Revised Cover Page

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

UNISUPER LTD., PUBLIC SECTOR SUPERANNUATION SCHEME BOARD, COMMONWEALTH SUPERANNUATION SCHEME BOARD, UNITED SUPER PTY LTD., MOTOR TRADES ASSOCIATION OF AUSTRALIA SUPERANNUATION FUND PTY LTD., H.E.S.T. AUSTRALIA LTD., CARE SUPER PTY LTD., UNIVERSITIES SUPERANNUATION SCHEME LTD., BRITEL FUND NOMINEES LIMITED, HERMES ASSURED LIMITED, STICHTING PENSIOENFONDS ABP, CONNECTICUT RETIREMENT PLANS AND TRUST FUNDS, and THE CLINTON TOWNSHIP POLICE AND FIRE RETIREMENT SYSTEM,	)	C.A. No. 1699-N
Plaintiffs,	)	
v.	)	
NEWS CORPORATION, a Delaware corporation, K. RUPERT MURDOCH AC, PETER L. BARNES, CHASE CAREY, PETER CHERNIN, KENNETH E. COWLEY AO, DAVID F. DEVOE, VIET DINH, RODERICK EDDINGTON, ANDREW S.B. KNIGHT, LACHLAN K. MURDOCH, THOMAS J. PERKINS, STANLEY S. SHUMAN, ARTHUR M. SISKIND, and JOHN L. THORNTON,	)	
Defendants.	)	

OPINION AND ORDER GRANTING LEAVE TO APPEAL FROM INTERLOCUTORY ORDER

Date Submitted: January 9, 2006
Date Decided: January 19, 2006
Date Revised: January 20, 2006

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Edward P. Welch, Robert S. Saunders, Edward B. Micheletti and T. Victor Clark, of SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Wilmington, Delaware, Attorneys for Defendants.

CHANDLER, Chancellor

Defendants seek certification of an interlocutory appeal of a portion of this Court's December 20, 2005 Memorandum Opinion and Order ("the Opinion").[1] The Opinion dismissed three of the five counts of plaintiffs' complaint.[2] Nonetheless, the Opinion did not dismiss two counts of plaintiffs' complaint: one based on an alleged breach of contract and another based on promissory estoppel. Defendants now seek certification of an interlocutory appeal of that portion of the Opinion that rejected defendants' contention that the purported contract at issue, assuming it existed, would be unenforceable as a matter of law. For the reasons set forth below, I have concluded that the requirements for certification of an interlocutory appeal are met in this case.

I.

Plaintiffs' case is based upon allegations of a contract between the parties by which it was agreed there would be a shareholder vote on any extension of News Corporation's ("News Corp." or "the Company") stockholder rights plan ("poison pill"). As the Opinion tried to make clear, the Court viewed plaintiffs' allegations of a purported contract with great skepticism because of plaintiffs' inability to plead with any detail contextual facts, *i.e.*, facts other than the bare assertion that a contract existed. Most importantly, plaintiffs did not allege with any specificity *how* the allegedly promised shareholder vote on the poison pill was to be

[1] *UniSuper Ltd., et al. v. News Corp., et al.*, Del. Ch., C.A. No. 1699-N (Dec. 20, 2005).
[2] The three dismissed counts alleged fraud, negligent misrepresentation and breach of fiduciary duty.

structured. The Court's implicit assumption (at least at this early stage of the proceedings) was that the vote would be structured as a shareholder vote on a proposed amendment to the Company's certificate of incorporation. Because plaintiffs did not include any details in their complaint regarding the structure of the shareholder vote or the nature of the requested relief, this Court did not attempt to examine the issue of how relief should be fashioned or even whether it ultimately would be appropriate for the Court to grant relief at all.

Nonetheless, for purposes of this appeal, *defendants have conceded that there was a contract*. In fact, it is beyond dispute that there was a "package" of contracts and promises made between plaintiffs and the Company in the months leading up to News Corp.'s re-incorporation as a Delaware corporation. It also is uncontroverted, at this stage, that without these "agreements" the re-incorporation would not have occurred. More particularly, after extensive negotiations, the parties agreed that if the Company would implement certain corporate governance reforms, plaintiffs would vote in favor of the proposed re-incorporation.[3] Specifically, plaintiffs' agreed to vote in favor of News Corp.'s proposed re-incorporation as a Delaware corporation if: a) three amendments were included in the Company's proposed certificate of incorporation; b) Rupert Murdoch entered into certain voting agreements; and c) the Company's board adopted a policy

