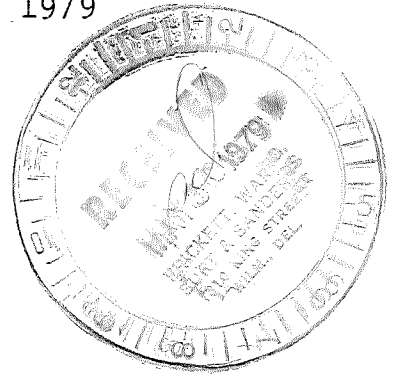


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IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM B. WEINBERGER,)
)
Appellant,)
Plaintiff Below,)
)
v.)
)
UOP INC., et al.,)
)
Appellees,)
Defendants Below.)

No. 120, 1979



DEFENDANTS' RESPONSE TO
PLAINTIFF'S NOTICE OF
APPEAL OF INTERLOCUTORY ORDERS

1. Nature And Stage Of
The Proceedings.

The complaint in this action was filed on July 5, 1978, alleging individual, class action, and derivative claims attacking the validity of the merger on May 26, 1978 of two Delaware corporations, UOP Inc. ("UOP") and Sigco Incorporated ("Sigco"), a wholly-owned subsidiary of The Signal Companies, Inc. ("Signal"), also a Delaware corporation.

After briefing and argument on various motions filed by the parties, on April 26, 1979, the Court of Chancery entered two orders (a) certifying the action as a class action pursuant to Chancery Court Rule 23(b)(3); (b) certifying the plaintiff William B. Weinberger, as the class representative; (c) including as members of the class those former UOP shareholders who voted against the UOP-Signal merger and/or have not turned in their UOP shares in exchange for the merger price; (d) dismissing, with prejudice, the derivative claims set forth in the complaint; and

(e) quashing the purported service of process upon Sigco. Copies of the orders are attached as Exhibits B and D to plaintiff's Notice of Appeal filed in this Court. The opinions of the lower court underlying the orders are attached as Exhibits A and C to plaintiff's Notice of Appeal.

On April 27, 1979, plaintiff filed an Application for Certification of an Interlocutory Appeal in the Court of Chancery. That application was denied in a letter opinion and order dated May 7, 1979, a copy of which is attached as Exhibit E to plaintiff's Notice of Appeal.* On May 25, 1979, plaintiff filed a Notice of Appeal of Interlocutory Orders with this Court. This is the defendants' response to that submission.

2. Statement of Facts.

On May 5, 1978, UOP mailed a detailed Notice of Annual Meeting of Stockholders and Proxy Statement for the annual meeting to be held on May 26, 1978. The Proxy Statement disclosed all germane facts with respect to the proposed UOP-Signal merger, including the fact that the merger was conditioned upon approval of a majority of the minority shares** voting on the issue. Significantly, the complaint does not allege otherwise. In fact, the Court of Chancery held in this case that:

"The complaint contains no specific allegation that the minority shareholders were deceived in any way into voting overwhelmingly in favor of the merger."

* * *

"[The complaint] does not charge fraud or deceit on the part of the defendants nor does it allege that approval of the merger was obtained by fraud or deceit."

Exhibit A, pp. 6, 11.

* Hereinafter, reference to exhibits will be to the exhibits attached to plaintiff's Notice of Appeal.

** As of the record date for the annual meeting, there were 11,488,302 shares entitled to vote. Of this total, Signal owned 5.8 million shares, or 50.5%.

On May 26, 1978, after receiving full and complete disclosure of all facts relevant to the proposed merger, minority shareholders owning 2,953,812 shares voted in favor of the transaction. This figure represented 92% of the minority shares actually voting, and 52% of all minority shares entitled to vote. On the same day, the merger became effective and, pursuant to the terms of the merger agreement, each former UOP share was converted into a right to receive in cash the sum of \$21.00. As of January 31, 1979, with the exception of certificates representing 147,593 former shares of UOP, all other former shares had been surrendered and the former UOP shareholders paid \$21.00 per share.

3. Argument

Supreme Court Rule 42 provides that an appeal from an interlocutory order will be allowed only if:

(i) The order of the trial court determines a substantial issue and establishes a legal right; and

(ii) This Court determines that:

(A) Any one of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41 is applicable; or

(B) The interlocutory order has sustained the controverted jurisdiction of the trial court; or

(C) The interlocutory order has vacated or opened a judgment of the trial court; or

(D) A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice.

