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# Corporations—Stockholder's Rights—Inspection of the Corporate Stock Ledger.—Trans World Airlines, Inc. v. State of Del. ex rel. Porterie

Nelson G. Ross

holders and a duty—a fiduciary relationship—flows down not only to the controlling shareholders but to all the stockholders. A sale of the directorships is a sale of a corporate asset and, considered as a breach of the fiduciary duty of these sellers, as directors, should not be countenanced by the law.

The trend of law today seems to be toward regarding management control as a corporate asset in which all shareholders have an equitable interest and in which they are entitled to share. On this basis the *Barnes* doctrine and the decision in the present case represent an outmoded view.[24]

Judge Friendly's opinion in the present case is indicative of the modern approach to the director's increased fiduciary obligations:

> . . . developments over the past decades seem to me to show that such a clause violates basic principles of corporate democracy. . . . A mass seriatim resignation directed by a selling stockholder, and the filling of vacancies by his henchmen at the dictation of a purchaser and without any consideration of the character of the latter's nominees, are beyond what the stockholders contemplated or should have been expected to contemplate. . . . A special meeting of stockholders to replace a board may always be called, and there could be no objection to making the closing of a purchase contingent on the results of such an election.[25]

THOMAS J. MUNDY, JR.

**Corporations—Stockholder's Rights—Inspection of the Corporate Stock Ledger.**—***Trans World Airlines, Inc. v. State of Del. ex rel. Porterie.***[1]**—** Petitioner, owner of record of one hundred shares of TWA stock, was refused permission by TWA to inspect its stock ledger. Its refusal was predicated on the contention that the petitioner was acting solely in behalf of Howard Hughes' interests which were being sued by TWA in another jurisdiction in connection with certain loans made to TWA. The airline further contended that the inspection was sought for the purpose of soliciting stockholder support for a resolution instigated by Hughes via the petitioner, recommending that it assist Hughes in prosecuting claims against certain lending institutions. Such action by TWA's management would result in an abandonment of its claims against Hughes, which TWA asserts would be inimical to the corporation. The Superior Court of Delaware granted a writ of mandamus permitting a qualified inspection of TWA's stock ledger. On

[24] Berle, "Control" In Corporate Law, 58 Colum. L. Rev. 1212, 1217 (1958): A third point of contact is the practically universal prohibition of contracts by directors to resign, [citing *Gerdes* case] . . . . The vice therefore of a director's contract to resign . . . at bottom rests not on the fact that such action is based on personal motives but on the simple fact that the control function is being abused. The thrust is quite simply, that directorships may not be bought and sold.

[25] 305 F.2d at 581.

[1] — Del. —, 183 A.2d 174 (1962).

appeal, the Supreme Court of Delaware HELD: Petitioner's qualified right of inspection of the stock ledger is dependent upon record ownership and is not defeated by proof that the inspection is sought for the purpose of thwarting TWA's claim against Hughes.

The issues involved in the litigation between TWA and Hughes were of no concern to the Delaware court sitting to determine the petitioner's right to inspect TWA's stock ledger. Therefore, TWA erred in assuming that since it considered the suit against Hughes to be in the best interests of the corporation, any purpose designed to defeat TWA's claim would be an improper purpose. The court determined that any TWA stockholder has the right to take the position that the suit against Hughes is not beneficial to the corporation, and since his purpose is germane to his interest as a stockholder, he cannot be precluded from inspection of the stock ledger because his position is adverse to that of management.