[3] The key parties who actually negotiated these agreements with News Corp. were two proxy advisory firms located in Australia. These firms monitor corporate governance and negotiate agreements calling for corporate governance reforms. These agreements are an important tool for corporate governance firms and other shareholder activists.

calling for a stockholder vote on continuation of the Company's poison pill. Defendants strenuously insist that the last of these agreements—the promise to adopt a policy calling for a stockholder vote on continuation of the Company's poison pill—should be unenforceable as a matter of law. Defendants are strangely silent on the other agreements that admittedly were part of the "package" deal to secure plaintiffs' favorable re-incorporation vote. This silence is just one of the many troubling implications of defendants' arguments, for it implies that all five of the agreements between plaintiffs and defendants were arguably invalid from their inception. In other words, were the same or similar facts to arise again, Delaware law (as defendants would have it) would *decrease* the likelihood that a foreign company would gain shareholder approval to re-incorporate in Delaware. Why? For the simple reason that shareholders in the foreign company would have no confidence that promises or representations regarding the foreign company's corporate governance made to induce their favorable vote would be enforceable under Delaware law.

News Corp. thus finds itself in a stew of its own making. News Corp. easily could have included language in the Press Release or Letter to Shareholders (publicizing the Company's agreement to adopt a board policy regarding poison pills) stating that the Company's board *reserved the right to rescind the board*

policy.[4] In like vein, News Corp. could have included a fiduciary out in its agreements with plaintiffs. Instead, defendants now unashamedly argue that—having availed themselves of the power to enter into agreements committing the Company to undertake certain corporate governance measures in order to induce plaintiffs to vote in favor of defendants' proposed re-incorporation—such agreements going forward should be unenforceable, *i.e.*, non-binding as a matter of law.

Putting aside defendants' rhetorical hyperbole about the Opinion, I note that defendants offer two different arguments for why the purported contract or promise in this case should be unenforceable as a matter of law. One argument is based on section 141 of the DGCL; the second argument is based on an established line of Delaware Supreme Court opinions describing fiduciary duties. The Opinion's rejection of these arguments, in the procedural context of a motion to dismiss, forms the basis for defendants' interlocutory appeal.

II.

Applications for interlocutory review, governed by Supreme Court Rule 42, require the exercise of the court's discretion and "are granted only in exceptional

[4] One can understand the predicament this posed for News Corp., for including such language would have contradicted the agreed upon representation in the Press Release that "[t]his policy will not permit the [poison pill] to be rolled over for successive one-year terms on substantially the same terms and conditions or to the same effect without shareholder ratification." In effect, including a proviso reserving the right to rescind what the board had promised would have revealed the illusory nature of the promise to begin with, likely costing News Corp. the favorable votes it needed from plaintiffs to achieve the re-incorporation. But at least it would have been an honest admission that the board's "promise" included a significant escape hatch.

circumstances."[5] This Court should certify an interlocutory appeal only if the ruling appealed from (i) determines a substantial issue; (ii) establishes a legal right; and (iii) meets one of the criteria in Rule 42(b)(i)-(iv).

A. The Opinion Determined Two Substantial Legal Issues

1. Section 141(a)

This Court rejected defendants' section 141(a) arguments based on a plain language reading of section 141(a). Section 141(a) states: "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."[6] In my view, to vest the board with plenary authority and then to insist (as defendants do) that the board may *never* limit its powers through contract would, in my opinion, have the unintended effect of severely limiting the board's power to manage the business and affairs of the corporation. As a matter of routine, boards of directors enter into contracts with third parties that limit the board's management of the business and affairs of the corporation, most notably agreements to merge with or to acquire other companies. Although such contracts are limiting in one sense, they are also enabling in another.

[5] *In re Pure Resources, Inc.*, 2002 WL 31357847, at *1 (Del. Ch. Oct. 9, 2002).
[6] 8 *Del. C.* § 141(a).

Ultimately, of course, a board's power to bind itself through contract is limited by the board's fiduciary duties (see below), but strictly speaking not by section 141(a) itself. Thus, for example, it is permissible for a board to enter into what are called deal protection measures such as lock-up agreements (these are, after all, a contractual device).[7] Nevertheless, if such deal protection measures are so strong that they impermissibly limit the board's fiduciary duties, they are unenforceable.[8] As yet another simple example, boards of directors routinely agree to bind themselves *in futuro* in agreements reached with shareholder-plaintiffs, in order to settle derivative or class action lawsuits. These agreements frequently commit the company to corporate governance "improvements" sought by representatives of the shareholders as remedies for perceived wrongs. Commitments are often made to restructure the composition and operation of important board committees, including the audit, governance and compensation committees. In other instances boards have agreed to adopt policies governing shareholder voting on certain matters, or to adopt certain by-laws. If these and similar "contracts" are unenforceable under section 141(a), this will do violence, in my opinion, to directors' and shareholders' settled expectations.