Supreme Court Rule 41 provides that certification of an interlocutory appeal will be accepted "only where there exist important

and urgent reasons for an immediate determination by this Court of the questions certified." As illustrative of the reasons for accepting certification Rule 41(b) lists:

(i) The question of law is of first instance in this State;

(ii) The reported opinions of the trial courts are conflicting upon the question of law;

(iii) The question of law relates to the constitutionality, construction or application of a statute of this State which has not been, but should be, settled by the Court.

A. The Class Action Order Did Not Determine A Substantial Issue And Establish A Legal Right Within The Meaning Of Supreme Court Rule 42 Nor Did It Meet The Additional Requirements For Certification Under The Rule.

The class action order simply determined that plaintiff Weinberger was entitled to represent a class consisting of those former UOP shareholders who voted against the UOP-Signal merger and/or have not turned in their stock certificates in exchange for the \$21.00 per share offered in the merger. The order did not "determine a substantial issue and establish a legal right" within the meaning of Supreme Court Rule 42(b)(i), nor does it satisfy any of the additional requirements for certification under that Rule.

Prior to certifying an interlocutory appeal pursuant to Rule 42, this Court must make two determinations: that the order for which an interlocutory appeal is sought "determines a substantial issue and establishes a legal right"; and that one of the factors listed in subsection (b)(ii) is present. Although the plaintiff omits to state what section of the Rule plaintiff believes is applicable, defendants assume that plaintiff is

attempting to satisfy subsection A of section (b)(ii) by showing that two "of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41 [are] applicable." In addition to his conclusory statement that the lower court's order meets the threshold Rule 42(b)(i) "substantial issue and legal right" standard, plaintiff asserts (Notice of Appeal, ¶4, p. 6), that the ruling "is one of first instance in this State" (a reference to Rule 41(b)(i)) and that the "points decided" by the court "relate to the correct construction and application of Rule 23 which have not been but should be settled by the Delaware Supreme Court ..." (a reference to Rule 41(b)(iii)).*

The criteria listed in Rule 41 are only meant to guide the Court in determining whether there exist "important and urgent reasons for an immediate determination by this Court." Thus the purpose of Rule 41 as incorporated in Rule 42 is to insure the proper timing of appeals. Yet plaintiff's Notice of Appeal is almost wholly devoted to a discussion of the significance of the questions to be raised on appeal rather than the timing of the resolution of those questions.

In fact, Rule 42 itself is concerned with the timing of appeals. The test denominated by the phrase "determines a substantial issue and establishes a legal right" is one by which the Court determines whether an immediate appeal is necessary in order to avoid prejudice to a party, and whether any such prejudice is outweighed by the delay in the pending action which is always caused by an interlocutory appeal:

"The purpose of the rule is to get at the dilemma [sic] posed by interlocutory appeals. On the one hand, they can serve a very salutary

* It is interesting to note that Rule 41(b)(iii) by its express terms applies only to statutes of this State. It makes no mention of Court Rules. Yet plaintiff seeks to apply it to an interpretation of Rule 23, which he concedes is "... purely procedural." (Notice of Appeal, p. 11).

purpose in the administration of justice by advancing the termination of litigation and saving time below if a threshold question can be resolved. On the other hand, interlocutory appeals have caused unnecessary delay and there is substantial danger of abuse of a right to file interlocutory appeals. The existence of the right to file interlocutory appeals is consistent with ABA Standard 3.12(b) which encourages interlocutory review but only at the discretion of the reviewing court where it determines that resolution of the questions of law on which the order is based will materially advance the litigation, protect a party from irreparable injury or clarify an issue of general importance in the administration of justice. The criteria applicable to the discretion of the trial court, and ultimately the Supreme Court, in deciding whether or not to accept an appeal of an interlocutory order are substantially in compliance with this standard."

Commentary of the Supreme Court Rules Committee to Rule 42 in the 1978 Cumulative Supplement to Volume 16 of the Delaware Code Annotated (at p. 43).