Under the Delaware Corporation Law,[2] a stockholder's right to examine the stock ledger is determined solely by record ownership.[3] This right has been founded upon the proposition that those in charge of the corporation are merely agents of the stockholders who are the real owners of the property.[4] Some authorities have gone so far as to equate the stockholder's right of inspection with that of a member of an ordinary partnership.[5] The majority of jurisdictions,[6] including Delaware, have qualified the seemingly absolute right conferred by the statute by refusing to grant the discretionary writ of mandamus[7] where the purpose of the inspection was inimical to the corporation or was sought for purposes unrelated to the petitioner's status as a stockholder.[8] In *State ex rel. Theile v. Cities Service Co.*,[9] the petitioner sought inspection for the purpose of selling stockholder

[2] Del. Code Ann. tit. 8, § 220 (1953) provides:
The original or duplicate stock ledger shall be the only evidence as to who are the stockholders entitled to examine the list required by Section 219 of this title or the books of the corporation, or vote in person or by proxy at any such election. The original or duplicate stock ledger containing the names and addresses of the stockholders, and the number of shares held by them, respectively, shall, at all times, during the usual hours for business, be open to the examination of every stockholder at its principal office or place of business in this state, and said original or duplicate stock ledger shall be evidence in all courts of this state.

[3] State ex rel. Healy v. Superior Oil Corp., 40 Del. 460, 13 A.2d 453 (Super. Ct. 1940).

[4] Guthrie v. Harkness, 199 U.S. 148 (1905); 5 Fletcher, Private Corporations § 2213 (perm. ed. rev. repl. 1952).

[5] Ibid.

[6] E.g., Mass. Ann. Laws ch. 155, § 22 (1959); Me. Rev. Stat. Ann. ch. 53, § 34 (1954); N.H. Rev. Stat. Ann. ch. 294, § 92 (1955); N.J. Stat. Ann. tit. 14, § 5-1 (1939); Pa. Stat. Ann. tit. 15, § 2852-308 (1958); Vt. Stat. Ann. tit. 11, § 461 (1958).

[7] State ex rel. Miller v. Loft, Inc., 34 Del. 538, 156 Atl. 170 (Super. Ct. 1931); Firestone, Rights of Stockholders to Compel Leave to Inspect Books of a Delaware Corporation, 30 Mich. L. Rev. 769 (1932).

[8] Ballantine, Corporations § 160 (rev. ed. 1946); State ex rel. Theile v. Cities Service Co., 31 Del. (1 Harr.) 346, 114 Atl. 463 (1921), aff'd, 31 Del. (1 Harr.) 514, 115 Atl. 773 (1922); State ex rel. Foster v. Standard Oil Co. of Kan., 41 Del. 172, 18 A.2d 235 (Super. Ct. 1941).

[9] Supra note 8.

lists for profit. The court stated that "the right given to the stockholder by the statute to inspect the company's books is given to him as a stockholder and is to be exercised by him qua such."[10] Hence, in cases involving denial of stockholder inspection privileges, the determination is dependent upon the propriety of the purpose of the inspection.

In *Insuranshares Corp. v. Kirchner*,[11] the Delaware Supreme Court granted a stockholder the right of inspection although the purpose was to conduct a proxy campaign which the board of directors deemed prejudicial to the corporation. *State ex rel. Foster v. Standard Oil Co. of Kan.*,[12] illustrates further the right of a stockholder to use the corporate stock ledger in an effort to seek support for a program adverse to that advocated by management. The petitioner in that case was bringing a derivative suit against the corporation's president and sought access to the stock ledger for the purpose of communicating with other stockholders regarding the pending litigation. The Delaware Supreme Court in its opinion stated "The limitations constructively imposed on the right of stockholders to examine stock ledgers ought not be so extended as to keep stockholders in ignorance of matters in which they are vitally interested."[13] The *Insuranshares*, *Foster* and *TWA* cases demonstrate that a distinction must be drawn between a purpose which is against the views of management and a purpose which is against the best interests of the corporation. The mere fact that a stockholder's purpose is advocation of a policy contrary to that endorsed by management does not render that purpose harmful, inimical or improper per se.

