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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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| WILLIAM B. WEINBERGER,<br>Plaintiff,<br>v.<br>UOP, INC., THE SIGNAL COMPANIES, INC.,<br>Defendants. | ) | Civil Action No. 5642 |

(UNREPORTED OPINION)

Submitted: April 6, 1984
Decided: April 24, 1984

William Prickett, Esquire, Michael J. Hanrahan, Esquire, and Michael F. Bonkowski, Esquire, of Prickett, Jones, Elliott, Kristol & Schnee, Wilmington, for Plaintiff

Robert K. Payson, Esquire, of Potter, Anderson & Corroon, Wilmington, and Alan N. Halkett, Esquire, of the California Bar Latham & Watkins for Defendant The Signal Companies

A. Gilchrist Sparks, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, for Defendant UOP, Inc.

BROWN, Chancellor

In Weinberger v. UOP, Inc., Del.Supr., 457 A.2d 701 (1983) the Supreme Court reversed the previous decision of this Court which had found both the circumstances of the cash-out merger in issue in this case as well as the price paid to the minority shareholder to be fair. The Supreme Court found on the evidence submitted at trial that the defendant, The Signal Companies, Inc. ("Signal"), as majority shareholder of the defendant UOP, Inc. ("UOP"), had been guilty of unfair dealing toward the minority shareholders of UOP. It further concluded that the then existing approach to valuation under Delaware law was outmoded and that it was thus improper for this Court to have based its determination as to the fairness of the merger price solely on the method established by existing precedent. The case was remanded so as to permit the plaintiff to test the fairness of the $21 per share merger price against the broadened valuation standards established by the Supreme Court decision.

The Supreme Court opinion indicated that on remand the fair value issue must be determined by taking into account all relevant factors, including "the elements of rescissory damages if the Chancellor considers them susceptible of proof and a remedy appropriate to all the issues of the fairness before him." 457 A.2d 714. At the same reference the Supreme Court went on to state as follows:

"While a plaintiff's monetary remedy

> ordinarily should be confined to the more liberal appraisal proceeding herein established, we do not intend any limitation on the historic powers of the Chancellor to grant such other relief as the facts of the particular case may dictate. The appraisal remedy we approve may not be adequate in certain cases, particularly where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved. Cole v. National Cash Credit Association, Del.Ch., 156 A.183 (1931). Under such circumstances, the Chancellor's powers are complete to fashion any form of equitable and monetary relief as may be appropriate, including rescissory damages. Since it is apparent that this long completed transaction is too involved to undo, and in view of the Chancellor's discretion, the award, if any, should be in the form of monetary damages based upon entire fairness standards, i.e., fair dealing and fair price." (Emphasis added.)

Thus, as I perceive it, the Supreme Court decision remanded the case to this Court for the purpose of reconsidering the fairness of the $21 merger price paid to the minority shareholders of UOP. In addition, it specifically encouraged this Court to consider the prospect of awarding rescissory damages.

As a result of this, the defendants sought a form of preliminary hearing on the issue of whether or not rescissory damages would be in the case for the purpose of the final hearing on remand. Defendants felt that they would be able to show that this was not a situation warranting rescissory damages and that possibly the substantial time and expense of discovery that would otherwise be connected with the rescissory damages element could thereby be avoided. Because of the unusual way in which the rescissory damage issue came to light in the matter, the defendants' request was granted over the strong and persistent objection of the plaintiff. The so-called preliminary hearing has now been held, and this is the decision thereon.

The basis for the defendants' contention that this is not an appropriate case for an award of rescissory damages can be set forth as follows. In its opinion the Supreme Court stated that a primary factor mandating reversal was the existence of a report or financial study which had been prepared for Signal's internal use only and which was not disclosed or made available to either UOP's independent, outside directors or to the minority shareholders prior to the time that the terms of the merger were approved by a majority of UOP's minority shareholders. This report was prepared by two members of Signal's senior management, both of whom were also directors of UOP. Named after its authors for the purpose of this litigation, the document is known as the Arledge-Chitiea report.

During the trial of the case in this Court the Arledge-Chitiea report did not receive a great deal of attention. It certainly was not made to take on the significance which it later achieved at the appellate level.

