**[J-70-00]**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**MIDDLE DISTRICT**

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| MICHAEL A. WAREHIME | : | No. 251 M.D. Appeal Dkt. 1999 |
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| v. | : | |
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| | : | Appeal from the Order of the Superior |
| JOHN A. WAREHIME | : | Court entered 12/2/98, at 709 HBG 1997 |
| | : | reversing the order entered 6/24/97 and |
| APPEAL OF: JOHN A. WAREHIME AND | : | remanding to the Court of Common Pleas |
| THE INDEPENDENT DIRECTORS | : | of York County at No. 95-SU-00471-07 |
| COMMITTEE | : | Civil Division |
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| MICHAEL A. WAREHIME, | : | No. 252 M.D. Appeal Dkt. 1999 |
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| Appellant | : | |
| | : | Appeal from the Order of the Superior |
| v. | : | Court entered 12/2/98, at 709 HBG 1997 |
| | : | reversing the order entered 6/24/97 and |
| JOHN A. WAREHIME, | : | remanding to the Court of Common Pleas |
| | : | of York County at No. 95-SU-00471-07 |
| Appellee | : | Civil Division |
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| MICHAEL A. WAREHIME | : | No. 253 M.D. Appeal Dkt. 1999 |
| | : | |
| v. | : | |
| | : | Appeal from the Order of the Superior |
| JOHN A. WAREHIME | : | Court entered 12/2/98, at 710 HBG 1997 |
| | : | reversing the order entered 7/8/97 and |
| APPEAL OF: JOHN A. WAREHIME AND | : | remanding to the Court of Common Pleas |
| THE INDEPENDENT DIRECTORS | : | of York County at No. 95-SU-00471-07 |
| COMMITTEE | : | Civil Division |

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| MICHAEL A. WAREHIME, | : | No. 254 M.D. Appeal Dkt. 1999 |
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| Appellant | : | Appeal from the Order of the Superior |
| | : | Court entered 12/2/98, at 710 HBG 1997 |
| v. | : | reversing the order entered 7/8/97 and |
| | : | remanding to the Court of Common Pleas |
| | : | of York County at No. 95-SU-00471-07 |
| JOHN A. WAREHIME, | : | Civil Division |
| | : | |
| Appellee | : | Argued: May 2, 2000 |

**CONCURRING OPINION**

**MR. JUSTICE SAYLOR** **DECIDED: November 27, 2000**

Like Mr. Justice Nigro and the Superior Court majority, I see no basis upon which to distinguish voting trustees from other fiduciaries in terms of defining the general scope of their obligations owing to beneficiaries of the fiduciary relationship. Therefore, I also would hold that a duty of loyalty should ordinarily attach to the voting trustee's undertakings in relation to the trust. See generally 5 Fletcher, CYCLOPEDIA CORP. §2091.1, at 481-82 (1996)(stating that "[v]oting trustees should be held to adhere to the usual fiduciary principles of a trust").

Whether, and to what extent, parties may contractually alter or eliminate such duties implicates an extensive, ongoing debate in the legal community among segments sometimes denominated in the commentary as contractarians and anti-contractarians. Compare Melvin Aron Eisenberg, The Limits of Cognition and the Limits of Contract, 47 STAN. L. REV. 211, 249-50 (1995)(explaining the basis for the imposition of some degree of mandatory, non-waivable fiduciary duties upon controlling, corporate interests), with Henry N. Butler & Larry E. Ribstein, Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians, 65 WASH. L. REV. 1, 71 (1990)(advocating private ordering of

corporate affairs, unrestricted by mandatory rules). In the present case, the majority position could perhaps be described as having a contractarian orientation, whereas the position of the Superior Court majority could be said to possess anti-contractarian overtones. Even under contractarian theory, however, in order for general principles regarding fiduciary duty to be overridden, there must be a sufficient meeting of the minds concerning the action of the fiduciary, which I find lacking in the trust instruments at issue. While these instruments effectively conveyed a broad array of powers,[1] I find an inherent ambiguity between the provisions limiting the effectiveness of the trusts to a fixed, ten-year term, and the utilization by the trustee of the trusts' authority to unilaterally establish an ongoing structure of corporate governance that undermines control of a corporation by majority vote of its shareholders beyond the agreed-upon time for expiration, particularly when such action is taken in contemplation of the impending termination. Therefore, I disagree with the majority that, in such circumstances, the voting trustee's obligations should be deemed limited by the written agreements. Rather, consistent with the general legal proposition advanced by Mr. Justice Nigro and the Superior Court majority, I would hold that, at least in the absence of express, unambiguous, contrary provisions within the voting trust instruments (or statutory prescription), the prevailing common-law standard of fiduciary conduct should control in such circumstances.