While originally, in Delaware, the burden of proof was on the stockholder to demonstrate a proper purpose,[14] the burden of proof is now placed upon the corporation to show that the purpose of the stockholder, in seeking inspection, is not pertinent to his status as a stockholder or is otherwise improper.[15] While Deleware has thus expanded the stockholder's right of inspection,[16] certain other jurisdictions have recently legislated in the opposite direction. Restrictions have been imposed by statutes requiring certain conditions precedent to the stockholder's otherwise absolute right to inspect the stock ledger. For example, the stockholder must have been an owner of record for a specified minimum period of time;[17] or must have owned a stipulated percentage of the outstanding stock.[18] However, in spite

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10 Id. at 521, 115 Atl. at 776.

11 40 Del. 105, 5 A.2d 519 (1939).

12 Supra note 8.

13 Id. at 177, 18 A.2d at 239.

14 Henn, Corporations § 201 (1961); State ex rel. Miller v. Loft, Inc., supra note 7.

15 Supra note 11.

16 Supra notes 11, 12 & accompanying text.

17 E.g., ABA-ALI Model Bus. Corp. Act § 46 (1953) (6 months); Ala. Code tit. 10, § 21(46) (Supp. 1961) (6 months); Fla. Stat. Ann. tit. 34, § 608.39 (1956) (6 months); Md. Ann. Code art. 23, § 51 (1957) (6 months); Mich. Stat. Ann. ch. 450, § 45 (1948) (3 months); Miss. Gen. Acts Adv. Sheets § 50 (1962) (6 months); N.Y. Stock Corp. Law ch. 59, § 10 (1951) (6 months); S.C. Corp. Law § 626 (eff. 1-1-64) (6 months).

18 E.g., ABA-ALI Model Bus. Corp. Act § 46 (1953) (5%); Ala. Code tit. 10, § 21(46) (Supp. 1961) (5%); Fla. Stat. Ann. tit. 34, § 608.39 (1956) (1%); Md. Ann. Code art. 23, § 51 (1957) (5%); Mich. Stat. Ann. ch. 450, § 45 (1948) (2%); Miss.

of these restrictions, most statutes permit courts, in their discretion, to order inspection provided the stockholder can demonstrate that his purpose is proper.[19] Thus, in such cases, unlike Delaware, the burden remains upon the stockholder. Several states have followed New York[20] in requiring that the stockholder execute an affidavit stating that such information is not sought for a purpose unrelated to the corporate business and that he has not sold such lists or aided others in procuring such lists in the past.[21]

Such restrictive provisions are not entirely without justification. In many instances they have obviated the possibility of common abuses. Previously, inspection could be gained by the acquisition of a minimum number of shares of stock to be used for various improper purposes. So-called "sucker lists" of stockholders were compiled and sold for profit.[22] Corporations were unwarrantedly subjected to harassment by stockholders.[23] Inspection also was sought to "fish" for litigable claims against the corporation and to serve other interests hostile to the corporation.[24]

Finally, there are two additional considerations suggesting that the restrictive trend is warranted. First, the rights of the stockholder who is cognizant of the purposes for which the inspection is sought are more easily safeguarded than the rights of a corporation which is generally unaware of and unable to ascertain the true purpose of the inspection. Thus, the burden of proof upon the stockholder under the restrictive-type statutes is much more easily sustained than the burden of proof upon the corporation under the Delaware-type statutes. Second, the legislatures revising their corporation laws are faced with two countervailing policy considerations. On the one hand, the stockholder as a part owner of the corporation is entitled to inspect the corporate stock ledger. On the other hand, the corporation and its stockholders must be protected from abuses of the right of inspection. In a compromise between these sometimes conflicting interests, the legislatures have proceeded upon the basis that these restrictions will not deny the stockholder with a proper purpose the right to inspect the stock ledger;[25] but they will prevent harm being incurred by the corporation to a greater extent than was previously possible by denying

Gen. Acts Adv. Sheets § 50 (1962) (1%); N.Y. Stock Corp. Law ch. 59, § 10 (1951) (5%); S.C. Corp. Law § 626 (eff. 1-1-64) (5%).