As suggested in Telvest, Inc. v. Olson, Del. Ch., C. A. No. 5798, Letter Opinion dated March 22, 1979 (copy attached), the question which Rule 42 requires this Court (and, in the first instance, the trial court), to answer, as the purpose of the rule indicates, is whether the party seeking certification would be prejudiced by awaiting a final order before being allowed to appeal. As is clear from Telvest, absent such prejudice, an interlocutory appeal should not be granted.*

Certification is not warranted in the present circumstances for several reasons. Most importantly, an appeal of the order limiting the class can be made after the Court of Chancery enters a final order in this litigation without adversely affecting

* In Telvest, the defendant had sought certification of an order granting a preliminary injunction which enjoined the defendant corporation from distributing an issue of shares created and designated as preferred stock. The Court of Chancery held that because at the time the order was entered a determination of the correctness of the granting of a preliminary injunction was not "critical", Telvest, supra, at 4 (in the sense that there was no urgency in having the issue decided), certification would not be granted.

the rights of any party to this action or of any supposed member of the class. Conversely, an appeal at this time will not advance this litigation, but would subject all of the parties to the delay always inherent in an interlocutory appeal, and possibly this Court to multiple appeals where one would suffice.*

The only portion of plaintiff's Notice of Appeal which in any way considers the timing of the appeal is based upon a failure to recognize that the class action order may be appealed after a final order has been entered by the Court of Chancery. Plaintiff states (at p. 9 of his Notice of Appeal) that the trial court's opinion "has eliminated from the class, without notice, all stockholders except those [designated by the trial court's order]". If this contention were correct, the importance of an interlocutory appeal would be obvious. However, the contention is totally incorrect -- like any interlocutory order, the Chancery Court's class determination order will merge with and be subject to appeal with a final order in the normal course of this litigation. See 10 Del. C. §144** and United States v. MacDonald, 432 U.S. 385 (1977).

Even assuming contrary to fact that the class action order is erroneous, an appeal in the normal course of the litigation (after a final order) would provide those presently excluded from the class with whatever relief those presently included in the

* On April 26, 1979, the defendants filed a motion to dismiss this action for failure of the remaining portions of the complaint to state a claim upon which relief may be granted. An Order Fixing Brief Schedule was entered by the Court of Chancery on May 14, 1979. The pendency of this motion is another common sense reason why the certification should be refused at this time.

** "A failure to appeal from an interlocutory order, judgment or decree of the Court of Chancery or Orphans' Court shall not bar a party from making any objection to such interlocutory order, judgment or decree on appeal from the final order, judgment or decree."

class may be able to gain in the litigation. For example, even were plaintiff to prevail on the merits and then successfully appeal the class determination, persons not now in the class could be awarded damages on the same basis as the present class members. If plaintiff is unsuccessful on the merits, then this Court could entertain an appeal from the class action order and the final order without prejudice to the rights of those who have not been certified as members of the class. Those presently not included in the class would not bring to this action any additional issues in terms of either liability or damages. In short, an immediate appeal of the class action order can be of no material significance to the very persons whom plaintiff's attorney purports to represent.

It is also significant that the interlocutory order does not represent a "final" determination of the size of the class. Rule 23(c)(1) specifically provides that any class action order "may be altered or amended before the decision on the merits." Thus the class action order is subject to continual modification and refinement by the Court of Chancery. See Exhibit E at p. 2. Cf., Levinson v. Conlon, Del. Supr., 385 A.2d 717 (1978). Presumably plaintiff will wish to subject defendants and this Court to future appeals were any such changes not to his liking. Defendants submit that this Court should be extremely reluctant to accept certification of an appeal from an interlocutory order which by the Court Rules is subject to such change. Compare Coopers & Lybrand v. Livesay, - U.S. - 98 S.Ct. , 57 L.Ed.2d 351 (1978). Of course, plaintiff's application for class certification has not been denied. In fact, plaintiff has been certified as the representative of a class. If the pending motion to dismiss is not granted (see footnote,

p. 7, supra), he may try the merits of the action on behalf of that class. Whether the results of the trial apply to a broader class can be determined if plaintiff later appeals.

In short, this is not a situation in which the litigation will be "materially advanced" by having the issues in question resolved immediately. Indeed, fragmenting the appeal process by certifying the interlocutory appeal now would serve no purpose whatsoever and would only result in the delay which Supreme Court Rule 42 was meant to guard against.