It was placed in evidence and its relevance was argued to some degree along with the other evidentiary matter. However, the involvement of the Arledge-Chitiea report during the trial was so minimal that the defendants deemed it unnecessary to call either Mr. Arledge or Mr. Chitiea to explain its content and purpose even though both were available and had been listed initially as trial witnesses. This relative lack of attention given to the Arledge-Chitiea report at trial as compared to the emphasis placed upon it at the appellate level has led directly to the request of the defendants for the preliminary hearing on the rescissory damages issue.

The Arledge-Chitiea report showed the projected financial impact on Signal in the event that the minority shares of UOP were purchased by Signal at various prices per share. The prices considered ranged from $18 per share to $24 per share. The figures in the report indicated, among other things, that at all such prices the acquisition of the remaining 49.5% of UOP by Signal would increase Signal's projected income for the forthcoming year. The percentage increase ranged from 9% at the $18 per share figure to 8% at the $21 figure to a low of 6% at the $24 figure. Other computations similarly revealed a projected financial benefit to Signal at any of the prices within the aforesaid range, although the benefits were naturally lower at the $24 price than they were at the $21 price then being considered by Signal's management.

At a page of the report outlining the purpose of the proposed merger of Signal and UOP whereby the UOP minority would be cashed out it was stated that the merger provided an "OUTSTANDING INVESTMENT OPPORTUNITY" for Signal. It was no doubt because of this, and because neither Arledge nor Chitiea were called to testify on the report, that in the course of rendering my decision on the matter after trial I made the observation that "[t]he report of Arledge and Chitiea indicated that it would be a good investment for Signal to acquire the remaining 49.5 percent of UOP at any price up to $24 per share." Weinberger v. UOP, Inc., Del.Ch., 426 A.2d 1333, 1332 (1981).

The defendants now suggest that this statement on my part constituted the point where the entire case began to go off the track. I must concede that it was my feeling from the evidence presented that this was what the report, on its face, was meant to indicate, namely, that the purchase of the UOP minority shares at any price up to $24 per share represented a good investment opportunity for Signal. I also felt, however, that this had no bearing on the issue of the fair value of the minority shares of UOP at the time since I viewed the report to be only a recommendation by members of Signal's senior management as to how high Signal should be willing to go to keep within the bounds of a good investment from its point of view regardless of the value of the minority shares. I was then looking at the value of the minority shares from the standpoint of a minority shareholder's proportionate interest in a going concern. See, Tri-Continental Corp. v. Battye, Del.Supr., 74 A.2d 71 (1950).

The defendants now suggest, however, that both the plaintiff and the Supreme Court picked up on this observation on my part——which they respectfully say is an errant one——and reached the even more erroneous conclusion that Signal's board considered that the acquisition of the UOP minority shares at any price up to $24 per share was a good investment for Signal. The failure of Signal to make either the UOP outside directors or the UOP minority shareholders aware of this was found by the Supreme Court to be a violation of the fiduciary duty owed by Signal as majority shareholder of UOP, and thus the primary factor mandating reversal.

To show how the apparent inconsequential error in my decision became compounded, the defendants point to the following statements in the Supreme Court opinion. The emphasis is added to illustrate the argument. At 457 A.2d 705 the following statement of the Supreme Court appears:

> "Arledge and Chitiea concluded that it would be a good investment for Signal to acquire the remaining 49.5% of UOP at any price up to $24 each."

At 457 A.2d 709, in discussing what transpired at the meeting of the UOP board on the day that the terms of the merger were approved by the two corporations, it is stated as follows:

> "While these minutes recite Mr. Walkup's presentation of the Signal offer, they do not mention the Arledge-Chitiea report or any disclosure that Signal considered a price of up to $24 to be a good investment."

And at 457 A.2d 712 the Supreme Court found as follows:

> "Finally, the minority stockholders were denied the critical information that Signal considered a price of $24 to be a good investment."

Thus, according to the defendants, the errant progression went from my passing observation as to what the report itself showed, to the Supreme Court's finding of what Arledge and Chitiea——as directors of both Signal and UOP——had concluded, to what Signal——through its board——had decided. But, say the defendants, there is no evidence whatsoever in the record of this case that Signal's management ever considered the proposed merger to represent a good investment at any price, let alone at $24 per share. All the evidentiary record shows, say the defendants, is that Signal's management determined that it propose a price in the range of $20 to $21 and that after feeling out UOP's outside directors it decided to offer $21. There is no evidence in the case, they say, that Signal was ever willing to pay a nickel more than $21. Indeed, there is evidence that some members of its management were opposed to the $21 figure.