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[1] The trial court described the delegation of powers under the trust instruments as unlimited; included within such grant of authority was the exclusive right to decide any subject amenable to shareholder vote, without limitation. See also Warehime v. Warehime, 722 A.2d 1060, 1067 (Pa. Super. 1998)(indicating that "[n]ot only did the settlors give the voting trustee a controlling interest in HFC, they conferred upon him virtually unrestricted voting powers[;] [t]he trustee was vested with the authority to exercise all rights of every kind granted to the shareholders").

The scope of a fiduciary's duty of loyalty has not been closely defined in the jurisprudence of this Court, or of other courts for that matter. To some extent, perhaps, this is intentional (or, at least, unavoidable). As stated by one court,

> [i]ssues of whether a corporate officer or controlling shareholder has fulfilled fiduciary duties have arisen in a number of circumstances and have led to the creation of various specific rules. Opinions pile phrase upon phrase in what appears to some observers to be a mere compilation of platitudes. Yet those platitudes express something deeper; they are a judicial attempt to emphasize that the heart of a corporate fiduciary's duty is an attitude, not a rule. The fiduciary best fulfills its duties if it approaches them with the attitude of seeking the beneficiary's interests rather than the personal interests of the fiduciary, not if it simply tries to follow rules codified from past decisions.

Chiles v. Robertson, 767 P.2d 903, 911-12 (Ore. App.), appeal denied, 784 P.2d 1099 (Ore. 1989), cited in Lawrence E. Mitchell, The Death of Fiduciary Duty in Close Corporations, 138 U. PA. L. REV. 1675, 1696 (Jun. 1990)[hereinafter, "Mitchell, Fiduciary Duty"]. The complexities associated with compliance with such loosely-defined duties are simply part of the burden borne by one occupying a position of substantial trust. Additionally, such complexities are magnified in situations involving concentrated ownership or control interests, such as in family and close corporations. As noted by one commentator:

> Close corporation shareholders tend to have invested substantial personal wealth in the enterprise, magnifying the consequences of any business decision as to a particular shareholder. Thus, any meaningful distinction between business decisions and distributional decisions becomes more difficult to make. Given significant stock ownership by close corporation management, the potential for conflicts of interest between director shareholders and non-director shareholders, or even among director shareholders themselves, over a given decision (business or distributional) is pervasive. While in the public issue corporation we might still talk about the best interests of the corporation, if for no other reason than as a shorthand for the lowest common

> denominator of shareholder interest, in the paradigmatic close corporation no discernable corporate interest exists apart from the individual interests of the shareholders at any given point in time. In the absence of any regulatory mechanism, internal disagreements degenerate into power struggles.

Mitchell, Fiduciary Duty, 138 U. PA. L. REV. at 1690-91. The same commentator has argued that the general response of the judiciary to problems of inherent conflicts of interest has been to effectuate an inappropriate dilution of fiduciary obligations. See id. at 1692. In the commentator's estimation, in many jurisdictions, the duty of undivided loyalty has inappropriately yielded to a less exacting weighing formulation, balancing the controlling interests against those of the minority, or a mere requirement of adherence to a standard of good faith or the business judgment rule on the part of the controlling interests. See id. at 1713-17.

Although I am sensitive to the potential for unwarranted dilution, I believe that the nature of the underlying enterprise affects the character and quality of fiduciary obligations owing; therefore, I would not, as some commentators have suggested, require the wholesale prohibition of transactions in which some degree of conflict of interest is present, such as in family and close corporations. See generally Mitchell, Fiduciary Duty, 138 U. PA. L. REV. at 1729 (citing Brudney, Fiduciary Ideology in Transactions Affecting Corporate Control, 65 MICH. L. REV. 259 (1966)). Indeed, if this were to be made the rule, the operations of a corporation having a structure and composition such as Hanover Foods Corporation ("HFC") would be substantially impeded, since the controlling interests could rarely satisfy a standard of pure, selfless disinterestedness. Rather, I believe that controlling interests bearing fiduciary duties should be permitted to exercise the implements of control, so long as they are truly operating in furtherance of the interests of the beneficiaries of the fiduciary relationship.

