MUNSTER BASE

33

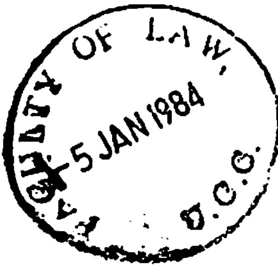
THE HIGH COURT

1983 No. 1405

BETWEEN:

MUNSTER BASE METALS LTD.

PLAINTIFFS



AND

BULA LTD.

DEFENDANT

Judgment of Mr. Justice Costello delivered the 29th July, 1983.

By a written agreement of the 28th March, 1983 the plaintiffs lent to the defendants a sum of £486,713.12. On the same day a share acquisition agreement was entered into between a company called Bula Holdings which is the parent company of the defendant herein and a company called Anglo United Development Corporation (hereinafter "Anglo" which is the parent company of the plaintiff company herein. By virtue of this share acquisition agreement Bula Holdings agreed to sell all its shares in Bula Limited (the defendants herein) to Anglo. These proceedings are closely linked to the terms of the share acquisition agreement in a manner to which I will now refer. The share acquisition agreement contained certain express warranties and representations relating inter alia to a document called a "disclosure letter". These warranties and representations included a paragraph, paragraph 85 in schedule 5 to the share acquisition agreement, which stated that "all particulars relating to Bula Limited which might be material to an intending purchaser of shares in Bula Limited have been disclosed" in the disclosure letter, The plaintiffs argue that there was a breach of the terms of the share acquisition agreement in that Bula Holdings failed to disclose a report (hereinafter referred to as the "Robertson Report") of December 1981, a report dealing with the reserve

of ore available to Bula Limited in its mines in the Navan area. This report it appears was obtained by a prospective purchaser of the mines and not by Bula Limited but was given to Bula Limited in the course of negotiations for a previous abortive agreement. Anglo have, because of the non-disclosure of the Robertson Report, rescinded the share acquisition agreement under Clause 10 2 thereof. The plaintiffs rely on these facts and on Clause 8 of the Loan Agreement which reads as follows:-

> "The loan and all interest accrued thereon shall become immediatel due and payable if Munster "(that is the plaintiffs herein)" shal so notify Bula Limited at any time after the occurrence of any of the following events:
>
> Acceleration events
>
> (a) B.H. "(that is Bula Holdings) or BLTD" (that is Bula Limited "fails to perform and observe any of its obligations under this agreement or B.H. "(that is Bula Holdings)" fails to perform and observe any of its obligations under the share acquisition agreement or
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> (b) any representation or warranty made by B.H. "(that is Bula Holdings) or BLTD"(that is Bula Limited)"in this agreement is incorrect when made or any representation or warranty mad by B.H. "(that is Bula Holdings)" in the share acquisition agreement was incorrect when made and Anglo would be entitl to damages in excess of £75,000 for breach thereof."

The plaintiffs now say:

1. That Bula Holdings failed to perform and observe its obligations under the share acquisition agreement by failing to disclose the Robertson Report and this was a failure to observe an obligation within the meaning of paragraph (a) of the Acceleration Clause to

which I have referred and

2. That an incorrect warranty or representation was made by Bula Holdings in that they failed to disclose the Robertson Report and that Anglo are entitled to damages in excess of £75,000 therefor and accordingly the acceleration event contemplated in paragraph b of Clause 8 has been established. So the plaintiffs argue in these proceedings the Acceleration Clause now operates because of the failure to disclose the Robinson Report and the loan is now immediately repayable.

The defendants admit that they were aware and have possession of a copy of the Robertson Report and they admit that they did not disclose it to Anglo but they say

(a) that the report was not a particular relating to Bula Limited which could be regarded as material to an intending purchaser an so no breach of the provisions of paragraph 85 of the Fifth Schedule occurred.

(b) If there was a breach it was not a breach of an obligation within the meaning of sub-paragraph (a) of the Acceleration Clause and so the loan is not repayable.

(c) If there was a breach it could only be regarded as a breach of warranty or representation and the Acceleration Clause does not apply because the plaintiffs have failed to prove that Anglo suffered a loss in excess of £75,000.

(d) That the plaintiffs were aware of the Robertson Report and cannc now claim that its non-disclosure amounted to a breach of paragraph 85 of the Fifth Schedule to the share acquisition agreement.

Taking these submissions in reverse order my view on them is as follows:

1. The affidavit of Mr. Stewart Gordon satisfies me that neither

Anglo or the plaintiffs were aware of the Robertson Report until after the execution of the agreements of the 28th March, 1983.

2. If the non-disclosure of the report was a breach of paragraph 85 then a breach of warranty has been established. The plaintiffs alleged in correspondence but did not formally prove by sworn testimony that the loss to Anglo exceeded £75,000. If the extent of their loss was the only issue in the case I would be prepared to adjourn the motion to allow formal proof on this point to be given.

3. If the non-disclosure of the Robertson Report was a breach of paragraph 85 of the Fifth Schedule then this breach amounted in my view to a failure to observe an obligation of the share acquisition agreement within the meaning of the Acceleration Clause. Clearly Bula Holdings were under an obligation under the share acquisition agreement not to make a false representation or warranty and a breach of paragraph 85 would if proved amount to an accelerating event within the meaning of sub-paragraph (a) of the Acceleration Clause.

Therefore the nett issue which remains is this. Was the Robertson Report a particular relating to Bula Limited which might be material to an intending purchaser? If it was then its non-disclosure was an "accelerating event" and the plaintiffs are entitled to the return of their loan. It is agreed that in adjudicating on the materiality of the Robertson Report the test is an objective one, that is the Court does not decide the issue solely by reference to the views of either the purchaser or the vendor of the shares. It has also been agreed by Counsel that the Court can by analogy apply the statement of principle contained in the judgment of Mr. Justice Kenny in the case of Chariot Inns .v. Assicurazioni Generali S.p.a. (reported in 1981 Irish Reports 199) at 226 whi[ch] reads as follows:-

"What is to be regarded as material to the risk against which the isurance is sought? It is not what the person seeking insurance regards as material nor is it what the insurance company regards as material. It is a matter or circumstance which would reasonably

> "influence the judgment of a prudent insurer in deciding whether he would take the risk, and if so in determining the premium which he would demand. The standard by which materiality is to be determined is objective and not subjective. In the last resort the matter has to be determined by the Court: the parties to the litigation may call experts in insurance matter as witnesses to give evidence of what they would have regarded as material, but the question of materiality is not to be determine by such witnesses.

The plaintiffs urge that the Robertson Report is obviously material within the meaning of paragraph 85 because an intending purchaser of the shares of Bula Limited might be influenced by the fact that the estimate of the ore body in the Bula Mines given in that report is lower than the estimate in other reports whose existence the vendors had disclosed. This is a forceful argument, but is it decisive? Is it sufficient to justify the granting of summary judgment? The defendants submit that i is not. The defendants submit that the Robertson Report was based on on a limited number of drill holes and that expert evidence will show that an objective test a report so based could not be regarded as material by an intending purchaser of the Bula shares. Can I determine the issu that thus arises between the parties now on this motion? Can I decide that the plaintiffs legal rights are so clear that the defence raised by Bula Limited is not a bona fide one? I do not think so. This does not seem to me to be an issue which can be determined without the benefit of an oral hearing of expert testimony on the matter. It seems to me that

this is not an appropriate case for determination in a summary manner. The issue it seems to me should be tried on a full hearing with oral evidence and I will adjourn the matter for this purpose.

Approved
JL
3.7.83