Defendants further argue that the Arledge-Chitiea report can in no way be interpreted to speak the state of mind of Signal even if it could be construed to represent a recommendation by Arledge and Chitiea that any price up to $24 was a good one. At best it can only be construed as the opinion of Arledge and Chitiea and not as the consensus of the Signal board members. Moreover, they argue that at $24 per share a projected 6% increase in income on an investment of $137 million (the amount required to purchase the UOP 49.5% interest at $24 per share) does not represent a good investment for an industrial concern of Signal's size.

Finally, the defendants contend that the Arledge-Chitiea report has absolutely nothing to do with the fairness of the merger price to the UOP minority. This is because it was designed solely to show the financial impact upon Signal should the UOP minority be acquired at any of the several prices. It was a document comprised primarily of Signal financial data. The only UOP information utilized was UOP's five-year projection plan and this, in addition to being already known at the time by UOP's outside directors, was disclosed in the proxy statement distributed to the minority shareholders prior to the time of their vote on the merger. Thus, the defendants argue that the report does not contain any secret information concerning UOP which was known only to Signal and deliberately withheld from UOP's outside directors and minority shareholders.

To illustrate their contention that the Arledge-Chitiea report contained nothing of any significance concerning the fair value of the UOP shares at the time, defendants point out that although the plaintiff's expert financial analyst had a copy of the report prior to trial, and although he was on the witness stand for five days, he never mentioned it even once during the course of his testimony. Moreover, the plaintiff's expert has conceded that there is no connection between the fairness of a purchase price to a seller and whether the purchase price represents a good or bad investment from the standpoint of the buyer.

In essence, defendants respectfully feel that the Supreme Court reached an erroneous conclusion when it found that Signal had determined that any price up to $24 per share represented a good investment for Signal, and when it found that the Arledge-Chitiea report proved that this was so. At the same time, defendants realize that the Supreme Court has spoken and that this puts an end to the matter, at least insofar as the concept of fair dealing is concerned. This brings us to the point of their present application.

Defendants point out that while the fair dealing component of the entire fairness test has been decided against them, the case has been remanded for this Court to look anew at the fair price aspect of the entire fairness standard. According to the Supreme Court's opinion, fair price, or fair value, includes the element of rescissory damages in the event that this Court deems rescissory damages to be an appropriate remedy in a particular case. Whether or not rescissory damages are to be granted lies within the discretion of this Court.

Thus, if I understand the defendants' position, they are contending that even though they have been found guilty of unfair dealing with the UOP minority, primarily because of the Arledge-Chitiea report, this Court, in re-examining the fair price issue on remand, is free to look at the nature of the wrong they have been found to have committed, and to judge it independently for what it is worth insofar as rescissory damages are concerned. For the reasons they advance, as set forth previously, they contend that the wrong they have been found to have committed is not of such a nature as to warrant rescission of the entire merger transaction. They feel that they certainly have not been found guilty of any fraud or deliberate misrepresentation. Otherwise the Supreme Court would have said so. At best they feel that they have been found guilty of having failed to disclose information which, in their reasoned view at the time, they did not feel obligated to disclose.

In essence, as I perceive their application, the defendants take the position that the breach of fiduciary duty which they have been found to have committed is bottomed more in mistake or neglect than it is in deceit, and that accordingly their wrong is not of such a degree as would warrant the setting aside the entire merger by a Court of equity. If the wrong does not warrant rescission of the merger itself, then it does not warrant an award of rescissory damages. Thus, they appeal to the Court's discretion to rule rescissory damages out of the case at this point before things proceed any further, and to limit the scope of the hearing on remand to the fair value of the UOP shares at the time of the merger as tested against the broadened approach to valuation now authorized by the Supreme Court decision.