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[7] *In re IXC Commc'ns, Inc. v. Cincinnati Bell, Inc.*, 1999 WL 1009174 (Del. Ch. Oct. 27, 1999) ("Termination fees are permissible under Delaware law.") (citing *QVC Network, Inc. v. Paramount Commc'ns, Inc.*, 635 A.2d 1245 (Del. Ch. Dec. 7, 1993)).

[8] *See Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 932 (Del. 2003) (applying enhanced judicial scrutiny to deal protection measures in a merger agreement). *See also In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1016 (Del. Ch. June 25, 2005) (applying a reasonableness standard to deal protection measures).

The fact (if it is a fact) that the News Corp. board agreed to cede part of its authority over a discrete question (extension of the Company's poison pill) to the Company's owners (the shareholders at large) is an additional reason why the contract ought (at least in theory) to be enforceable. It would threaten widely held investor expectations if a Delaware court were to decide that shareholders are outsiders, merely residual claimants, and not in some sense the "owners" of the corporation with authority to exert themselves collectively via "voice" and not only via "exit." To the extent the Opinion rejected defendants' arguments based on section 141(a), the Opinion clearly determined a substantial legal issue.

2. Fiduciary Duties

The board of directors owes fiduciary duties *to* the shareholders. In the Opinion, this Court referred generally to agency law principles to illustrate why the nature and purpose of fiduciary duties is to serve as a shield for shareholders, not as a sword for directors to use against shareholders as a group. Although the Opinion employed agency law principles to illustrate by analogy the gap filling nature of fiduciary duties, it did so in an effort pointedly to reject defendants' effort to invoke the board's fiduciary duties as a muzzle to silence shareholders. Shareholders rarely speak with one voice because of so-called "collective action problems." Here, however, the Company promised that a majority of shareholders would be given the opportunity to speak with one voice and to exercise their shareholder franchise, presumably through the vehicle of an amendment to the

Company's charter. It seems highly dubious to me (*at least preliminarily and before any factual record has been developed*) that directors can impede the shareholders' franchise and take away the microphone on the grounds that "directors' fiduciary duties compel them to do so."

One can imagine instances where the directors' fiduciary duties may necessitate that a board not permit a shareholder vote to take place. This might be so where the board has reason to believe that a shareholder vote is likely to be improperly coerced. Determining whether shareholders are being subjected to actionable coercion so as to implicate directors' fiduciary duties is a factually intensive inquiry. On its face, a shareholder vote on whether or not to keep in place a poison pill, or a vote on amending the company's charter to prohibit adoption of a poison pill, is not a vote, to my mind, that raises the specter of improper coercion. The board, of course, would have every right, and a duty, to fully inform shareholders of the board's views on the wisdom, or the folly, of taking such action (*i.e.*, amending the Company's charter to preclude adoption of a poison pill). Again, to the extent this Court rejected defendants' arguments that the contract is in conflict with the board of directors' fiduciary duties, the Opinion determined a substantial legal issue.

B. The Opinion Established a Legal Right

In the absence of a legal right, an interlocutory order is unappealable.[9] The Delaware Supreme Court has held that a legal right is not established if "either side may yet be victorious at the trial level in regard to its view of the interpretation of the contract."[10] If no legal right is established where a contract remains open to interpretation, then certainly where a contract might not exist (an issue still to be determined at trial), then no legal right has been established.

Notwithstanding this line of authority on the legal right issue, defendants point to a line of cases permitting interlocutory appeals of rulings on statutes of limitations.[11] In those contexts, the untimeliness of the claim implicated the legal right to be free of the expense of a trial defense to a claim. Defendants urge that this reasoning should be extended from the context of statutes of limitations and applied to the present case. They contend that the Opinion rejected a legal defense

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[9] *Pepsico v. Pepsi-Cola Bottling Co. of Asbury Park*, 261 A.2d 520, 521 (Del. 1969).

[10] *Certain Underwriters at Lloyd's, London v. Burlington Northern R. Co.*, 1994 WL 658483, at *2 (Del. 1994) (holding that choice of law ruling, although determining a substantial issue, did not establish a legal right as required by Rule 42, because court had not yet applied the chosen law to resolve any substantive issue), *quoting Gardinier, Inc. v. Cities Serv. Co.*, 349 A.2d 744, 745 (Del. 1975).

