



P. MACAULAY & ASSOCIATES INC.

130 King Street West, Suite 1800, Toronto, ON M5X 1E3

P 416.642.6010 E pmacaul@pmacaulay-assoc.com

## Krispy Kreme Donuts Plaintiff Collects Damages Twice Court Sends a Message to Co-Investors and Directors

While the Plaintiffs sustained losses on all three tranches of shares in which they invested, they were only able to demonstrate the causal link to the wrongs on the part of the Defendants in respect of the third tranche. Hence, their claim is limited to their investment in the third tranche of shares.

If the case is appealed, one of the issues that may be raised is the double recovery by Mr. Fiorillo; where he recovered from Mr. Alofs based on fraud, and from the directors based on oppression. Presumably, the Defendants will argue that this judgement goes beyond making Mr. Fiorillo whole.

### Background

Three Plaintiff shareholders and Mr. Alofs invested in Kremeko Inc., a private corporation, holding franchise rights for Krispy Kreme donuts for parts of Canada. Mr. Alofs was also a director of Kremeko. The investments occurred in three tranches. Prior to the Plaintiffs investing in the third tranche of shares, Mr. Alofs: a) resigned his directorship, and b) sold his shares without advising the Plaintiffs. Kremeko eventually failed, and the Plaintiffs' shares lost all of their value.

The Plaintiffs alleged that they and Mr. Alofs formed an informal investing group. Further, they claimed that had they known that Mr. Alofs had sold his shares, they would not have invested in the third tranche. "They claim against Mr. Alofs for the amount each invested in the third tranche on the basis of fraudulent or negligent misrepresentation plus punitive damages. They also claim against Mr. Alofs and the remaining ... directors of Kremeko, on the basis of oppression in failing to notify the Plaintiffs of the sales of Mr. Alofs' shares."

The purchases and sales of shares by Mr. Alofs and the Plaintiffs are summarized on the table below.

	July 2001	September 2002	June 2003	August 2003
	<i>"First Tranche"</i>	<i>"Second Tranche"</i>		<i>"Third Tranche"</i>
Mr. Alofs	Bought 240,000 shares @ \$2.50 = \$600,000	Bought 90,466 shares @ \$5.28 = \$477,660	Sold 330,466 shares @ \$5.28 = \$1,744,860	
<b>Plaintiffs</b>				
• Mr. Fiorillo	Bought 160,000 shares @ \$2.50 = \$400,000	Bought 60,310 shares @ \$5.28 = \$318,437		Bought 83,190 shares @ \$5.28 = \$439,243
• Mr. Breen	Bought 40,000 shares @ \$2.50 = \$100,000			Bought 20,000 shares @ \$5.28 = \$105,600
• Ms. Goulimis	Bought 80,000 shares @ \$2.50 = \$200,000	Bought 30,155 shares @ \$5.28 = \$159,218		Bought 20,797 shares @ \$5.28 = \$109,808

## Fraudulent Misrepresentation Claim

Mr. Alofs' primary relationship was with Mr. Fiorillo. Mr. Fiorillo then passed information on to Mr. Breen (CPI Investment Board), and Ms. Goulimis' husband (Mr. Monty Gordon of Gordon Capital), who in turn passed the information on to her.

Between January 2003 and June 2003, Mr. Alofs negotiated the sale of his shares. Effective June 2003, Mr. Alofs sold 100% of his shares, and as part of the share sale was required to resign as a director. The shares were sold to the parent of Kremeko, other directors, and new shareholders. Mr. Alofs did not tell Mr. Fiorillo, Mr. Breen or Ms. Goulimis that he had sold his shares. The three Plaintiffs went ahead and purchased shares from the third tranche, unaware that Mr. Alofs had sold his.

Justice Newbould found that Mr. Alofs intentionally deceived Mr. Fiorillo with the intent that Mr. Fiorillo act on the deception. However, he did not find that Mr. Alofs had intentionally deceived Mr. Breen or Ms. Goulimis with the intent that they act on the deception.

## Oppression Claim

The Plaintiffs claim that they were entitled to notice of Mr. Alofs' share sale. More specifically, under the bylaws of Kremeko and the unanimous shareholders' agreement, the Plaintiffs were entitled to notice of, and had a right to vote on, a resolution approving the sale of Mr. Alofs' shares.

Justice Newbould found that the Board kept the sale of Mr. Alofs' shares secret. The Plaintiffs invested in the third tranche, which they would not have done, had they known of the sale by Mr. Alofs of his shares.

## Damages

Justice Newbould awarded the Plaintiffs damages equal to their investment in the third tranche of shares, based on his findings on liability. The specific damages are listed on the table below.

	Recovered From Mr. Alofs	Recovered from the Directors
<b>Plaintiffs</b>		
• Mr. Fiorillo	\$439,243	\$439,243
• Mr. Breen		\$105,600
• Ms. Goulimis		\$109,808

*Peter Macaulay focuses on damage quantification in commercial disputes. He is a Chartered Accountant and has been designated as a specialist in Investigative and Forensic Accounting by the CICA. [www.pmacaulay-assoc.com](http://www.pmacaulay-assoc.com)*