Pursuant to this standard, I also agree with Mr. Justice Nigro and with the Superior Court majority that alteration of the structure of corporate governance by a voting trustee is generally impermissible where the intent and effect of the action is to perpetuate the trustee's own control over the corporation beyond the life of the voting trust. In such circumstances, the conflict of interest confronting the trustee is simply too great and cannot be reconciled with his duty of loyalty.[2] On the other hand, however, I would not foreclose the effectuation of necessary structural changes by a voting trustee under the broad form of authority conveyed by the present trust instruments where the intent underlying the changes, and their effect, are otherwise, and, after careful scrutiny of the facts, the duty of loyalty can be said to be fulfilled. Indeed, this latter form of action would seem to fall well within the scope of the parties' initial intention in entrusting their interests to a single decision maker whose own interests were, in significant part, in alignment with theirs. Thus, in my assessment, the critical questions in determining John Warehime's compliance with his fiduciary obligations in connection with the proposed amendments to HFC's articles of incorporation are: whether, and to what extent, the amendments were intended to, and/or would have the effect of, perpetuating John Warehime's control over HFC; and whether, and to what extent, the

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[2] See generally Brown v. McLanahan, 148 F.2d 703, 708-09 (4th Cir. 1945); Friedberg v. Schultz, 38 N.E.2d 182, 184 (Ill. App. 1941)(noting that "[w]here property is placed in the hands of trustees for a specified period courts are careful not to permit an extension of control of the property by the trustees beyond the period mentioned"); Fletcher, CYCLOPEDIA CORP. §2091.1, at 481-82 (stating that "[i]t has been held that voting trustees could not elect themselves or others as directors for terms of office that would outlast the duration of the voting trust" (citations omitted)); 18A AM. JUR. 2D CORPORATIONS §1146 (1985 & Supp. 1999)(noting that "attempts by voting trustees to perpetuate their control of a corporation by extending the term of the trust beyond the period specified therein without the consent of all certificate holders, or by improper use of their powers, have usually been unsuccessful" (citations omitted)).

amendments would inure to the benefit (or, conversely, operate to the detriment) of the minority shareholders.

Responsive to such questions, on consideration of Michael Warehime's motion for a preliminary injunction, the trial court issued detailed findings of fact and conclusions of law, making a close assessment of HFC's past and present circumstances, the interests and objectives of its ownership and management, and the nature and effect of the amendments. Regarding the company's past performance under existing management, the trial court found that, despite a general decline in the industry, HFC had achieved record-high results in terms of asset valuation, shareholder's equity and pre-tax earnings. It found, however, that uncertainties associated with the future expiration of the voting trusts were causing destabilization of HFC's corporate governance and would prevent the company from raising essential capital -- according to the trial court, absent necessary stabilization, it would be impossible for HFC to conduct business in a manner beneficial to its long-term interests, and the company would likely deteriorate within a short time period. The trial court also found that HFC had lost key employees and was in danger of losing others; the uncertainties jeopardized relationships with growers and suppliers; and particular minority interests were engaging in behaviors disruptive of corporate governance, although they had no plan for the future of the corporation. The trial court then described the response of HFC board members to this state of affairs, including the formation of an "Independent Directors Committee" to consider strategic alternatives absent advice or input from John Warehime, the retention of several firms and individuals in this regard, and the ultimate recommendation of the amendments to HFC's articles of incorporation. See generally Warehime, 722 A.2d at 1061-62 (describing the trial court's findings).

Against this backdrop, the trial court detailed the proposed amendments in terms of their creation of 10,000 shares of Series C convertible preferred stock to be issued to the HFC 401(k) plan; the fact that the issuance of such stock effectuated no alteration in the authorized number of shares for any HFC class of stock; the fact that the Series C stock could be voted only in the event of a dispute among members of the Warehime family with respect to the election of directors or other related matters for a five-year period; the requirement that the voting trustees for the plan be disinterested directors; and the relationship between the Series C shares and the general classes of shares in terms of voting. The trial court found that the voting structure embodied in the amendments constituted a necessary and neutral dispute resolution procedure in furtherance of the essential goal of stability. Further, the trial court specifically determined that the amendments were in the best interests of all shareholders, including minority interests. Indeed, the trial court went so far as to indicate that the amendments did not reflect a conflict between John A. Warehime's private interests and the interests of the shareholders and beneficiaries of the voting trust.[3] Thus, the trial

