1962
*Nov. 26, 27

1963
Jan. 22

ESSO STANDARD (INTER-AMERICA) INC. ..... APPELLANT;

AND

J. W. ENTERPRISES INC., JOE WEINSTEIN, JOWEIN OPERATING CORP., JOE WEINSTEIN FOUNDATION INC., SAUL ALTMAN, SELMA FINEMAN, ANNA GESCHWIND, J. W. MAYS, INC. PROFIT SHARING TRUST RETIREMENT PLAN AND DAVID GOLDBERG .....RESPONDENTS.

AND

MARGARET A. MORRISROE .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Companies—Offer to purchase shares of company by subsidiary of majority shareholder—Offeror not entitled to order for compulsory acquisition of minority shares—Approval of nine-tenths majority required—Shares must be independently held—Companies Act, R.S.C. 1952, c. 53, s. 128(1).

*PRESENT: Kerwin C.J. and Cartwright, Martland, Judson and Ritchie JJ.

E Co., a Delaware corporation, sent an offer to the shareholders of I Co. to purchase all the outstanding shares of that company. E Co. was a wholly owned subsidiary of S Co., a New Jersey corporation, and I Co. was incorporated under the *Companies Act,* R.S.C. 1952, c. 53. The offer was to remain open for a period of not less than four months as required by s. 128(1) of the *Companies Act.* It also stated that S Co. was the owner of 96 per cent of the outstanding shares of I Co. and had indicated its intention to accept the offer and that consequently, E Co. expected to be in a position to give notice under the provisions of s. 128(1) for the compulsory acquisition of the shares of all shareholders who did not accept the offer. S Co. accepted within the four-month period but during that time holders of less than 90 per cent of the free shares accepted.

E Co. obtained an *ex parte* order under s. 128 authorizing it to give notice to the dissenting shareholders for the compulsory acquisition of their shares unless these shareholders moved for an "order otherwise". Two such motions were made by certain dissenting shareholders (the present respondents). These motions, each of which sought an order setting aside the *ex parte* order and a declaration that E Co. was not entitled nor bound to acquire the common shares of the dissenting shareholders, were unsuccessful. Appeals from the orders dismissing both motions were allowed by the Court of Appeal, one member dissenting. E Co. appealed to this Court.

Held: The appeal should be dismissed.

There was substantial identity of interest between the majority shareholder of I Co. and the transferee company. With this identity of interest the whole proceeding was a sham with a foregone conclusion, for the purpose of expropriating a minority interest on terms set by the majority. The promoting force throughout was obviously that of S Co. and not its subsidiary. A transfer of shares from S Co. to E Co. was meaningless in these circumstances as affording any indication of a transaction which the Court ought to approve as representing the wishes of 90 per cent of the shareholders (the percentage required by s. 128(1)). Here the 90 per cent was not independent. The section contemplated the acquisition of 90 per cent of the total issued shares of the class affected and that this 90 per cent must be independently held.

Re Hoare & Co. Ltd. (1933), 150 L.T. 374; *Re Evertite Locknuts Ltd.,* [1945] 1 Ch. 220; *Re Press Caps Ltd.,* [1949] 1 Ch. 434; *Re Sussex Brick Co. Ltd.,* [1961] 1 Ch. 289, distinguished; *Re Bugle Press Ltd.,* [1961] 1 Ch. 270, approved.

Constitutional law—Companies Act, R.S.C. 1952, c. 53, s. 28—Whether intra vires Parliament.

Section 128 of the Dominion *Companies Act* was not unconstitutional. It was truly legislation in relation to the incorporation of companies with other than provincial objects and it was not legislation in relation to property and civil rights in the province or in relation to any matter coming within the classes of subject assigned exclusively to the legislature of the province.

APPEAL from a judgment of the Court of Appeal for Ontario, which, on appeal from Wells J., rejected an application of the appellant, made under s. 128 of the Dominion *Companies Act,* for the compulsory acquisition of certain minority shares of a company. Appeal dismissed.

