) the duties of the defendant Directors under the Ontario Business Corporations Act are not owed to the plaintiffs, who lack standing to seek declarations respecting them; and
- (2) the pleadings disclose no allegations against the defendant Directors which in law could make them personally liable to the plaintiffs.

3 I have little difficulty accepting the first proposition of the moving parties, and, in fact, heard no real argument to the contrary. The second proposition requires closer consideration.

4 In considering the second proposition I must begin with the decisions of the Ontario Court of Appeal in *Scotia McLeod Inc. v. Peoples Jewellers Limited* (1995), 26 O.R. (3d) 481. Finlayson J.A. stated the following at p. 490-1:

The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact-specific. In the absence of findings of fraud, deceit, dishonesty or want of authority on the part of employees or officers, they are also rare. ... In every case, however, the facts giving rise to personal liability were specifically pleaded. Absent allegations which fit within the categories described above, officers or employees of limited companies are protected from personal liability unless it can be shown that their actions

are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own.

5 While the plaintiffs here have not in terms alleged fraud, deceit, dishonesty or want of authority on the part of the defendant directors, they argue that certain paragraphs in fact support a claim of fraud. They refer to a number of similar paragraphs in their claim such as paragraph 46, which alleges, in part, that when the Canlea Board authorized Canlea to enter the restructuring agreement, "Canlea's directors knew or ought to have known that ... Canlea was unable to meet its debts as they came due without the financial support of CIBC, and if CIBC did call of its loans, would be insolvent". Allegations such as this one, they argue, provide a sufficient allegation of fraud.

6 I have no difficulty accepting that the specific elements of a cause of action need not be alleged, provided the facts supporting such elements are pleaded. I do not consider that the facts pleaded here, however, rise to that level. The pleadings as they stand, however generously read, simply do not support a claim against the defendant directors in their personal capacity. The action, as pleaded, is certain to fail.

7 Paragraph 46, for example, does not allege that any particular Canlea director defendant participated in the particular discussion, that any particular director defendant voted at the particular meeting, or that any particular director defendant supported entry into the restructuring agreement. I am also of the view that a claim of fraud, deceit or dishonesty cannot be based, as this one is, on objective knowledge, that is, an allegation that directors ought to have known certain facts.

8 Accordingly, the statement of claim is struck out as against the moving parties, as disclosing no reasonable cause of action. It appeared from the argument of the plaintiffs, however, that they may have a viable theory of liability against the directors, although they have not pleaded one. Accordingly, I give them leave to file an amended statement of claim within thirty days of this order, failing which the action against the director defendants is dismissed. The defendants will have twenty days from the delivery of an amended statement of claim to file their amended statement of defence.

9 Counsel may arrange to speak to the issue of costs.

DAMBROT J.

qp/d/mmr