Unreported Cases

INTRODUCTION

UNREPORTED CASES will be a continuing feature of THE DELAWARE JOURNAL OF CORPORATE LAW. Significant unreported cases that have not been published by a reporter system will be included. The courts' opinions are printed in their entirety.

To expedite the attorney's research, all cases are headnoted according to the NATIONAL REPORTER key number classification system.* Indices are provided for case names, statutes construed, rules of court, and key numbers and classifications for this issue.

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† These cases are cited in THE DELAWARE GENERAL CORPORATION LAW, Ernest L. Folk III (1972).

CASE INDEX

(Chronological Order)

STATUTES CONSTRUED

KEY NUMBER INDEX

TASSETTE, INC. v. M. A. GERETT, INC., & HOLMES E. PENN

No. 2722

Court of Chancery of the State of Delaware, New Castle

February 5, 1971

In a suit for specific performance of a contract calling for an in-kind transfer of stock, the court held that where a contract calls for an exchange of stock which is not purchasable in the open market, the subject matter of the contract may be such as to allow for the specific enforcement of the contract.

1. Contracts ⟹ 211

   Equity ⟹ 23

In equity, unlike at law, time is not generally of the essence unless made so by the contract itself, or from the nature and situation of the subject matter, or by express notice given, requiring the contract to be closed or rescinded at a stated time.

2. Corporations ⟹ 118

   Contracts ⟹ 193

Time is not to be regarded as essential because of the fact that the subject matter of the contract is corporate stock.

3. Corporations ⟹ 121(7)

   Specific Performance ⟹ 70

It is generally held that specific performance of contracts for the sale or delivery of personal property will not be decreed, because money damages will ordinarily enable the party to purchase goods of like kind and quality in the market place, and the rule applies to corporate stocks and bonds which are traded in the market.

4. Corporations ⟹ 121(1)

   Specific Performance ⟹ 70

Where stock is not purchasable in the market and its value is not easily ascertainable, specific performance of the contract may be enforced.

5. Contracts ⟹ 290

In order to invoke an estoppel, it is elementary that the party invoking the estoppel must show that in reliance upon his opponent's conduct he has been led to change his position for the worse.

6. Specific Performance ⟹ 16

The remedy of specific performance will not usually be denied where the hardship is due to the defendant's own acts or where the hardship was clearly forseeable.

SHORT, *Vice Chancellor*

Plaintiff, Tassette, Inc. (Tassette), a Delaware corporation, seeks cancellation of 100,000 shares of its common stock which were issued and delivered to defendants in exchange for all the outstanding shares of Winning-Peplow, Inc., (Winning-Peplow), a California corporation, owned by defendants Holmes E. Penn (Penn) and M. A. Gerett, Inc. (Gerett) a New York corporation. The complaint and amended complaint are founded alternatively upon lack of mutual agreement, fraud and misrepresentation, and a subsequent written agreement to rescind. Defendants were preliminarily enjoined on October 14, 1969 from disposing of the Tassette shares in their possession prior to final decision by the court. This is the decision after final hearing.

There is little need to develop an extensive fact pattern in light of what I deem to be a controlling issue in the case. Penn, a personal shareholder of Winning-Peplow and president and board chairman of United States Dimension Products, which now controls defendant Gerett, negotiated the transfer of defendants' Winning-Peplow stock to plaintiff. Robert Oreck, plaintiff's president and a business associate of Penn in other matters, represented plaintiff in the negotiations. Discussion and investigation of revelant financial statements took place. Plaintiff's agents also made a number of on-sight inspections of the principle Winning-Peplow facility in California. A number of agreements concerning the exchange of Tassette's stock for defendants' Winning-Peplow stock were proposed and even executed during March and April of 1966. These early agreements were, however, mutually rescinded.

In May 1966 plaintiff received in New York a copy of the alleged final contract from defendants' counsel in Wisconsin. Stuart Jackson, plaintiff's counsel and secretary, discovered that Gerett's warranties and representations as provided in the contract submitted were not in accordance with his understanding of the parties' agreement. Jackson changed page 5 of the contract to reflect the Gerett warranties as he understood them and returned the contract as thus changed with Tassette's signature to defendants' counsel together with the Tassette shares issued in defendants' names. Defendants' counsel, without notifying plaintiff, substituted for page 5 as altered by Jackson the unaltered page 5 as originally

submitted and returned the signed contract to Jackson together with the Winning-Peplow share certificates. An involuntary petition in bankruptcy was filed against Winning-Peplow on June 23, 1966. On the basis of alleged misrepresentations concerning inventories and other items plaintiff informed defendants on June 24 of its intent to withdraw from the transaction, and upon receipt of the executed contract Jackson informed defendants' counsel on June 27 more extensively concerning misrepresentations and the misunderstanding relating to Gerett's warranties.