[11] *See Laventhol, Krekstein, Horwath and Horwath v. Tuckman*, 372 A.2d 168, 171 (Del. 1976) (legal right at issue when order enlarged an exception to generally followed rule in determining whether to apply a statute of limitations, and ruling obliged the appealing defendants to go to trial on the complaint); *Price v. Wilmington Trust Co.*, 1996 WL 560177, at *2 (Del. Ch. Sept. 3, 1996) (timeliness of the claim implicated both substantial issue and right not to be put to the expense of trial); *Cochran v. Stifel Financial Corp.*, 2000 WL 376269 (Del. Ch. Apr. 6, 2000) (denial of a motion to dismiss on statute of limitations grounds determines a substantial issue and establishes a legal right); *but see Scharf v. Edgcomb Corp.*, Del. Ch., C.A. No. 15224, Mem. Op., 1997 Del. Ch. Lexis 169, Steele, V.C. (Dec. 2, 1997), *appeal denied*, Del. Supr., No. 1, 1998, 705 A.2d 243, 1998 Del. Lexis 9 (Jan. 14, 1998) (unpublished order) (court's ruling that a specific affirmative defense was not available, did not establish a legal right between the parties and, therefore, was not appropriate for interlocutory review).

to the purported contract—that any contract limiting a board of directors' discretion to deploy a poison pill is *per se* unenforceable under 8 *Del. C.* § 141(a). Although the Opinion expressed deep skepticism about the existence of a contract, as well as the exact nature of its terms and what would be the appropriate relief if it were found to exist, it did nonetheless reject defendants' "unenforceable as a matter of law" defense. Does rejection of a litigant's argument that a contract is "legally unenforceable" because of a statute (8 *Del. C.* § 141(a)) or because of certain judicial precedents (*e.g.*, *Omnicare*) establish a legal right? Although the question is not free from doubt, I conclude that in this context it does. There are "no disputed issues of fact to muddy the waters; rather, a pure question of law is presented."[12] It seems to me that appellate review affords the easiest and most appropriate way to resolve the issue efficiently and with the least expense to the parties. In reaching this conclusion, I am frankly weighing the prospect of discovery disputes and pretrial motions, and the burdens of a trial on the docket of a busy trial court. Given that an appeal may promptly resolve the dispute and avoid the time and expense of trial, I am inclined to err on the side of a broad interpretation of the "establish a legal right" requirement. Accordingly, I find that the establishment of a legal right requirement of Supreme Court Rule 42 is arguably satisfied.

[12] *Cochran*, 2000 WL 376269, at *2.

C. An Appeal Would Serve the Interests of Justice

Considerations of justice, within the meaning of Supreme Court Rule 42(b)(v), will be served by appellate review. If defendants' legal arguments are correct, interlocutory appeal has the potential to end this suit, sparing defendants, as well as plaintiffs and this Court, the expense of further litigation. Furthermore, the legal questions defendants seek to have reviewed are issues that the Court of Chancery is dealing with in other matters currently before the Court. Appellate review would, for that reason, serve considerations of justice by answering important questions that could determine the outcome not only in this case, but in those other cases as well.

III.

This Court's December 20, 2005 Opinion does determine a substantial legal issue and establish a legal right. Appellate review of the Opinion could potentially end this lawsuit without further expense of discovery and trial, thus serving considerations of justice. Accordingly, I grant defendants' motion for an order certifying an interlocutory appeal in this matter.

Finally, I also grant defendants' motion for a stay of proceedings in the Court of Chancery during the pendency of the interlocutory appeal. This will avoid the expense of discovery and other pretrial preparations until the appeal has been resolved, and it may avoid the need for such expense altogether. The

plaintiffs may ask the Delaware Supreme Court to vacate the stay during the appeal process; and if the appeal is refused, I will promptly enter a case scheduling order.

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Defendants.	)	

ORDER GRANTING LEAVE TO APPEAL FROM INTERLOCUTORY ORDER

This 19th day of January, 2006, the defendants having made application pursuant to Rule 42 of the Supreme Court for an order certifying an appeal from the interlocutory order of this Court, dated December 20, 2005; and the Court having found that such order determines substantial issues and establishes legal rights and that a review of the

interlocutory order may terminate the litigation and otherwise will serve considerations of justice;

IT IS ORDERED that the Court's order of December 20, 2005 is hereby certified to the Supreme Court of the State of Delaware for disposition in accordance with Rule 42 of that Court.

Chancellor

Dated: January 19, 2006