1963

ESSO STANDARD (INTER-AMERICA) INC. v. J. W. ENTERPRISES *et al.* AND M. A. MORRISROE

J. D. Arnup, Q.C., and *J. C. McTague, Q.C.*, for the appellant.

J. J. Robinette, Q.C., for the respondents: J. W. Enterprises Inc. *et al.*

Terence Sheard, Q.C., for the respondent: Margaret A. Morrisroe.

D. S. Maxwell, Q.C., and *N. A. Chalmers*, for the Attorney General of Canada.

The judgment of the Court was delivered by

JUDSON J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] which, on appeal from Wells J., rejected an application of Esso Standard (Inter-America) Inc., made under s. 128 of the Dominion *Companies Act* for the compulsory acquisition of certain minority shares of International Petroleum Company Limited. At the original hearing, Wells J. had made an order for the acquisition of these shares. Section 128(1) reads:

> (1) Where any contract involving the transfer of shares or any class of shares in a company (in this section referred to as "the transferor company") to any other company (in this section referred to as "the transferee company") has, within four months after the making of the offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths of the shares affected, or not less than nine-tenths of each class of shares affected, if more than one class of shares is affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice, in such manner as may be prescribed by the court in the province in which the head office of the transferor company is situate, to any dissenting shareholder that it desires to acquire his shares, and where such notice is given the transferee company is, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, entitled and bound to acquire those shares on the terms on which, under the contract, the shares of the approving shareholders are to be transferred to the transferee company.

The respondents are dissenting shareholders who hold approximately 20,000 shares.

On January 12, 1960, Esso Standard sent an offer to the shareholders of International Petroleum Company Limited to purchase all the outstanding shares of this company at a price of $45 U.S. per share. This offer was to remain open for a period of not less than four months as required by the section. It also stated that Esso Standard was an affiliate of

[1] *Sub nom. Re International Petroleum Co. Ltd.*, [1962] O.R. 705, 33 D.L.R. (2d) 658.

Standard Oil Company (New Jersey) and that this company was the owner of 96 per cent of the outstanding shares of International Petroleum and had indicated its intention to accept the offer of $45 per share and that consequently, Esso Standard expected to be in a position to give notice under the provisions of s. 128(1) for the compulsory acquisition of the shares of all shareholders who did not accept the offer of $45 per share.

Esso Standard is a corporation incorporated under the laws of the State of Delaware and the whole of its issued and outstanding shares were at the date of the offer and at the date of the hearing owned by Standard Oil Company (New Jersey). The following table shows the shareholdings of International Petroleum at the date of the offer, January 12, 1960:

Issued and outstanding	14,568,583	
Held by Standard Oil of New Jersey	14,095,917	(96.75%)
Held by 3,423 other shareholders	474,660	
Outstanding options for shares	2,400	

By May 12, 1960, four months after the date of the offer, 2,478 shareholders, holding 377,281 shares had accepted. This was, of course, less than 90 per cent of the free shares. By November 21, 1960, 3,054 shareholders, holding 434,146 shares, had accepted.

Thus, at the date of the hearing before Wells J., out of the shares held by shareholders other than Standard Oil of New Jersey, there were only approximately 40,000 shares the owners of which had not accepted the offer. About half of these outstanding shares are held by the respondents. Standard Oil of New Jersey accepted within the four-month period.

On May 18, 1960, the Court made an *ex parte* order under s. 128 authorizing Esso Standard to give notice to the dissenting shareholders for the compulsory acquisition of their shares at $45 per share unless these shareholders made a motion to the contrary within the statutory period of one month.

Within one month two such motions were made by certain dissenting shareholders, who are the respondents in this appeal. Each motion sought an order setting aside the *ex parte* order of May 18, 1960, and a declaration that Esso

1963

ESSO STANDARD (INTER-AMERICA) INC. v. J. W. ENTERPRISES et al. AND M. A. MORRISROE

Judson J.

Standard was not entitled nor bound to acquire the common shares of the dissenting shareholders. Wells J. dismissed both motions on August 31, 1961.