Eight of the nine causes of action alleged in the original and amended complaints relate to events which took place prior to and during June 1966. The other cause of action (numbered "Seven" in the original complaint) pertains to events which occurred thereafter, and in particular to an agreement to rescind dated December 1, 1966. Since I am satisfied that plaintiff, in any event, is entitled to recover on its Seventh cause of action it is unnecessary to consider the other causes alleged.

Tassette first requested the return of its stock in a June 24 telegram to defendants, and the parties discussed re-exchange of the stock for the next five months. On July 20 plaintiff, at defendants' request, sent the Winning-Peplow stock, corporate books and seal to Keith McGregor, defendants' attorney, to be held in escrow pending settlement of creditors' claims against Winning-Peplow or return to plaintiff of the Tassette shares prior to August 20, 1966. The settlement with creditors did not materialize, nor were the Tassette shares returned, but the Winning-Peplow stock remained in the possession of McGregor. The efforts of the parties to settle their differences by re-exchange of the stock culminated in the executed agreement of December 1, 1966 by the terms of which Tassette agreed to deliver to Gerett and Penn "on or before December 15, 1966" a general release, an appropriate resolution of Tassette's board authorizing its execution, and the Winning-Peplow stock, and Gerett and Penn agreed "upon receipt of the documents" to deliver to Tassette their release, resolution of Gerett's board and the Tassette stock. The agreement as originally drawn by defendants' attorneys provided for Tassette's performance "on or before December 5, 1966." At Tassette's request the date was changed at the time of execution of the agreement to December 15, 1966. Despite the extension of time, however, Tassette did not actually deliver the general release and accompanying corporate resolution until on or about April 17, 1967. In the meantime, Winning-Peplow's assets, by order of the bankruptcy court, were sold piecemeal at auction on March 2, 1967. Defendants refused to accept Tassette's tendered performance in April.

Defendants' principal defense for avoiding the December 1 rescission agreement is based upon the contention that time was of the essence of the contract. Defendants' rely upon these circumstances: (1) Tassette's time for performance was specifically extended once from December 5 to December 15, (2) Winning-Peplow's assets were sold at auction prior to plaintiff's tender, and (3) the subject matter of the agreement was corporate stock.

[1] It has long been established in equity, unlike at law, that time is not generally of the essence. *Coyle v. Kierski,* 10 Del. Ch. 229, 89 A. 598; *Tull v. Smith,* 29 Del. Ch. 347, 50 A.2d 908, where this court said: "time may become of the essence of the contract, either by being made so by the contract itself, or from the nature and situation of the subject matter of the contract, or by express notice given, requiring the contract to be closed or rescinded at a stated time." The agreement here does not expressly make time of the essence. Defendants argue, however, that the extension, at Tassette's request, of the time for its performance indicated the intent of the parties to make time essential. But I am not persuaded by this argument. The extension, in my opinion, was indicative of an intent contrary to that for which defendants contend. Moreover, the circumstances and defendants' conduct clearly show that they did not regard the extended date as essential. Commencing in July 1966 Penn had engaged in negotiations to save Winning-Peplow. His first efforts were directed to the making of an arrangement with the Winning-Peplow creditors. When these failed he sought to "find a new buyer that could put capital into that company and make it run." Penn's efforts were motivated by a desire to be relieved of his personal and Gerett's guarantee of payment of a large Winning-Peplow indebtedness to Bank of America and his belief that Winning-Peplow, even though in bankruptcy, had a greater potential than 100,000 shares of Tassette stock. He testified to a willingness to rescind the stock exchange contract "as long as Winning-Peplow's capacity to manufacture wasn't impaired and I had interested people," that there were interested people, and that Winning-Peplow was a saleable facility as late as January or February 1967. I am satisfied that the extension of time, at Tassette's request, did not have the effect of making the time of its performance of the essence of the rescission contract.

[2–4] Nor is time here to be regarded as essential because of the fact that the subject matter of the contract is corporate stock. True, it is generally held that specific performance of contracts for the sale or delivery of personal property will not be decree. 4 Pomeroy's Equity Jurisprudence § 1402; *Esso Standard Oil Co. v. Cunningham,* 35 Del. Ch. 210, 114 A.2d 380, *aff'd,* 35 Del. Ch. 371, 118 A. 2d 611. This is because money damages will ordinarily enable the party to purchase goods of like kind and quality in the market place. The applicability of the rule to corporate stocks and bonds which are traded in the market has long been recognized in this state. *Diamond State Iron Co. v. Todd,* 6 Del. Ch. 163, 14 A. 27. But where the stock is not purchasable in the market and its value not easily ascertainable specific performance of the contract may be enforced. 4 Pomeroy's Equity Jurisprudence § 1402; *G. W. Baker Mach. Co. v. United States Fire Apparatus Co.,* 11 Del. Ch. 386, 97 A. 613; *McLeod v. Keith,* Wash. Supr., 417 P.2d 861.