[3] With regard to this particular finding, I would find that the trial court made a misstatement. Certainly, there is some degree of conflict of interest present (at least at a subjective level) where there is a contest over control of a company, and one side proposes to utilize a controlling interest in a manner which may prevent his ouster. As noted below, however, where minority shareholders themselves have conflicting interests, the trustee (and ultimately, where necessary, a trial court) may be required to undertake some form of balancing of those interests to determine the highest net benefit to minority interests. Here, as I read the sum and substance of the trial court's findings, it weighed particular subjective minority interests (for example, Michael Warehime's desire to oust John Warehime) against more objective minority interests (maximization of share value) and found that the highest net benefit to minority interests would be achieved by favoring the latter. While this sort of balancing ordinarily would not be within the court's province, since minority interests generally do not owe fiduciary obligations to a corporation, but see Mitchell, Fiduciary Duty, 138 U. PA. L. REV. at 1730 (advocating imposition of fiduciary obligations upon minority interests in close corporations as one solution to the problem of inherent conflicts of interests), here, the (continued...)

court held that effectuation of the proposed amendments was consistent with John Warehime's fiduciary duties.

The Superior Court majority, on the other hand, reached a diametrically different conclusion. Although acknowledging the broad array of powers delegated to the voting trustee and the trial court's findings that the establishment of a dispute resolution procedure was in the best interests of all shareholders, the Superior Court nevertheless viewed the reinstatement of the beneficiaries' full voting powers as the paramount consideration. Additionally, writing against the trial court's essential determination that the amendments embodied a neutral, fair procedure, the majority characterized them as "a plan whose sole instrumentation is to disenfranchise beneficiaries from their rightful empowerment as shareholders." Warehime, 722 A.2d at 1069. It concluded that:

> [t]he adoption of the proposed amendments directly benefited [John Warehime] by perpetuating his control, or substantially increasing the likelihood of his continued control, of the company well beyond the expiration of the voting trust. Moreover, his action worked to the detriment of the trust beneficiaries as it effectively diminished their voting power and virtually assured that they would be without any meaningful input with regard to the management of the corporation. We, therefore, conclude that John Warehime acted beyond the limit of his authority as voting trustee and breached his duty of loyalty to the trust beneficiaries.

Id. at 1071. Unlike the trial court, the Superior Court majority did not balance the minority shareholders' voting interests against their interest in promoting the welfare of

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(...continued)
minority interests surrendered their voting rights to a trustee, and it is solely in the context of the assessment of the trustee's performance of his duties and obligations that this balancing occurs. Indeed, the trial court's decision to favor the objective goal of promoting share value over subjective goals of individual shareholders seems entirely consistent with the parties' decision in the first instance to delegate their voting powers to a trustee to centralize the decision making authority.

HFC and thus maximizing the value of their shares. Rather, it formed its own conclusions, "[t]he factual findings of the trial court notwithstanding." Id. at 1062.

In light of the differing assessments provided by the trial court and Superior Court, determination of the appropriate appellate standard of review assumes a heightened degree of importance. Although the Superior Court majority acknowledged the limited review standard applicable to a trial court's decision to grant or deny a preliminary injunction, see Warehime, 722 A.2d at 1063 (indicating that, "unless the record shows that the trial court's ruling was palpably erroneous, a misapplication of law, or a manifest abuse of discretion, this court will affirm the lower court's decision"), it did not differentiate between the trial court's factual findings and legal conclusions in terms of the character of review afforded.