On April 12, 1962, the Court of Appeal allowed the appeals from the orders of Wells J. and declared that "Esso Standard (Inter-America) Inc., is not entitled nor bound to acquire the shares of the appellants or any of them in International Petroleum Company Limited". Schroeder J.A. dissented and would have dismissed the appeals.

Section 128 of the Canadian Act is based upon a section of the English *Companies Act* which now appears as s. 209 of the *Companies Act* of 1948. The English section was first enacted in 1929 and the Canadian section in 1934. One significant difference between the two Acts is that the English Act provides that in computing the nine-tenths of the shares affected, there shall not be included "shares already held at the date of the offer by or by a nominee for the transferee company or its subsidiary".

At the date of the offer, January 12, 1960, Esso Standard held no shares of International Petroleum but it was a wholly owned subsidiary of Standard Oil of New Jersey, which held on that date 96.75 per cent of the issued shares. It is apparent that if s. 128 permitted Esso Standard to do what it proposed to do, the transfer of this 96.75 per cent would follow as a matter of course and that the necessary percentage would be obtained at one stroke. The outside shareholders were told this in the notice or offer.

The reported cases on the sections, both in England and Canada, have been comparatively few. There was little guidance to be found in the legislation itself on the principles to be applied in considering a dissenting shareholder's application for an "order otherwise" under the section. These were first formulated by Maugham J. in *Re Hoare & Company Limited*[1], and followed—it seems to me with increasing emphasis on the difficulties in the way of a dissenting shareholder—in three other cases. These were *In re Evertite Locknuts, Limited*[2]; *In re Press Caps Limited*[3];

[1] (1933), 150 L.T. 374. [2] [1945] 1 Ch. 220.
[3] [1949] 1 Ch. 434.

and *In re Sussex Brick Company Limited*[1] (decided in 1959 but reported in 1961). The matter is summarized in Palmer's Company Law, 20th ed., at p. 691:

> When an application is made to the court by a shareholder who alleges that the terms are not fair, the onus is upon the applicant to establish his allegation. The court will attach considerable weight to the fact that the large body of shareholders have accepted the offer. An application by a shareholder must allege unfairness; it is not sufficient merely to say that insufficient information was given; discovery will not be allowed, upon such an application, to enable the shareholder to establish his case.

In each of these cases there was, I think, a true "takeover bid" where, with more than 90 per cent of the shares of the transferor company held by independent shareholders, the transferee company had acquired 90 per cent of the total outstanding shares. This was certainly so in *Re Hoare* and in *Re Press Caps Limited,* according to the statement of Evershed M.R. in *Re Bugle Press Limited*[2].

It is at once apparent that on the facts there is no resemblance between Esso's position in the present case and the first four English cases above referred to and, in my opinion, these cases give no guidance on what should be done in the present case.

I agree with Laidlaw J.A. that in this case the Court should grant the dissenting shareholders' applications for "order otherwise" for the reasons given by the Court of Appeal in England in the case of *In re Bugle Press, supra.*

The shares involved in the *Bugle Press* case were those of a small publishing company with an issued share capital of 10,000 shares of £1 each. Two majority shareholders held 4,500 shares each and the third, 1,000 shares. The majority shareholders wished to buy out the minority shareholder and had made him a private offer which he had rejected. They then caused a transferee company to be incorporated of which they held all the outstanding shares. This transferee company then made an offer of £10 per share to all three shareholders. The £10 per share was based on a valuation made by a firm of chartered accountants and was less than the private offer that had previously been made. The immediate result of the offer of the transferee company at £10 per share was the acquisition of 90 per cent of the shares of the transferor company from the two majority shareholders. The transferee company then gave notice of its

[1] [1961] 1 Ch. 289.

[2] [1961] 1 Ch. 270 at 284.

1963

ESSO STANDARD (INTER-AMERICA) INC. v. J. W. ENTERPRISES et al. AND M. A. MORRISROE

Judson J.

intention to exercise its powers of compulsory acquisition under s. 209 of the *Companies Act, 1948*. The minority shareholder moved for a declaration similar to the one sought in the present case, that the transferee company was neither entitled nor bound to acquire his shares on the terms offered notwithstanding the approval of nine-tenths of the shareholders.