The Tassette stock which was the subject of the rescission agreement was "investment" stock. The certificates bore the legend that the shares

were held for investment and not for distribution. Penn testified that the stock couldn't be sold. Conversely it couldn't be purchased in the market. And being investment stock its value was obviously difficult to ascertain. In fact, determination of the stock's value might well have been impossible in view of Tassette's woeful financial condition over a period of years. The contention that time was of the essence of the rescission contract because its subject matter was corporate stock is not, in the circumstances, persuasive.

[4, 5] But defendants argue that because of a material change in circumstances, namely the sale of Winning-Peplow's assets, and particularly its plant and machinery, before the offer of performance Tassette is estopped to claim that time was immaterial. In the ordinary case this argument might well have merit. However, this is the unusual case. There is nothing in the record to show, and defendants do not even contend, that Tassette's delay in performance in any way hampered Penn's efforts to save Winning-Peplow. There is nothing to indicate that had Tassette performed on December 15, 1966, or on any later date, the Winning-Peplow assets would not have been sold. In short, there is simply no causal connection between Tassette's delay and the bankruptcy sale. Moreover, in order to invoke an estoppel it is elementary that the party must show that in reliance upon his opponent's conduct he has been led to change his position for the worse. *Friel v. Jones,* 42 Del. Ch. 148, 206 A.2d 322, *aff'd,* 42 Del. Ch. 371, 212 A.2d 609. Neither reliance or a change of position for the worse appears in this record. Nor can defendants' claim hardship resulting from the change of circumstances. The remedy of specific performance will not usually be denied where the hardship is due to defendants own acts or, as here, was clearly foreseeable. *Craft Builders, Inc. v. Ellis D. Taylor, Inc.,* Del. Supr., 254 A.2d 233.

There is some testimony in the record that between December 15, 1966, the date called for Tassette's performance by the rescission agreement, and April 17, 1967, when performance was tendered Penn, in a telephone conversation with Jackson, inquired about the release and resolution which Tassette was to furnish. Just when this conversation took place is not at all clear. Jackson testified that it occurred "in that period." Penn's testimony tends to show that it took place, if at all, in December. In any event, it is clear that, assuming such a conversation, Penn gave no notice "requiring the contract to be closed or rescinded at a stated time."

At oral argument defendants' counsel suggested that the true reason for Tassette's delay in performance was because Oreck, plaintiff's president, was undecided as to whether he wanted the Tassette stock or the Winning-Peplow stock; that Oreck "wanted to go the way that would pay him to go." This suggestion finds no support in the evidence. On the contrary, it is refuted by Oreck's and Jackson's testimony and by Penn himself.

Since time was not of the essence of the rescission contract the remaining question is whether or not Tassette's tender of performance was within a reasonable time. As heretofore indicated defendants were not prejudiced by the delay. And the undisputed testimony tends to show that after December 15 Tassette was repeatedly lulled into a sense of security with respect to the continued existence of the rescission contract. Oreck testified that in the early months of 1967 he, on a number of occasions, asked Penn to return the Tassette stock; that on each such occasion Penn promised to do so; and that when Penn brought to his attention the fact that the instruments called for by the contract had not been delivered he directed Jackson to make delivery and Jackson did so. Penn did not deny the Oreck testimony and admits that during this period he was in close contact with Oreck concerning other business matters. Jackson, while frankly assuming responsibility for the delay, testified that he didn't consider delivery of the instruments important timewise. As the evidence stands neither did Penn. I am satisfied that in the circumstances Tassette's tender of performance in April 1967 was within a reasonable time.

An order, on notice, requiring defendants to specifically perform the agreement of December 1, 1966 may be presented.

STRYKER & BROWN v. THE BON AMI COMPANY, ET AL.

No. 1945

GOTTLIEB v. LESTOIL PRODUCTS, INC., ET AL.

No. 1947

Court of Chancery of the State of Delaware, New Castle

March 16, 1964

Plaintiffs in both actions are minority stockholders of Bon Ami and they seek a restraining order to prevent the vote on a proposed merger of Bon Ami into Lestoil Products, Inc.; their basic claim being that the proposed terms of the merger by which shares of Bon Ami are to be converted into common stock of Lestoil are unfair and inequitable to minority stockholders of Bon Ami. They claim a corresponding unjust benefit will flow to Lestoil and those who own it. The court held that defendants did not meet their burden of proof and that plaintiff's application would be granted, subject to certain conditions.

[1] Corporations ⟹ 519(1)

Despite a prospective vote in favor of proposed merger by the holders of the majority of the independent stock of the offeree corporation (being, however, a minority of all the stock) defendants have burden of proof of showing fairness of the transaction.

[2] Corporations ⟹ 586

While, ordinarily, an attempt to arrive at a meaningful projection of earnings requires an examination of past earnings, where the parties disagree as to the comparative figures which result from the application of practically every relevant principle usually employed in determining the value of corporate stock, certain factors make the use of past earnings an unsatisfactory basis for capitalizing the value of the respective shares of stock.

