IN THE SUPREME COURT OF THE STATE OF DELAWARE

TCV VI, L.P. and TCV MEMBER FUND, L.P.,	§	No. 117, 2015
Plaintiffs Below, Appellants,	§	Court Below: Court of Chancery of the State of Delaware
v.	§	C.A. No. 10164-VCN
TRADINGSCREEN INC., PHILIPPE BUHANNIC, PIERO GRANDI, and PIERRE SCHROEDER,	§	
Defendants Below, Appellees.	§	

Submitted: March 27, 2015
Decided: April 7, 2015

Before **STRINE**, Chief Justice; **HOLLAND** and **VAUGHN**, Justices.

O R D E R

The preferred stockholders of TradingScreen Inc. (the "appellants") seek interlocutory review under Supreme Court Rule 42 of a Court of Chancery decision and order denying their motion for judgment on the pleadings.[1] The appellants argue that interlocutory review is in the interests of justice and judicial efficiency because the decision raises novel issues about the enforceability of a charter provision requiring the payment of dividends to preferred stockholders

[1] *See TCV VI, L.P. v. TradingScreen Inc.*, No. 10164-VCN (Del. Ch. Feb. 26, 2015) [hereinafter *TradingScreen*].

under certain circumstances. Although 8 *Del. C.* § 160(a)(1) provides that a corporation cannot redeem stock "when the capital of the corporation is impaired or when such purchase or redemption would cause any impairment," § 160 does not address a situation where the company might have funds to pay the dividend, but there is a substantial basis to believe that the payment will render the corporation unable to pay its other bills, unable to function as a going concern, and insolvent, injuring the rights of other creditors.

The Court of Chancery determined that it would be useful to have this Court determine certain legal issues that might be dispositive depending on the facts that emerge after discovery. The Court of Chancery thus certified the appellants' application for interlocutory review even though its decision hewed closely to the Court of Chancery's thoughtful decision in *SV Investment Partners, LLC v. ThoughtWorks, Inc.* and our affirming opinion.[2] In that decision, we stated "[w]hen a board decides on the amount of surplus available to make redemptions, its decision is entitled to deference absent a showing that the board: (1) acted in bad faith, (2) relied on unreliable methods and data, or (3) made determinations so

[2] 7 A.3d 973 (Del. Ch. 2010), *aff'd*, 37 A.3d 205 (Del. 2011). In that case, the company's certificate of incorporation contained a preferred stock redemption provision that provided that redemptions could only be made out of "funds legally available." The Court of Chancery concluded that the common law prevented the company from redeeming stock when doing so would render the corporation unable to pay its debts as they came due, and as such, "funds legally available" for redemption could differ from surplus funds under those circumstances. *ThoughtWorks*, 7 A.3d at 987.

far off the mark as to constitute actual or constructive fraud."[3] The Court of Chancery relied on that standard in its decision below,[4] but noted in its certifying memorandum that there are a number of related questions that this Court has not opined on, and that the answers could shed light on this dispute.

Applications for interlocutory review are addressed to the sound discretion of this Court under Rule 42(d)(v). In the exercise of our discretion, we have examined the Court of Chancery's decision according to the criteria set forth in Rule 42, and we have concluded that the appellants' application for interlocutory review should be refused. As the appellees point out and the Court of Chancery's decision makes clear, the facts developed in discovery could profoundly affect the legal questions that must be answered to decide the case, because the appellees dispute whether the company had surplus funds within the definition of § 160 to make a greater dividend payment.[5] It would be hazardous to decide those novel legal questions in the abstract, rather than against a concrete factual scenario. For example, it is potentially important whether a dividend payment will indisputably

[3] *ThoughtWorks*, 37 A.3d at 211.
[4] *See TradingScreen* at 17 ("To succeed in challenging such a decision, a plaintiff must prove that in determining the amount of funds legally available, the board acted in bad faith, relied on methods and data that were unreliable, or made a determination so far off the mark as to constitute actual or constructive fraud.") (internal quotations omitted).
[5] *See TradingScreen* at 11 n.19 ("While Defendants dispute the amount of TradingScreen's statutory surplus, this issue need not (and will not) be considered on this motion . . . .").