B. The Derivative Counts.

There is nothing novel in the Chancery Court's dismissal of the derivative counts; the legal issue is not one of first instance in Delaware; the reported opinions of the trial courts (including the U. S. District Court) are not in conflict;* and the question of law does not relate to the constitutionality, construction or application of a Delaware statute which has not been settled by this Court. In short, there is no important and urgent reason for an immediate determination by this Court of the correctness of the lower court's dismissal of the derivative counts.

Plaintiff argues that the lower court's ruling extended the holdings of Heit v. Tenneco, Inc., 319 F.Supp. 884 (D.Del. 1970); Braasch v. Goldschmidt, Del. Ch., 199 A.2d 246 (1964); and Bokat v. Getty Oil Co., Del. Supr., 262 A.2d 246 (1970) and is therefore one of first instance in this State. (Notice of Appeal, p. 6) However, the Court of Chancery did not dismiss the derivative counts on the ground that they were moot. Rather the court

* See, e.g., Heit v. Tenneco, Inc., 319 F.Supp. 884 (D.Del., 1970), and the Delaware decisions cited and discussed therein.

decided the threshold question of plaintiff's standing to maintain a derivative action. Because plaintiff was not a stockholder of UOP when the complaint was filed, the lower court properly held that he had no such standing. That has long been the law of Delaware. See, e.g., Heit v. Tenneco, Inc., supra, and the Delaware decisions cited and discussed therein. Plaintiff continues to argue that the Court of Chancery should not have dismissed the derivative counts because plaintiff continues to hold his UOP stock certificates. Obviously, however, plaintiff's retention of the stock certificates is meaningless, because, as the lower court stated in its Opinion of April 3, 1979:

"... the plaintiff was, by virtue of the terms of the merger, automatically converted from a shareholder of UOP into a creditor of Signal as of the date the merger became effective." (Exhibit A, p. 4)

Plaintiff's reliance upon Singer v. Magnavox Co., Del. Supr., 380 A.2d 969 (1977) and Bruno v. Contran, Del. Ch., C. A. 5170 (Letter Opinion dated 10/18/77, a copy of which is attached to plaintiff's Notice of Appeal) is entirely misplaced. Singer involved only a purported class action attacking the fairness of a merger; there were no derivative allegations. In Bruno v. Contran, Chancellor Marvel permitted plaintiff to amend his complaint so as to include a derivative count seeking damages with respect to a merger proposal which was defeated at a stockholders' meeting. Since the merger in Bruno was not consummated, obviously the plaintiff-shareholder had the requisite standing to maintain the derivative action. In the instant case, however, plaintiff's shares of UOP were automatically converted into a right to receive cash when the merger became effective. Thus, plaintiff was not a shareholder of UOP when he filed his complaint in this action and the lower court properly determined that he has no standing to maintain the derivative counts.

Finally, there is nothing inconsistent between the Chancery Court's opinions of April 3 and April 5, 1979. In the first opinion, the court held that plaintiff had no standing to maintain the derivative counts because he was not a stockholder of UOP when the complaint was filed. In the second opinion the court concluded:

" . . . that the class sought to be certified should consist only of those former shareholders of UOP who are not disputed by the defendants as constituting a proper class, namely, those former shareholders of UOP who voted against the merger and/or have not turned in the stock certificates in exchange for the \$21 per share payment."
(Emphasis added) (Exhibit C, p. 13).

It is clear that the lower court decided that all shares of UOP common stock (other than those owned by Signal) were converted into rights to receive cash as a result of the merger. Thus, plaintiff's assertion that in the April 5 opinion "... the Court below has permitted a suit by some but not all stockholders" (Notice of Appeal, p. 9), is simply wrong. What the lower court has done is to permit a class action to be maintained by a limited number of former stockholders of UOP.

Again, plaintiff has not satisfied the requirements of Supreme Court Rule 42(b) and seeks only to burden those involved for no apparent reason. By the derivative counts, plaintiff was seeking (without the requisite standing) to enforce a supposed right belonging to UOP. Both UOP and the alleged wrongdoers will be able to have their rights determined by this Court if the plaintiff chooses to appeal after a trial of his class action count.

CONCLUSION

For the reasons stated above, defendants respectfully request that the Court refuse the interlocutory appeal.

Respectfully submitted,

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