[3] Corporations ⟹ 586

Where offeree corporation reports a loss for one year that results from a unique expenditure and if one were to assume that the sales of offeree corporation would remain near the present level and that the capitalization rate for both offeree and offeror corporations would be similar, then proposed exchange ratio based on earnings valuation would be fair.

[4] Corporations ⟹ 586

If savings of $600,000.00 result from measures already taken by offeree's management and such savings is added to income, then fairness of proposed exchange ratio is open to serious question.

[5] Corporations ⟹ 310(1)

Evidence ⟹ 486

While there is no doubt that management may spend additional money for advertising, if this increase was motivated by a desire to adjust the relative earning prospects of the two corporations to vindicate the proposed exchange ratio, the court would be justified in making its own estimates of income and expenses for purposes of fair valuation.

[6] Corporations ⟹ 214

Where there is no finding that a merger is unfair, but the merger is restrained to determine fairness of exchange ratio, plaintiffs will be required to post appropriate bond with surety to cover any interim financing problems which result from the delay of the proposed merger.

SEITZ, *Chancellor*

The plaintiffs in both of these actions are stockholders of The Bon Ami Company. They seek a restraining order to prevent the vote on a proposed merger of the corporate defendant, The Bon Ami Company into the corporate defendant, Lestoil Products, Inc. In essence they claim that the proposed terms of the merger by which each share of Bon Ami (except those owned by Lestoil) are to be converted into 1.2 shares of the common

stock of Lestoil are unfair and inequitable to the minority stockholders of Bon Ami. They claim a corresponding unjust benefit will flow to Lestoil and those who own or control it.

In August 1963, Lestoil and its affiliate purchased 360,292 shares or approximately 61.5% of the outstanding stock of Bon Ami. Lestoil later purchased its affiliate's interest therein so that at all times here important Lestoil had had a controlling stock ownership in Bon Ami and must be deemed presently to control it. Bon Ami has for many years been mainly engaged in making cleansers under its own name, aerosol cleansers, furniture polish, dusting cloths and household specialty paper products. Lestoil makes heavy duty liquid detergents, dry bleach, deodorizers, window cleaners, etc. Since the acquisition by Lestoil of a controlling stock interest in Bon Ami certain administrative and marketing functions have been integrated. Both are now modest operations in their respective fields, being faced with competition from the three giants, viz., Procter & Gamble, Lever Bros., and Colgate.

In general, it may be said that plaintiffs do not attack the business wisdom of the proposed merger but only the stock exchange ratio, which they believe should be 3.25 shares of Lestoil for each share of Bon Ami. The proxies received by the management of Bon Ami from the stockholders, other than Lestoil, overwhelmingly support the merger. Plaintiffs contend, however, that the proxy statement contained numerous misleading statements which would in any event invalidate the proxies.

While the matter came before the court on an application for a restraining order, the court has had the benefit of more than the usual record on such an application because it required the production of certain underlying reports relied upon by defendants in support of the exchange ratio. It has also received substantial affidavits and briefs from the parties.

[1] The time factor involved does not permit the court to indulge in a full scale discussion of this matter. I proceed by assuming that despite the prospective vote in favor of the merger by the holders of a majority of the so-called independent Bon Ami stock (being, however, a minority of all the stock), the defendants have the burden of showing the fairness of the transaction. Compare *Sterling v. Mayflower Hotel*, 33 Del. Ch. 293, 93 A.2d 107. I consider now the reasonable prospects of plaintiffs' ultimate success in the light of this legal principle and the record to date.

[2] The parties disagree as to the comparative figures which result from the application of practically every relevant principle usually employed in determining the value of corporate stock. The parties do agree, of course, that primary consideration should be given to the future earnings prospects of both corporations. Ordinarily an attempt to arrive at a meaningful projection of earnings requires an examination of past earnings. In the present case, however, a number of factors make the use of past earnings a largely unsatisfactory basis for capitalizing the value of the respective shares of stock. Without attempting to discuss in detail the

various factors involved; I merely note that while Lestoil's sales and earnings over the past five years have on the average greatly exceeded those of Bon Ami, nonetheless the trend of such sales and earnings has been generally downward. On the other hand, after a loss year in 1959, Bon Ami's sales and earnings steadily increased from 1960 through 1962. In 1963, however, due to certain non-recurring operating losses and other extraordinary charges Bon Ami had a substantial deficit. In the case of Lestoil sales and earnings are admittedly largely affected by the competition which the company faces in marketing Lestoil Pine Scent, a liquid detergent that represents a substantial part of its total sales. Bon Ami's sales and earnings, however, are colored to a considerable extent by certain recent acquisitions. In summary, while past earnings ought not be disregarded in ascertaining value, it is difficult on the present record to construct a meaningful protection of earnings for either company based on that factor alone. Indeed, neither of the experts whom the defendants consulted for the purpose of establishing a proper ratio of exchange utilized past earnings as a basis for valuing the shares of either Lestoil or Bon Ami.