Buckley J. made the order sought by the minority shareholder. He held that in the circumstances of this particular case the onus was on the transferee company to show that the scheme was one which the minority shareholder ought to be compelled to accept. This was a reversal of the onus placed on the dissenting shareholder in the ordinary case to show unfairness. He also held that when the 90 per cent majority shareholders are themselves in substance the transferee company, the Court ought to "order otherwise" when compulsory acquisition is sought.

The Court of Appeal, in affirming Buckley J., founded its judgment upon his second ground—substantial identity of interest between the majority shareholders and the transferee company. With this identity of interest the whole proceeding, as Laidlaw J.A. stated it, is a sham with a foregone conclusion, for the purpose of expropriating a minority interest on terms set by the majority. Evershed M.R., at p. 286, said:

> Even, therefore, though the present case does fall strictly within the terms of section 209, the fact that the offeror, the transferee company, is for all practical purposes entirely equivalent to the nine-tenths of the shareholders who have accepted the offer, makes it in my judgment a case in which, for the purposes of exercising the court's discretion, the circumstances are special—a case, therefore, of a kind contemplated by Maugham J. to which his general rule would not be applicable. It is no doubt true to say that it is still for the minority shareholder to establish that the discretion should be exercised in the way he seeks. That, I think, agreeing with Mr. Instone, follows from the language of the section which uses the formula which I have already more than once read "unless on an application made by the dissenting shareholder the court thinks fit to order otherwise." But if the minority shareholder does show, as he shows here, that the offeror and the 90 per cent. of the transferor company's shareholders are the same, then as it seems to me he has, prima facie, shown that the court ought otherwise to order, since if it should not so do the result would be, as Mr. Instone concedes, that the section has been used not for the purpose of any scheme or contract properly so called or contemplated by the section but for the quite different purpose of enabling majority shareholders to expropriate or evict the minority; and that, as it seems to me, is something for the purposes of which, prima facie, the court ought not to allow the section to be invoked—unless at any rate it

were shown that there was some good reason in the interests of the company for so doing, for example, that the minority shareholder was in some way acting in a manner destructive or highy damaging to the interests of the company from some motives entirely of his own.

Evershed M.R. did not base his judgment on the proviso in the English section that in computing the nine-tenths of the shares affected there should not be included "shares already held at the date of the offer by, or by a nominee for, the transferee or its subsidiary". Although the case was within the standard of computation laid down by the section and the shares were not held in the manner stated in the exclusion, the Court should "order otherwise" because the section was not intended to cover this kind of case.

There is no distinction between *Bugle Press* and the present case either on fact or law. This was the opinion of Laidlaw J.A. and I fully agree. We have here 90 per cent ownership in Standard Oil Company (New Jersey). The promoting force throughout is obviously that of Standard Oil and not its subsidiary. A transfer of shares from Standard Oil to Esso Standard is meaningless in these circumstances as affording any indication of a transaction which the Court ought to approve as representing the wishes of 90 per cent of the shareholders. This 90 per cent is not independent. On this ground alone I would reject the appeal and hold that the section contemplates the acquisition of 90 per cent of the total issued shares of the class affected and that this 90 per cent must be independently held.

Esso Standard cannot strengthen its position by pointing to the extent of its acquisition of the independent shares. These constituted less than 4 per cent of the total issue and even then, as I have pointed out above, it did not acquire 90 per cent of those shares within the four-month period.

Wells J. and Schroeder J.A. were impressed by this large acquisition of the independent shares. They thought that this was sufficient to enable them to find that a substantial number of shareholders of International Petroleum had by their acceptance expressed their favourable opinion of the offer (which was almost 50 per cent above the stock exchange quotation) and that the dissenting shareholders had not satisfied them of the unfairness of the offer.

1963

ESSO STANDARD (INTER-AMERICA) INC. v. J. W. ENTERPRISES et al. AND M. A. MORRISROE

Judson J.

