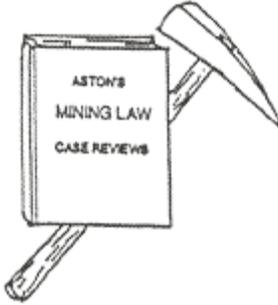


ASTON'S MINING LAW CASE REVIEWS™

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Jurisdiction : Ireland

IMPS Aston's Complimentary Case No. 9-07-02

IRISH SUPREME COURT GRANTS ORDER FOR SECURITY IN DISPUTE BETWEEN LEAD-ZINC MINE OWNERS

In ongoing legal battles for the past thirteen years since first instituted in the Irish courts in 1986, Bula Limited (in receivership) and Bula Limited have been litigating with Tara Mines Ltd. over control of a reputedly large and valuable lead-zinc ore deposit located near Navan (An Uaimh), County Meath, in Eastern Ireland.

In a more recent decision delivered on 6 February 1997, where all the remaining complaints of Bula against Tara were dismissed, except one, the court awarded the costs of the proceedings to the Tara defendants and the State defendants. However, because Bula had indicated that an appeal was to be made, the court granted a stay on the order of costs by the plaintiffs but limited the stay to 75% of the costs of the trial since, "at the very least, 25% of the costs of the trial were attributable to the time taken up with (plaintiffs') complaints which had been subsequently withdrawn and / or abandoned."

Subsequent to the serving of a Notice of Appeal, the defendants filed motions seeking security in respect to the costs of the appeal. "In the case of the corporate plaintiffs, the motions were brought pursuant to §390 of the Companies Act 1963 which provided:

" Where a limited company is plaintiff in any action or other legal proceedings, any judge having jurisdiction in the matter, may if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security be given for those costs and may stay all proceedings until the security is given."

" In the case of both the corporate plaintiffs and the personal plaintiffs, the motion was brought pursuant to Order 58, Rule 17 of the Rules of the Superior Courts which provides that :

Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Supreme Court .”

These two motions seeking orders for the provision of security for the costs of the plaintiffs’ / appellants’ appeal in the proceedings were the issues in the latest round of litigation between Bula and Tara in *Bula Limited (in Receivership), Bula Holdings, et al v. Tara Mines Ltd., Outokumpu Oy, et al, and the Minister for Energy* [1998] 110 /97 (Keane J.). The first motion for security was made on behalf of the “Tara Defendants”, and the second motion for security on behalf of the “State Defendants”.

Background Facts :

The properties and, later, the legal proceedings over the lead-zinc deposits, near Navan have a long, troublesome, and arduous history beginning in the late 1960s.

As noted by the Supreme Court, the discovery of the lead-zinc orebody was made “by a Canadian mining company associated with the first defendant, Tara Mines, Ltd. (hereafter “Tara”). Part of the rich deposits were underneath lands at Nevinstown which were the property of one Patrick Wright. Tara sought to obtain a lease of the minerals from the defendant, the Minister for Energy (hereafter, “the Minister”) in order to develop a zinc and lead mine. When it transpired that the minerals under Patrick Wright’s lands were owned by him and not by the State, Tara sought to acquire his interest in the land and / or minerals. However, in March 1971, Wright accepted a higher offer from two of the personal plaintiffs (Roche) in these proceedings, the land being conveyed at their direction to plaintiff Bula Limited (hereafter Limited).”

The Minister, believing that the ore body would be better exploited as one operation than multiple, attempted to consolidate the private and state-controlled land by a mineral acquisition order which failed both in the High Court and on appeal to the Supreme Court. (see *Roche & Anor. v. Minister for Industry and Commerce & Ors* [1978] IR 149).

Not to be dissuaded by the *Roche* decision, the Minister persisted in attempting to obtain some control or interest in the privately owned Nevinstown operations. Similarly, Bula Holdings (hereafter, “ Holdings”) which controlled Bula Limited and the former Wright property, was concerned with obtaining the good will and cooperation of the Minister in the exploitation of the Nevinstown ore body. Consequently, an agreement called the Inter Party Agreement was made in December 1975, by which the Minister /State acquired 49% of the capital shares of Bula Limited.

With the State as a major shareholder in Bula Ltd. (the Bula Mine), the Minister agreed to “*use his best endeavours to ensure that the Government of Ireland agrees to guarantee an amount not exceeding £10 million in respect of the major financing required by (Limited) to develop the mine.*”

Just prior to the Inter Party Agreement, in September 1975, the Minister had granted a lease to Tara for the larger part of mineral deposit. Thus, the division of the entire lead-zinc mineral deposit was 5/6th held by Tara Mines, and 1/6th by Bula Ltd. The Court particularly noted that between December 1975 and 1986 the Bula Mine still had not produced any lead or zinc, while the Tara Mine been producing for nearly a decade.