I turn next to the consolidated statements of income for Lestoil and Bon Ami for the year 1963 alone. These statements are of considerable significance here, because they are the basis on which defendants' experts justified the proposed ratio of exchange. Moreover, both plaintiffs and defendants seem to concede that these statements provide a more nearly accurate profile of both the income and taxes of both companies.

Lestoil reported earnings of $0.65 per share before taxes. Defendants claim, however, relying on a market analysis prepared by Lestoil's management in late November or early December of 1963, that sales of Lestoil products will increase in 1964 by approximately $2,000,000 and will result in earnings for Lestoil of about $0.81 per share before taxes. I assume for purposes of discussion herein, without deciding, that such estimate is accurate.

[3] While Bon Ami reported a substantial loss per share in 1963, the parties nonetheless agree that in order to provide a meaningful basis for projecting future earnings, Bon Ami's extraordinary and non-recurring charges for 1963, including an expense of $550,000 for a so-called "barter time" spot advertising on radio and television, should be eliminated. These adjustments result in Bon Ami operating income of $615,000 or about $1.01 per share. If one were to assume that the sales of Bon Ami would not increase substantially at least in the near future and that the capitalization rate for Bon Ami would at best be no greater than that for Lestoil — assumptions which, I add, are not unreasonable on the present record, than it would follow that the proposed ratio of exchange based on an earnings valuation is fair.

[4] The parties go on to argue, however, that certain adjustments must be made in Bon Ami's future expenses in order to arrive at an accurate picture of its earnings prospects. The plaintiffs point out that Bon

Ami will save an estimated $600,000 in administrative costs annually as the result of certain measures taken by Bon Ami's current management and that by adding such savings to income, Bon Ami can fairly be expected to earn over $2.00 per share. On that basis the fairness of the proposed exchange ratio would be open to serious question. The defendants admit the propriety of making the adjustment for savings in administrative costs, but they contend that such savings will be more than offset by substantially increased advertising expenditures in 1964, which may or may not result in increased sales and profits.

It is agreed that the $500,000 spent by Bon Ami for "barter time" in 1963 was "wasted" and should be treated for accounting purposes as a nonrecurring loss. Nonetheless, the company has now budgeted for the Bon Ami line for 1964 the sum of $1,467,000, which exceeds 1963's expenditures for that line, including the so-called wasted item, by some $500,000. Presumably nothing will be spent for "barter time." An estimate of advertising expenses for 1964 was originally made by Bon Ami's Accounting Department at the end of November 1963, and the sum of $956,000 was then allocated. This allocation exceeded the actual 1963 expenditure including the amounts spent for "barter time" by about $50,000. The large increase in the budgeted item was subsequently made by management in January 1964, after the defendants were on notice that certain stockholders desired to ascertain the basis for the proposed exchange ratio. They were not given this information except as it appears in the proxy statement.

[5] There is no doubt that the additional advertising money is to be spent for 1964, though nothing is said of subsequent years, and there is no doubt of the right of management to make such a judgment and to spend the money. However, if, as plaintiffs suggest, the large increase in this item was motivated by a desire to adjust the relative earnings prospects of the two companies in order to vindicate the proposed ratio of exchange, the court would be justified in constructing its own estimate of income and expense in order to reflect fairly for valuation purposes the actual earnings potential of Bon Ami. Thus, the advertising factor is of real significance here in determining the intrinsic value of a share of Bon Ami stock. I do not think that the defendants have under all the circumstances adequately discharged at this stage their burden of explaining the substantial increase in Bon Ami's 1964 advertising budget. Weighing this consideration together with the fact that defendant Lestoil already controls Bon Ami, I conclude that a balancing of the equities justifies the granting of plaintiffs' application to the extent indicated below.

In view of the conclusions reached herein it is unnecessary to discuss at this stage plaintiffs' other claims involving, inter alia, alleged misstatements in the proxy statement.

[6] Defendants suggest that a pending bank loan of Bon Ami would have to be renegotiated if the merger were to be restrained. Of course,

there is no finding at this time that the merger is unfair and thus, at best, the management would be confronted only with the need for arranging interim financing pending the final determination. To the extent that this may be a factor the defendants will be protected because the plaintiffs will be required to give appropriate bond with surety. An order will be entered restraining the effectuation of the merger if the votes thereon are favorable.

Present order on notice.

BOWLING v. BONNEVILLE, LTD.

No. 1688

Court of Chancery of the State of Delaware, Sussex County

January 14, 1963

Action by a stockholder against Bonneville, Ltd., a Delaware corporation, wherein stockholder requested an injunction to prohibit the holding of a special stockholders' meeting called to approve the sale of assets of Bonneville to either of two corporations, both of which had submitted offers for the assets. The president of Bonneville was named a defendant and charged with breach of fiduciary duties. The Court of Chancery, per Short, Vice Chancellor, held, inter alia, (1) that the plaintiff failed to establish that proponents of the sale made false and misleading statements in the proxy material and (2) 8 DEL. C., § 271 does not require a majority of the board of directors to make a determination as to which of the two offers should be recommended to shareholders for approval.