It is very difficult to draw this kind of inference from the facts of this case. Although the number of shares held by independent shareholders is large, the percentage of the total issued shares that they represented is very small. It is, further, difficult to infer to what extent these independent shareholders were influenced by the terms of the offer when they were told that the matter was a foregone conclusion. It is also very difficult to draw any inference as to value from stock exchange quotations when more than 90 per cent of the shares are held by one shareholder.

The extent of the acquisition and evidence of value are, however, irrelevant in this case and I found my judgment solely on the principle set out in *Bugle Press*. I think that it was foreseen in the *obiter* opinion of Rand J. in *Rathie v. Montreal Trust Company et al.*[1], when he said:

> This comparatively new power by which a majority may coerce a minority is one to be exercised in good faith and with the controlling facts available to shareholders to enable them to come to a decision one way or the other. In most, at least, of the cases which have reached the courts in England, the circumstances showed a straightforward transaction with its business considerations made evident to the shareholders. The analogy which obviously suggests itself is that of the sale of a company's undertaking. Such a power has long been accorded companies, and the equivalent transfer by way of share acquisition presents no greater objection in principle except in relation to individual shareholders. One can easily imagine resort to s. 124 for a purely arbitrary acquisition of shares of a small interest by a larger one, but I cannot think the provision was introduced for any such a purpose; and it is significant that it is to a company and not an individual that the power is given.

The respondents, in support of their judgment, submitted an alternative argument that s. 128 was unconstitutional. The question had been raised and argued in the *Rathie* case but this Court found it unnecessary to decide the point because of the failure of the transferee company to comply with the time requirements of the section. It has again been raised and fully argued throughout the course of the litigation. There has been complete unanimity throughout that Parliament has the power to enact s. 128. The matter was summarized by Laidlaw J.A. as follows:

> It is my opinion that the Parliament of Canada having legislative power to create companies whose objects extend to more than one Province possesses also the legislative power to prescribe the manner in which shares of the capital of such companies can be transferred and acquired. That matter is one of general interest throughout the Dominion.

[1] [1953] 2 S.C.R. 204 at 213.

It is truly legislation in relation to the incorporation of companies with other than provincial objects and it is not legislation in relation to property and civil rights in the province or in relation to any matter coming within the classes of subject assigned exclusively to the legislature of the province. It deals with certain conditions under which a person may become a shareholder or lose his position as a shareholder in such a company and, in my opinion, this case is completely covered by the reasons of this Court in *Reference re constitutional validity of s. 110 of the Dominion Companies Act*[1]. This was also the opinion of the British Columbia Courts in the *Rathie* case[2].

I would dismiss the appeal with costs. Although all the Attorneys-General of the Provinces were notified, no one appeared on their behalf. The Attorney General of Canada did appear. There should be no order for costs to or against him.

Appeal dismissed with costs.

Supplementary Reasons

We have been asked by counsel to explain whether our reasons also apply to the 21,645 shares held by 360 or 361 shareholders who were "unheard from" at the date of the motion before Wells J. These shareholders had neither accepted the offer nor moved for an "order otherwise" under s. 128 of the Act.

We all agree that, on the facts recited in our reasons, s. 128 was not applicable at all and that the appellant did not acquire the 21,645 shares by virtue of s. 128.

The respondents, when they moved before Wells J., asked to have set aside the *ex parte* order of Landreville J. dated May 18, 1960. This relief was not included in the judgment of the Court of Appeal. It should be included in the judgment of this Court.

Solicitors for the appellant: Osler, Hoskin & Harcourt, Toronto.

[1] [1934] S.C.R. 653, 4 D.L.R. 6.
[2] (1952), 5 W.W.R. (N.S.) 675, 3 D.L.R. 61; affirmed, (1952), 6 W.W.R. (N.S.) 652, 4 D.L.R. 448.

1963

ESSO STANDARD (INTER-AMERICA) INC. v. J. W. ENTERPRISES et al. AND M. A. MORRISROE

Judson J.

Solicitor for the respondents, J. W. Enterprises Inc. et al.: John J. Robinette, Toronto.

Solicitors for the respondent, Margaret A. Morrisroe: Johnston, Sheard & Johnston, Toronto.