[19] E.g., ABA-ALI Model Bus. Corp. Act § 46 (1953); Ala. Code tit. 10, § 21(46) (Supp. 1961); Fla. Stat. Ann. tit. 34, § 608.39 (1956); Miss. Gen. Acts Adv. Sheets § 50 (1962); S.C. Corp. Law § 626 (eff. 1-1-64).

[20] N.Y. Stock Corp. Law § 10 (1951).

[21] See, e.g., S.C. Corp. Law § 626 (eff. 1-1-64). Several jurisdictions require only a written demand setting forth the purpose of the inspection: e.g., ABA-ALI Model Bus. Corp. Act § 46 (1953); Ala. Code tit. 10, § 21(46) (Supp. 1961); Md. Ann. Code art. 23, § 51 (1957); Mich. Stat. Ann. ch. 450, § 45 (1948); Ohio Rev. Code Ann. tit. 17, § 37 (1958).

[22] See S.C. Bus. Corp. Act (Draft Version), p. 124 (1962).

[23] Ibid.

[24] Ibid.

[25] Some jurisdictions go further to provide that a stockholder who has been unjustly refused access may recover a penalty assessed against the corporation for such denial equal to a percentage of the value of the stockholder's shares in such corporation. E.g., ABA-ALI Model Bus. Corp. Act § 46 (1953) (10%); Ala. Code tit. 10, § 21(46) (Supp. 1961) (10%); Miss. Gen. Acts Adv. Sheets § 50 (1962) (10%).

inspection where the stockholder cannot demonstrate his purpose to be proper.

However, it is submitted that even in a jurisdiction having a restrictive-type statute, assuming conditions precedent fulfilled, the result would be the same, for clearly a stockholder has the right to take a side, seek the support of other stockholders and express his views to the corporation, though they are in conflict with those of management.

NELSON G. ROSS

**Fair Trade—Non-Signer Clauses—Standing to Sue: Contract or Tort.** —***Gillette Co. v. Master.***[1]—Gillette brought an action to enjoin Master from selling Gillette's products at prices below those set out in fair trade minimum price contracts[2] between Gillette and other retailers. Defendant questioned the ability of the plaintiff to bring suit arguing that the alleged violation sounded in contract, and that because of this Gillette was precluded from bringing the action since it had neither registered for a Certificate of Authority,[3] nor paid the $250 penalty fee.[4] Gillette argued that since the action was based on tort[5] its standing to sue was unaffected by the fact that it had not obtained a Certificate of Authority. Each party based its argument on its interpretation of Section 2 of the Pennsylvania Fair Trade Act.[6] The parties stipulated that should the court find that Gillette had standing

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[1] 408 Pa. 202, 182 A.2d 734 (1962).

[2] See Pa. Stat. Ann. tit. 73, § 7 (1960). Section 7 provides in part:

> No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, or the vending equipment from which said commodity is sold to the consumer bears the trade-mark, brand or the name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed in violation of any law of the State of Pennsylvania by reason of any of the following provisions which may be contained in such contract:
>
> (a) That the buyer will not resell such commodity, except at the price stipulated by the vendor.
>
> (b) That the buyer of such commodity require upon his resale of such commodity that the purchaser from him agree that such purchaser will not in turn resell except at the price stipulated by the vendor of the buyer.

[3] Pa. Stat. Ann. tit. 15, § 2852-1001 (1958).

[4] Pa. Stat. Ann. tit. 15, § 2852-1014 (1958).

[5] Brief for Appellant, p. 13.

[6] Pa. Stat. Ann. tit. 73, § 8 contains the relevant portion of section 2, Act of 1935, P.L. 266:

> Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section one of this act, whether the person so advertising, offering for sale, or selling is or is not, a party to such contract, is unfair competition and is actionable at the suit of such vendor, buyer or purchaser of such commodity.

Gillette stressed that part of the statute which stated that the offense *"is unfair competition* and is actionable," while Master stressed *"in any contract* entered into . . . whether the person . . . is, or is not, a party *to such contract*, . . . is actionable." (Emphasis supplied.)