Judgment in accordance with opinion.

1. Corporations ⟹ 182.4(3), 312(5)

Where directors, though evenly divided as to which offer of purchase is the best, do recommend a sale of assets and approval of one of the other of the two proposals, the stockholders should be the only body to break the deadlock, it being impossible for an evenly divided board to recommend the one or the other. 8 Del. C., § 271

2. Corporations ⟹ 198(4)

A stockholder of a corporation may properly solicit other stockholders to vote in a certain manner on proposed corporate action, and the form of such solicitation may be tete-a-tete or, as here, in letter form.

3. Corporations ⟹ 198(3), 313

The fact that the soliciting stockholder is president of the corporation and a director of its board, which is evenly divided as to the propriety of

the proposed action, in no way affects the stockholder's right of solicitation, and authority to solicit is not required.

4. Corporations ⟹ 198(3), 298(6)

While the particular method of solicitation adopted by an officer, that is, inclusion of his letter with the proxy material, may be an unusual way of approach to other stockholders, it certainly cannot be regarded as forming the basis for a finding that the proxy statement was false and misleading.

5. Corporations ⟹ 198(3)

There is an area of "permissible puffing" to be expected in proxy solicitations.

6. Corporations ⟹ 198(4)

Proxy material need not contain more than one point of view, since the directors who favor a counter proposal have an equal opportunity to present their views to the stockholders, and the fact that opposing points of view had been presented to stockholders on prior occasions is not pertinent.

7. Corporations ⟹ 198(3)

If certain financial statements in support of one offer are included in the proxy material, the failure to include comparable statements in support of the other does not necessarily lead to the conclusion that stockholders were or could have been mislead, and whether that result would follow such an omission depends upon the circumstances of the case.

8. Corporations ⟹ 198(3)
Securities Regulation ⟹ 50

In determining whether certain language in a proxy is subject to misinterpretation, the standard to be applied is whether a person of reasonable intelligence would have been mislead or confused.

9. Corporations ⟹ 307, 310

Something more than the bare fact that at some time in the past some third person had evinced an interest in the corporation assets, must be shown to warrant the conclusion that the offers entertained are not the highest and best available and that the directors have been derelict in their duty to obtain the best offer, and this duty does not require that the assets be placed upon the auction block.

SHORT, *Vice Chancellor*

Plaintiff seeks an injunction against Bonneville, Ltd., a Delaware corporation, enjoining the holding of a special stockholders' meeting called to approve the sale of assets of Bonneville to either Standard Magnesium Corporation, a New York corporation, or Kern County Land Company, a California corporation, both of which had made offers for the assets. Quincy A. Shaw, Jr., president of Bonneville, is named a defendant and charged with breach of fiduciary duties. The facts are set forth in briefs of counsel filed subsequent to the hearing. Since it is agreed that time is important I will not recite them here.

The complaint contains four counts. The first cause of action charges that the proxy material is false and misleading in certain specified particulars. The second alleges that the submission to the Bonneville stockholders of the two proposals is in violation of Section 271, Title 8, DEL. C., since a majority of the board of directors did not make a determination as to which of the two offers should be recommended to stockholders for approval. The third count charges that a sale under either proposal would, in effect, constitute a merger or consolidation without compliance with Delaware law, and the consequent denial of the right of appraisal to non-assenting stockholders. The fourth cause of action alleges that the holding of the stockholders' meeting without curing the false and misleading statements in the proxy material as described in the first count will result in irreparable injury to dissenting stockholders.

If plaintiff's interpretation of Section 271, Title 8, DEL. C., is correct, then it is, of course, unnecessary to consider the remaining causes of action stated in the complaint. I will, therefore, first consider the question raised by the allegations of the second count. That plaintiff himself is in serious doubt of the propriety of his position is evidenced by the fact that his brief devotes but one sentence to his contention. He states: "The absence of any recommendation of a majority of Bonneville's directors as required, so it seems to plaintiff, by 8 DEL. C., Section 271, did not constitute an unprejudiced exercise of judgment by said Directors." The remainder of plaintiff's argument under the second count deals with the question of whether or not the directors, particularly Shaw, acted in accordance with the fiduciary duties. Plaintiff moved, subsequent to trial, to add the remaining directors as parties defendant and to amend his complaint to charge them with breach of fiduciary duty. This motion was denied by the court for the reasons then stated. Since, as hereafter appears, the premise of plaintiff's argument asserting breach of fiduciary duty by Shaw is not established, the question of breach of duty by the directors is not now before the court.

