Michigan Law Review

Volume 47 | Issue 3

1949

CORPORATIONS-POWER OF DIRECTORS TO TRANSFER ALL ASSETS-DISSENTERS' RIGHTS TO APPRAISAL AND PAYMENT

John C. Walker
University of Michigan Law School

CORPORATIONS—POWER OF DIRECTORS TO TRANSFER ALL ASSETS—DISSENTERS' RIGHTS TO APPRAISAL AND PAYMENT—By action of its board of directors, defendant corporation entered into a written extension of a lease of substantially all its assets. This action was not authorized by a majority vote at a shareholders' meeting or by the written consent of the holders of a majority of the shares. Plaintiff, a shareholder of record on the date the lease was made, had no knowledge of the transaction until about three months later, at which time he objected to the making of the lease and demanded payment for his shares as provided in section 44 of the Michigan general corporation act[1] under which defendant was organized. Upon defendant's refusal to comply with this demand plaintiff brought suit, citing section 57 of the act[2] but basing his right to recovery entirely on section 44. Plaintiff alleged that the lack of a shareholders' meeting and timely knowledge on his own part made it impossible for him to comply with the provisions of section 44 which required him to vote against the lease and to file written objection within twenty days of the time the action was taken. The trial court found that the directors owned or controlled voting rights of more than two-thirds of defendant's stock and that the lease divested defendant of substantially all its assets. An order was made for the appointment of appraisers, and defendant appealed. *Held,* reversed. The extension of the lease by action of the board of directors did not violate section 57, but was lawful and valid, since it was in furtherance of the purposes of the corporation as set out in the articles of incorporation. Since a shareholders' meeting was not necessary under section 57 and was never held, it was impossible for plaintiff to meet the statutory conditions precedent to appraisal and payment under section 44. *Pollack v. Adwood Corporation,* (Mich. 1948) 32 N.W. (2d) 62.

The general rule at common law is that a solvent and going corporation cannot dispose of all its assets without the unanimous consent of the shareholders.[3] The purpose of section 57 is to relax the stringent common law rule and take away the power of a minority to block action desired by the majority, while section 44 is designed to compensate the dissenter by giving him at least a right to appraisal and payment for his stock.[4] The rights of a dissenter under section 44 are completely

[1] Mich. Acts (1931) No. 327, Mich. Stat. Ann. (1937) § 21.44 provides in part as follows: "If a corporation has authorized the sale, lease or exchange of all or substantially all of its assets a shareholder . . . who voted against such action may, within twenty days . . . object thereto in writing and demand . . . payment of the fair cash value of his shares . . . and surrender at such time to the corporation the certificate or certificates for his shares. . . ."

[2] Section 57 provides in part as follows: "Every corporation . . . may sell, lease or exchange all or substantially all of its property and assets . . . when and as authorized by the affirmative vote of the holders of a majority of the shares issued and outstanding given at a shareholders' meeting duly called for that purpose, or when authorized by the written consent of the holders of a majority of the shares. . . ."

[3] Abbot v. American Hard Rubber Co., 33 Barb. (N.Y.) 578 (1861); Voight v. Remick, 260 Mich. 198, 244 N.W. 446 (1932). In general, see 13 FLETCHER, CYC. CORP., perm. ed., § 5797 (1943); 60 A.L.R. 1210 (1929); and 79 A.L.R. 624 (1932).

[4] Matter of Timmis, 200 N.Y. 177, 93 N.E. 522 (1910); WILGUS AND HAMILTON, MICH. CORP. LAW, 325-326 (1932); 9 U.L.A. 132, 138 (1942); 13 FLETCHER, CYC. CORP., perm. ed., § 5891 (1943).

dependent upon compliance by a corporation with section 57, the former section being predicated on the latter.[5] The legislative intent is clear, but the principal case shows that the statute as now written leaves the rights of dissenters in a rather precarious position. Section 10 of the Michigan act[6] grants general powers to boards of directors except as otherwise provided. Whenever a transfer of all corporate assets by action of a board of directors is held valid as a legitimate exercise of this general power, dissenters have no possible way in which to comply with section 44. Directors are therefore in a position to deprive dissenters of their rights unless the courts interpret section 57 as a restriction on the power granted in section 10. It would seem on the face of it that section 57 is such a restriction,[7] and in the light of a recent Michigan case the finding that the lease in the principal case was valid might be open to question,[8] although there is authority to support it.[9] Be that as it may, a dissenter is not in court to contest the sale but has elected to stand on the sale and get payment for his stock. The problem can only be solved by legislative action, since the courts are committed to a strict interpretation of the statutes as they now stand.[10] Extension of shareholders' control by broadening section 57 would impair the freedom of action of directors in managing a corporation and would seem undesirable. The logical solution might be to divorce section 44 from section 57, perhaps by the addition of a proviso covering transfers of all or substantially all of the corporate assets without authority of the shareholders. In such cases, the provisions as to written objection and demand should be made to depend upon the time at which the dissenter first has notice of the transfer. Still, such a change might provide a means by which a shareholder, who has had time in which to exercise hindsight, might escape from a corporation which has

[5] See In re Drosnes, 187 App. Div. 425, 175 N.Y.S. 628 (1919), and Matter of Timmis, supra, note 4, showing the interdependence of two similar sections in the old New York Stock Corporation Law.

[6] Section 10(k) provides: "The powers of a corporation, except as otherwise provided, shall be exercised by the board of directors. . . ."

[7] Some states make different provisions for the sale of all assets in the usual course of business and such sales not in the usual course of business, but the Michigan statute makes no such distinction. As examples of the former type of statute, see Me. Rev. Stat. (1944) c. 49, § 80; S.C. Code (1942) c. 153, § 7705; and Ill. Rev. Stat. (1947) c. 32, §§ 157.71, 157.72.

[8] Michigan Wolverine Student Co-Operative, Inc. v. Wm. Goodyear & Co., 314 Mich. 590, 22 N.W. (2d) 884 (1946), commented on in 45 MICH. L. REV. 341 (1947).

[9] See the cases cited in 6 FLETCHER, CYC. CORP., perm. ed., § 2949 (1931) and 79 A.L.R. 624 (1932), which show the reluctance of the courts to hold that statutes similar to section 57 are applicable in borderline cases.

[10] This is the general rule whenever a statute creates a new right of the type now being discussed. Johnson v. C. Brigham Co., 126 Me. 108, 136 A. 456 (1927); Klein v. United Theaters Co., 148 Ohio St. 306, 74 N.E. (2d) 319 (1947), noted in 46 MICH. L. REV. 562 (1948). But see In re Drosnes, 187 App. Div. 425, 175 N.Y.S. 628 (1919), where the statute was given a liberal construction. For a criticism of some of the other weaknesses of appraisal statutes in general see 15 CORN. L.Q. 420 (1930).

simply made a bad bargain; but the legislature might guard against this result by requiring strict proof of time of notice of the transfer and good faith on the part of the dissenter.

John C. Walker