By 1983, Bula Ltd. was in serious financial difficulties. In response, the Minister acting for the State as a major shareholder in Bula Ltd. attempted an infusion of cash credits from a Finnish mining company, Outokumpu Oy, and the Irish government, and loan financing from several banks. The Minister's proposal was known as the "Bankers' Trust Package".

Tara Mine countered with an alternate proposal for a take over by them of the interests of Bula and the State to operate the entire ore deposit.

"The Minister for Energy concluded that the first proposal, (i.e., The Bankers' Trust Package) would not result in a viable independent development of the Bula mine and accordingly recommended to the government that it be rejected." Consequently, with the Tara proposal also being aborted, Bula Ltd.'s financing banks appointed a receiver and manager for Bula Ltd. in October 1985.

The suit was filed on 17 November 1986. An amended complaint was filed two and-a-half years later in March 1989. The principal claim was for damages for economic loss allegedly caused by the defendants, to wit :

- (i) various wrongful acts on the part of Tara, including inducing the Minister to withdraw from the Bankers' Trust Package and making misrepresentations as to the Tara proposal;
- (ii) conspiracy between Tara and the State defendants to cause such loss to the plaintiffs ;
- (iii) other wrongful acts on the part of the State defendants causing economic loss to the plaintiffs; and
- (iv) the trespass of Tara in to the ore body belonging to (Bula) Limited and the unlawful extraction and conversion to their own use of a significant part of that ore body.

The defendants denied all counts of the complaint.

Pre-trial hearings, interlocutory applications, and lengthy discovery proceedings followed, consuming several years until the trial actually started near the end of 1993. The trial lasted 277 days and was reported to be the longest in the judicial records of the State.

During the course of action, all of the allegations made by Bula Ltd. charging trespass by Tara and wrongfully extracting and converting part of Bula's ore body to Tara's use were abandoned. It was not until a little over 3 years later, on 6 February 1997, that the trial judge delivered a reserved judgement dismissing all the remaining charges of the complaint against all the defendants. The trial judge awarded the costs of the suit to the defendants. Since the plaintiffs were to appeal the court's decision, the judge ordered a

stay on the order granting costs to be paid by the plaintiffs extending to 75% of the costs of the trial.

Thus, the present question for the Court was a determination of whether the plaintiffs would be able to pay the costs of the appeal if the defendants were successful in defeating it.

The Court's Analysis :

The chances of whether the plaintiffs' appeal would, or even could be successful on appeal, based on the evidence presented as questions of law and fact in the trial were speculative matters. The Court's determination was based on the following summary of reasoning :

(i) Costs of the appeal :

From several professional accounting sources, 25% of the costs for the appeal was estimated to range between £500,000 and £600,000.

In an application for security under Order 58 Rule 17, and §390 of the Companies Act 1963, the Court must be satisfied that the plaintiffs will be unable to pay the costs of the defendant in the event the latter is successful. In this respect, the Court stated, "There can be no doubt that these pre-conditions are met in the present case." (p.16), and, "Given the admitted lack of resources of the plaintiffs, it follows inevitably that, irrespective of the result of the appeal, the defendants will have to suffer the clear injustice of the result of having to pay these costs themselves." (p.19)

(ii) Appellants' demonstration of arguable grounds for appeal :

After reviewing plaintiffs' arguments and evidence, the Court stated, "In these circumstances, on the materials before this court, one could not be satisfied that the plaintiffs have established, as an arguable ground of appeal, that there was no credible evidence to support fairly and properly the judge's finding and that the inferences he drew were not fairly and properly drawn." (p. 24); and "It is sufficient to say that the plaintiffs have not established as an arguable ground of appeal that the judge was not entitled to treat the evidence in question as credible and as fairly and properly supporting the findings ... " (p.26); and, "I am satisfied that the plaintiffs have failed to establish that they have an arguable ground of appeal from this finding by the trial judge." (p.27)

(iii) Bias by the trial judge :

In answer to this charge by the plaintiffs, the Court responded, " I am satisfied that it has not been established that the plaintiffs have an arguable ground of appeal in this regard."

The Court's Decision :

Thus, the Court adduced that plaintiffs' chances for winning the appeal were not arguably good and the motions for security for the defendants were granted with the Court stating, " ... this is a case in which the corporate plaintiffs should be required to furnish security for the costs." (p.28)