[1] While not expressly dispositive of the issue raised by plaintiff's second cause of action, I am satisfied that the propriety of the procedure here followed is tacitly recognized in *Robinson v. Pittsburgh Oil Refining Corp.*, 14 Del. Ch. 193, 126 A. 46. In fact, in the Robinson case, the

directors simply submitted to stockholders the question as whether or not the assets of the corporation should be sold. No recommendation whatever was made. Here the directors, though evenly divided as to which offer was the best, did recommend a sale of assets and approval of one or the other of the two proposals. Being evenly divided, it was impossible for the board to recommend the one or the other. In such circumstances the stockholders were the only body which could break the deadlock. *duPont v. duPont,* D. Del., 242 F. 98. I am satisfied that the procedures followed by the directors was not in violation of Section 271, Title 8, DEL. C.

Plaintiff's first cause of action charges that the proxy statement sent to stockholders with the notice calling the special meeting was false or misleading in several particulars. I will consider these in the order set forth in plaintiff's brief.

The statement failed to disclose that Shaw was to become Chairman of the Board and a director of Standard. The record does not, in my opinion, justify a finding of any such agreement. The only evidence adduced by plaintiff on the subject is the testimony of two directors that Shaw told them that he had "an informal understanding" with Standard that he was to be Chairman of the Board if the sale of the Bonneville assets to Standard was consummated. Shaw testified that there was no understanding and emphatically denied having made such a statement. His testimony as to the absence of such an agreement was supported by an officer of Standard who participated in the negotiations. The mere fact that the possibility of placing Shaw on the Standard board was at one time in the early negotiations mentioned is not sufficient to raise the conclusion that an understanding was reached.

The statement failed to disclose that Shaw recommended the Standard proposal because of the threat of litigation, which was a motivating factor. When the proxy material was prepared the threat of litigation had been withdrawn. In order to forestall possible legal action by Standard, Shaw had committed himself to vote the shares which he controlled in favor of the Standard proposal. The consideration for the commitment was not only the release of Bonneville, Shaw and other directors from liability to Standard for any breach of the Bonneville-Standard agreement, but also an increase in the amount of Standard's offer for the Bonneville assets. How far Shaw was motivated in entering into his commitment by the release from liability is an uncertain quantity at best. That he all along favored dealing with Standard is asserted by plaintiff himself, so that the argument that Shaw was chiefly influenced in committing himself by the threat of litigation loses much of its force. Moreover, since the threat had been dissipated, the directors unanimously agreed, after discussion, that it was not necessary or advisable to make mention of it in the proxy statement.

[2, 3, 4] The Shaw private letter violated the attitude of neutrality sought by the Board, was not authorized by the Board, and was sent over the objection of three of the directors. By these complaints I do not

believe that plaintiff intends to assert that any stockholder of a corporation may not, with propriety, solicit other stockholders to vote in a certain manner on proposed corporate action. If such is the intent, it is obviously without merit. Nor is the form of solicitation of any moment, whether tete-a-tete or, as here, in letter form. The fact that the soliciting stockholder is president of the corporation and a director of its board which is evenly divided as to the propriety of the proposed action in no way affects the stockholder's right of solicitation. Neither is authority to solicit required. While the particular method of solicitation adopted by Shaw, that is, inclusion of his letter with the proxy material, may be an unusual way of approach to other stockholders (the same method of solicitation was adopted by a corporate president in *Campbell v. Loew's, Incorporated,* 36 Del. Ch. 563, 134 A.2d 852), it certainly cannot be regarded as forming the basis for a finding that the proxy statement was false and misleading.

[5] The Shaw letter "puffed" about the potential value of the Standard debentures. Assuming a puffing, as plaintiff says, it is hardly to be regarded as misleading or false. Shaw was merely pointing out to other stockholders his own belief as to why the Standard proposal was preferable. That he conceded, in his President's letter, that the debentures were speculative and was aware that certain persons considered them worthless adds no force to the puffing charge. Moreover, there is an area of "permissible puffing" to be expected in the situation involved. *Karbs v. California Eastern Airways, Inc.,* 33 Del. Ch. 395, 94 A.2d 217.

[6] The Shaw private letter presented only one point of view and no effort was made to present the contrary. This complaint certainly cannot be taken to mean that Shaw himself should have presented to other stockholders the case for the Kern County offer. There is no suggestion in the record that the directors who favored that offer were denied the opportunity to present their views to the stockholders. For all that appears they, or any one of them, could have attached a personal letter to the proxy material explaining the reasons for their position. The fact that opposing points of view had been presented to stockholders on a prior occasion has no pertinency.

No disclosure was made that Standard did not have the cash to finance the purchase of the Bonneville assets or the developments referred to in the Shaw private letter. Even if true, the failure to disclose would not be misleading to stockholders who elected to take the full value of their shares in cash. But even as to those who would consider accepting part in cash and the balance in debentures, the proxy material, inferentially at least, did disclose Standard's inability to finance the purchase from any cash reserves. I can see no merit in this contention.

The proxy material contained the latest Standard annual report but not a similar report for Kern County.

The proxy material contained a pro forma balance sheet and an income and expense statement for a combined Standard-Bonneville Company

but no comparable statements for a combined Kern County-Bonneville Company.