result in the corporation's immediate inability to meet its ongoing obligations, or simply put the corporation at greater risk of becoming insolvent in the future.[6]

We also decline to exercise interlocutory review when doing so would not be case dispositive.[7] Here, the extent of the statutory surplus must be determined to shape any remedy. Moreover, the appellants have pled four other counts in their complaint, including a claim that the failure to pay the requested dividend was a breach of fiduciary duty. Those counts require factual development and will not be resolved by an interlocutory ruling of this Court.[8] Therefore, the parties must proceed to discovery on the financial state of the company and the other claims, as the Court of Chancery itself noted,[9] regardless of our opinion on the novel issues

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[6] *See e.g.*, *ThoughtWorks*, 37 A.3d at 212 (affirming the Court of Chancery's decision because there "was evidence at trial showing that if [the plaintiff] obtained a judgment for the amount of the surplus [the plaintiff's expert] claimed, then ThoughtWorks would not be able to meet its obligations, including payroll, and that it would face bankruptcy [immediately]").

[7] *E.g.*, *MICH II Holding LLC v. Schron*, 2012 WL 3224351, at *6 (Del. Ch. Aug. 7, 2012) ("[W]here interlocutory review is unlikely to terminate the litigation or otherwise serve the administration of justice, certification should be denied."); Donald J. Wolfe, Jr. and Michael A. Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY, § 14-4 at 14-5 (2000) (in considering whether to grant an application for interlocutory relief, courts must seek to "avoid[] fragmentation and delay when interlocutory review is unlikely to terminate the litigation or otherwise serve the administration of justice").

[8] *See TradingScreen* at 7 (noting that the appellants moved for judgment on the pleadings for two of their six counts).

[9] *See TradingScreen* at 16 ("There Are Material Factual Issues Regarding TradingScreen's Legal Ability to Make a Redemption"); *TradingScreen* at 17 ("Whether or not the Special Committee validly concluded that a full redemption would destroy TradingScreen's ability to continue as a going concern is a factual decision that cannot be decided on the pleadings."); *TradingScreen* at 18 n.41 ("However, whether a redemption would affect TradingScreen's ability to continue as a going concern for the near future is a highly contested factual issue. Even accepting Plaintiffs' comparatively narrow view of insolvency, the Court cannot grant their motion when material facts are in dispute.").

supposedly presented by this proposed interlocutory appeal. When, as is the situation here, the case will not be resolved without the development of a full record regarding the underlying economic facts, it makes most sense for the Court of Chancery to handle the case in the normal order, using its own expertise and analysis of cases like *ThoughtWorks* and prior relevant decisions for guidance in addressing any novel legal issues that may arise from the facts as they ultimately develop.[10]

NOW, THEREFORE, IT IS HEREBY ORDERED that the within interlocutory appeal be REFUSED.

BY THE COURT:

/s/ Leo E. Strine, Jr.

Chief Justice

[10] *See TradingScreen* at 11-12 ("Case law spanning the last century makes clear that '*in addition* to the strictures of Section 160, the undoubted weight of authority teaches that a corporation cannot purchase its own shares of stock when the purchase diminishes the ability of the company to pay its debts, or lessens the security of its creditors.'") (quoting *ThoughtWorks*, 7 A.3d at 987) (emphasis in original); *see also In re Color Tile, Inc.*, 2000 WL 152129, at *5 (D. Del. Feb. 9, 2000) (holding that a complaint alleging a Delaware corporation had incurred "debts beyond its ability to pay" validly pled that the corporation "lacked legally available funds at the time of the dividend declaration"); *Farland v. Wills*, 1975 WL 1960 (Del. Ch. Nov. 12, 1975) ("A corporation should not be able to become a purchaser of its own stock when it results in a fraud upon the rights of or injury to the creditors."); *In re Int'l Radiator Co.*, 92 A. 255 (Del. Ch. 1914) ("A corporation cannot purchase its own shares of stock when the purchase diminishes the ability of the company to pay its debts, or lessens the security of its creditors.").