

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EDWARD M. MILLER and	§	
WILLIAM A. DE LORENZO,	§	No. 486, 1999
	§	
Defendants Below,	§	
Appellants,	§	
	§	
v.	§	Certification of Question of Law
	§	from the Court of Chancery
STUART AGRANOFF, L. DAVID	§	of the State of Delaware
CALLAWAY, III, and EMS CORP.,	§	in and for New Castle County
	§	C.A. No. 16795
Plaintiffs Below,	§	
Appellees,	§	
	§	
and	§	
	§	
CITICORP VENTURE CAPITAL, LTD.,	§	
	§	
Intervenor Plaintiff	§	
Below, Appellee.	§	

Submitted: November 30, 1999

Decided: March 9, 2000

Corrected: March 14, 2000

Before **VEASEY**, Chief Justice, **HOLLAND**, **HARTNETT**, **BERGER**, Justices,  
and **RIDGELY**, President Judge, <sup>1</sup> constituting the Court *en Banc*.

ORDER

This 9th day of March, 2000, upon consideration of the briefs and arguments  
of the parties, it appears to the Court that:

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<sup>1</sup>Sitting by designation pursuant to Supreme Court Rule 2 and Del. Const. art. IV §12.

1) By Order dated October 27, 1999, this Court accepted certification of the following question of law posed by the Court of Chancery:

What is the price EMS, CVC or Air Canada is required to pay for the Warrant Shares: \$57,691 plus interest (representing the price of \$1 per share paid to EMS to exercise the BT Warrants) or \$3,482,691 plus interest (representing the price Miller paid for the BT Warrants plus the \$1 per share exercise price paid to EMS)?

2) Although the Court of Chancery asked about two specific prices, we read the certified question as requesting clarification of this Court's Order dated August 25, 1999. Accordingly, we are not constrained to select one of the two prices suggested in the certified question.

3) The amount to be paid for the Warrant Shares must be determined in accordance with the principle that, "a fiduciary who purchases for himself individually property which he should purchase for the beneficiary holds the property upon a constructive trust for the beneficiary...."<sup>2</sup> The fiduciary must surrender that property if the beneficiary "restores to the fiduciary the amount of the purchase price, or the price for which he could have obtained it for the beneficiary, whichever is less."<sup>3</sup>

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<sup>2</sup>Restatement of the Law of Restitution § 194, Comment b. (1937).

<sup>3</sup> Id.

4) Miller paid a higher price to obtain the Warrant Shares than he did for the Agreement Shares because, for Miller, the Warrant Shares represented a control block. It appears that the Warrant Shares would not have commanded a control premium, however, if the purchaser had been EMS, CVC or Air Canada. Miller must be paid the lesser of his purchase or the price at which EMS, CVC or Air Canada could have obtained the Warrant Shares, that being the value of the benefit to them. That hypothetical purchase price, which we assume will be a “fair value” price equivalent to that determined through appraisal, is a factual determination, which must be made by the Court of Chancery.

NOW, THEREFORE, IT IS ORDERED that the certified question is answered as provided herein, and this matter is REMANDED for further action in accordance with this Order. Jurisdiction is not retained.

BY THE COURT:

/s/Carolyn Berger  
Justice