[7] Though the directors might well have determined to incorporate in the proxy material comparable reports and financial statements for Kern County and a Kern County-Bonneville combination, they concluded, after discussing the matter, that this was unnecessary. In setting forth the Kern County proposal the proxy statement discloses: "Kern County is a large and well-established company. Its interests include oil wells, agricultural and cattle properties, automotive equipment, industrial and commercial real estate, housing and asbestos. At the end of 1961, it had a capital and surplus of about $96,000,000 gross income of more than $100,000,000 and net income after taxes of about $17,000,000. Its common stock is listed on the New York Stock Exchange and currently sells at about $70 and the range from the beginning of the year to date has been from about $60 to more than $90." After describing the Kern County offer, the statement continues: "Bonneville's assets are so small in comparison to those of Kern County that their acquisition will not change the Kern County picture in any material way. The proposal is, therefore, entirely different in this respect from that of Standard Magnesium, where the assets of the two companies are approximately equal in value." It is to be noted that plaintiff does not challenge the sufficiency or accuracy of the description of Kern County, its offer, or the comparison of the two proposals from the point of view of combined operations. He merely asserts that because financial statements in support of one offer were included in the proxy material stockholders were or could have been misled by the failure to include comparable statements in support of the other. The result asserted does not necessarily follow from the premise. It depends upon the circumstances. In those here appearing I am satisfied that the failure to include comparable statements as to Kern County was not misleading.

Shaw's private letter made no reference to footnote 6 of Standard's annual report which discloses a potential tax liability. In answer to this complaint, suffice it to say that because the letter did not expressly refer to everything that appeared in the proxy material it does not follow that the letter was misleading. The possibility of a tax liability was disclosed to any stockholder who took the trouble to read the material, and his failure to read could not form the basis of any complaint.

Undue emphasis was given to the Shaw private letter by placing it as the first document contained in the material sent to stockholders. Since the method of Shaw's solicitation was not improper, the mere placement of his letter in the position claimed is not significant. There is no merit to this contention.

[8] Plaintiff also points to certain language in the proxy which he contends is to be interpreted as informing stockholders that their failure to vote would constitute an affirmative vote for the Standard proposal. The statement mentioned is in this language: "If you do not signify your

choice on your proxy or fail to send in your proxy, you will receive cash and Convertible Debentures." When read in its proper context the interpretation which plaintiff places upon this sentence is not justified. It appears as the last paragraph under the title "Proposal of Standard Magnesium Corporation, Inc.," and immediately follows this sentence: "If you favor acceptance of the Standard Magnesium offer, be sure to state whether you wish cash and Convertible Debentures or whether you prefer all cash amounting to Eight Dollars ($8.00) per share of Bonneville, Ltd. stock." It is thus apparent that what the proxy statement intended to convey to stockholders, and, by necessary inference, did convey was that if a stockholder favored the Standard proposal he should send in his proxy and indicate his election to take cash and debentures or all cash, and that his failure either to return the proxy, or in returning it to indicate his election would, in the event of approval of the Standard proposal, result in his receiving cash and debentures. While it might have been preferable to include the cited statement in the preceding paragraph following the quoted sentence, I am satisfied that any person of reasonable intelligence would not be misled or confused because of the manner in which the statement was set forth.

Plaintiff contends also that the form of the proxy is deficient in failing to provide a place for stockholders to vote against both proposals. Defendants say that a stockholder may, in effect, vote against both by not voting for either. As they point out, since a majority vote of the issued and outstanding stock is required to authorize a sale of assets, which fact was expressly stated in the proxy material, the mere failure to vote is tantamount to a vote against both proposals. Again, the directors might well have provided a place on the proxy wherein stockholders could indicate their disapproval of both proposals, but the failure to do so was not misleading.

I find no merit in any of plaintiff's contentions as to misleading or false statements in the proxy material.

The third count of the complaint charging that a combination under either proposal would, in effect constitute a merger or consolidation has been abandoned by plaintiff.

The fourth cause of action is without merit for reasons already stated.

[9] Plaintiff's complaint does not allege, nor does his proof show, that the proposals submitted, or either of them, are unfair to stockholders. In his brief he dwells at some length on the proposition that directors have an affirmative fiduciary duty to seek out the highest and best offer for corporate assets. Except to point out that the records of the corporation show that Kaiser Aluminum and Chemical Corp. was, at one time, apparently interested in acquiring the Bonneville assets, plaintiff has not come forward with an iota of evidence that the proposals submitted were not the highest and best offers that could be obtained. Something more than the bare fact that at some time in the past some third person had evinced an interest in the corporate assets must be shown to warrant the conclusion

that the offers entertained are not the highest and best available and that the directors have been derelict in their duty to obtain the best offer. After all, this duty does not require that the assets be placed upon the auction block.

On the record made plaintiff is not entitled to the ultimate relief which he seeks. Judgment will, therefore, be entered for the defendants, and the restraining order issued November 30, 1962, is hereby dissolved. Present order on notice.