Factual findings generally are to be reviewed on a deferential basis so long as they are supported by the evidence; see Thatcher's Drug Store of West Goshen, Inc. v. Consolidated Supermarkets, Inc., 535 Pa. 469, 477, 636 A.2d 156, 160 (1994); whereas legal conclusions are open to de novo review. See id. Here, quite obviously, to the extent that the Superior Court's conclusion that the character and effect of the amendments benefited John Warehime to the detriment of the shareholders is solely one of law, it is unassailable as a matter of fiduciary analysis, since an action taken in the self-interest of the trustee which runs contrary to the interests of a trust beneficiary is, by definition, a violation of the duty of loyalty. In my view, however, the factual aspect of the conclusions concerning the operation and net effect of the amendments is substantial, and therefore, the trial court's findings in this regard were entitled to greater

deference. See generally Mitchell, Fiduciary Duty, 138 U. PA. L. REV. at 1677 (giving reference to the fact-specific nature of fiduciary analysis).[4]

Although I believe that John Warehime was presented with an inherent conflict of interest in considering the amendments, see supra note 4, given the realities of family-controlled corporations, I would hold that a fiduciary who is by selection self-interested may be permitted to proceed in the face of such conflicts so long as his actions inure to the benefit of minority interests. See generally Mitchell, Fiduciary Duty, 138 U. PA. L. REV. at 1688 (describing the "difficulty courts face in distinguishing actions taken in the best interests of the corporation and shareholders from those which impinge unfairly on the minority"). Where the minority interests themselves have conflicting interests, as the trial court found in the present case, the trustee initially, and the trial court ultimately, must necessarily make a decision that will be in derogation of some minority interests, but in furtherance of others, with the objective being to maximize the ultimate, net benefit to minority shareholders. See supra note 3.[5]

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[4] This Court has not articulated a universal standard of review applicable to mixed questions of law and fact. Compare Mars Area Sch. Dist. v. United Presbyterian Ass'n of N. Am., 554 Pa. 324, 326, 721 A.2d 360, 361 (1998)(applying abuse of discretion/lack of supporting evidence standard to a mixed question of law and fact in a given context), with City of Chester v. Commonwealth, Dep't of Transp., 495 Pa. 382, 389-90, 434 A.2d 695, 699 (1981)(stating that "[j]ust as the trial court may decide mixed questions of law and fact, so may the appellate courts review them"). This, perhaps, results from the fact that mixed questions differ in terms of the degree to which the legal versus the factual aspects predominate. See generally Commonwealth v. Santiago, 439 Pa. Super. 447, 466, 654 A.2d 1062, 1072 (1994)(describing federal courts' approach to review of mixed questions, which varies according to the predominance of legal over factual aspects).

[5] It merits emphasis that the unavoidable balancing of conflicting minority interests in this context is distinguishable from the balancing of the interests of the majority versus those of the minority, about which the author of the Fiduciary Duty article complains. See supra (citing Mitchell, Fiduciary Duty, 138 U. PA. L. REV. at 1713-17).

Here, I would find that the trial court's conclusions concerning the nature and effect of the proposed amendments vis-à-vis minority interests are mixed ones of law and fact, with the factual aspects predominating, and thus should be subject to a deferential standard of review. While acknowledging that the amendments would dilute Class B shareholders' voting interests, the trial court found this detriment substantially outweighed by the advancement of the shareholders' conflicting interest in maximizing share value, which could best be served through implementation of an effective dispute-resolution procedure. The trial court also clearly viewed such procedure as far more neutral in relation to the ongoing family dispute than did the Superior Court majority. Since I believe that the trial court's findings and conclusions in these regards are supported in the evidence and were made within the boundaries of its decision making authority, particularly as it relates to the assessment of likelihood of success on the merits on consideration of a motion for a preliminary injunction, I am able to join the majority's disposition reversing the Superior Court's order.

Finally, I note that the trial court's opinion indicates that the present compliment of HFC directors lacked disinterestedness for purposes of voting the Series C stock; subsequently, however, it appears that John Warehime exercised his powers as voting trustee to amend HFC's articles of incorporation to change the way disinterestedness is assessed, thus allowing the present directors to vote. This action was contested by Michael Warehime; however, the trial court denied his challenge without opinion. This matter is the subject of a consolidated cross-appeal, and, as I understand the majority's disposition, will by decided by the Superior Court on remand. Without expressing any opinion as to the merits of such issue, I note that the required disinterestedness of the voting trustees for Series C stock is an essential element of my analysis above -- if those trustees are not truly disinterested, then the amendments cannot be viewed as a

neutral dispute resolution procedure, but rather, would have to be viewed, as they are by Mr. Justice Nigro and the Superior Court majority, as a mechanism effectuating an improper entrenchment of current controlling interests. Thus, resolution of this aspect of the appeal in the Superior Court is necessary before, ultimately, the parties' rights and interests in relation to the amendments can be finally determined.