In support of this position, the defendants offered the testimony of Mr. Arledge at the preliminary hearing. Indeed, Arledge testified without equivocation that the Arledge-Chitiea report was never intended to show or pass upon the fair value of the UOP stock but rather it was intended solely to show the impact upon Signal of a transaction that was being proposed by management; that at no time did he ever reach the conclusion that the acquisition of UOP minority at any price up to $24 per share would be a good investment for Signal; that no one else in Signal's management ever reached such a conclusion; that the $18 to $24 spread in the Arledge-Chitiea report was merely offered for the benefit of Signal's board of directors so as to give them the impact picture to Signal at $3 per share on either side of the proposed $21 price; and that there was never any intention on the part of Signal's management or its board of directors to offer more than $21 per share. Thus, defendants would now rely on the evidence offered at the preliminary hearing so as to have this Court construe the effect of the Arledge-Chitiea report differently from that found by the Supreme Court based on the evidence offered at trial.

While I am sympathetic to the defendants' plight, I find that I cannot do as they ask. I reach this conclusion for two reasons.

First, it appears that the same arguments that they are making here as to the purpose and materiality of the Arledge-Chitiea report were made to the Supreme Court, and were rejected. Thus, I think the conclusion is inescapable that the defendants are asking me to re-litigate factual findings made by the Supreme Court and to reach a different interpretation of them for the purpose of determining fair price than that reached by the Supreme Court for the purpose of determining fair dealing. However, I am forced to agree with the plaintiff that the factual findings of the Supreme Court as to the effect of the Arledge-Chitiea report and the failure of the defendants to disclose it constitute the law of the case under the circumstances. Compare, Lee Builders v. Wells, Del.Ch., 103 A.2d 918, 919-920(1954). See also the dissenting opinion of Justice Quillen in Lynch v. Vickers Energy Corp., Del.Supr., 429 A.2d 497, 507 (1981) in which he observed that a factual finding of breach of fiduciary duty made by the Supreme Court on appeal constituted the law of the case on remand.

Stated simply, the test of entire fairness is comprised of two elements, fair dealing and fair price. The Arledge-Chitiea report cannot be interpreted as meaning one thing for the purpose of evaluating one element and another thing for the purpose of evaluating the other.

In the scheme of things, the Supreme Court's decision on the subject clearly controls.

This leads to the second point. Since the test of entire fairness is comprised of two elements, fair dealing and fair price, the defendants have already flunked the test since they have not passed the fair dealing requirement. In other words, the Supreme Court's findings as to fair dealing means that there is no way in which Signal, as majority shareholder standing on both sides of the transaction, can pass the test of entire fairness. Thus, the purpose of the remand, as I view it, is for this Court to determine what monetary amount, if any, is due to the minority shareholders in order to fairly compensate them for the wrong they have suffered from the improper manner in which the merger proposal was structured and presented to them by the defendants.

The key to the matter is that the finding of the Supreme Court means that the vote of the minority was tainted and of no effect. Since the defendants structured the transaction so as to give the minority the right to either approve or disapprove of it, the failure of the defendants to disclose material information germane to the decision to be made deprived the minority of information which might have persuaded them to vote down the proposal and thus remain shareholders of UOP. So found the Supreme

Court. Thus, regardless of whether the wrongs of the defendants were deliberate or unintentional, they deprived the minority of the right to make an informed decision on whether or not they wanted to accept the $21 per share or remain shareholders of UOP. In view of this, I find it difficult to rule the possibility of rescissory damages out of the case at this juncture based upon the arguments put forth by the defendants.

By so holding I do not mean to imply that I am inclined to award rescissory damages after a final hearing. I may or may not, depending on what the evidence of value may show. The object is to see that the minority is treated fairly in the long run, and it is difficult to do this until all the options are put before the Court.

I wish to make it clear also that I am only ruling on that which is before me, namely, the application of the defendants to have the element of rescissory damages ruled out of the case now so as to avoid the substantial discovery that would be entailed in this area of the matter in order for both sides to prepare for the final hearing. I have heard the defendants' arguments and based thereon I decline to do so.

The application of the defendants is denied. The stay of discovery previously entered following the remand is vacated. IT IS SO ORDERED.

With regard to the scope of discovery pertaining to rescissory damages, it is my feeling that it should extend from the date of the merger to the present time. Given the nature of the remedy I fail to see how I can realistically limit it to any lesser date or time frame. However, if counsel wish to be heard on this point I shall afford them the opportunity provided that application is made promptly and without formal briefing.