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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 96-1665 BLS1

BARDON TRIMOUNT, INC.

vs.

LOUIS E. GUYOTT, JR., et al.

notice sent
9/4/07
K.Y.F.
M.R.G.--D M
R.I.--B L
R.S.H.
M.E.R.
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K.S.S.
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J.M.W.
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FINDINGS OF FACT, RULINGS
OF LAW AND AN ORDER FOR JUDGMENT

This matter is before the Court after a jury-waived trial on the merits of what remained to be heard after remand from the Appeals Court. See Bardon Trimount, Inc. v. Guyott, 49 Mass. App. Ct. 764, 780-781 (2000). Before setting forth its findings and rulings, the Court pauses to set the procedural and legal stage in which this trial was conducted.

This case revolves around the interpretation and application of a certain Share Purchase Agreement (hereafter "the Agreement"), that closed on May 4, 1988. In the Agreement, Bardon Group PLC, a predecessor to Bardon Trimount, Inc., (hereafter interchangeably "Bardon"), purchased each and all shares of the Guyott Company for a total base price of \$100 million. Id. at 764-65. By that purchase Bardon acquired ownership of the Guyott Company's properties, many of which, including the Haverhill property in issue, had ongoing environmental contamination claims. "As the costs to be incurred in dealing with and liquidating the claims were in many respects inchoate and could not be accurately forecast," id. at 764, language was included in the Agreement to deal with future environmental cleanup events and the possibility of cost-sharing therefor. In particular, the language of Section 5.12 dominates this case.

As stated, this matter is before the Court on remand from the Appeals Court. The claims

of the plaintiff, Bardon, first filed on March 27, 1996, were dismissed in March of 1998, on summary judgment by a prior Court (King, J.). Judge King's decision was appealed by Bardon to the Appeals Court. After decision by the Appeals Court on the appeal and remand to the Superior Court, the case later was transferred on January 11, 2006, to the Business Litigation Session, where it ultimately came on for "for trial . . . in accordance with [the Appeals Court's] opinion."

The Appeals Court's Conclusion in Bardon Trimount, Inc., 49 Mass. App. Ct. at 780-781, bears repeating:

Main case. The judgment is affirmed insofar as it held the shareholders not liable for any environmental costs associated with the non-Haverhill sites, and not liable for past environmental costs associated with the Haverhill site. The judgment is reversed insofar as it held the shareholders not liable for estimated future environmental costs associated with the Haverhill site as described in the April 26, 1993, notice, and this matter is remanded for trial in the Superior Court in accordance with this opinion. On remand, the declaration of rights shall be modified to conform to the foregoing disposition.

The award of attorney's fees in favor of the shareholders is reversed.

Separate claim. The dismissal of Bardon's claim for costs and counsel fees in the Federal action is reversed and this matter is remanded to the Superior Court for the entry of judgment in favor of Bardon in reasonable amount as found by the court.

Thus, all issues in this case, including all claims and defenses thereto, except for "future environmental costs associated with the Haverhill site as described in the April 26, 1993, notice," and "Bardon's claim for costs and counsel fees in the Federal action," either have been resolved by the Appeals Court or are no longer open because not raised on appeal.

In response to motions in limine this Court ruled that it would be inappropriate to re-open this case for any purpose other than for the two purposes dictated by the Appeals Court; and it

did not. This Court concluded that to re-open the case further would run directly counter to the Appeals Court's affirmance of the final judgment as to any environmental costs associated with the non-Haverhill sites, and for past environmental costs associated with the Haverhill site – and thereby everything that led to that judgment – except for the future environmental costs associated with the Haverhill site and counsel fees in the Federal action.¹

The “duty of the Superior Court [is] ‘to follow implicitly the terms of the rescript and not to travel outside what . . . [was] there laid down.’ Bourbeau v. Whittaker, 265 Mass. 396, 399.” MacNeil Bros. v. State Realty Company of Boston, Inc., 350 Mass. 772 (1966).

In addition to not re-opening the case beyond the narrow confines of the Appeals Court's remand, certain other issues already have been resolved by the Appeals Court and are binding on this Court here. For example:

[T]he parties were in agreement that the terms of the [A]greement, notably section 5.12, were “unambiguous,” that is, neither side thought extraneous evidence was needed to resolve any supposed ambiguities in the text; in such case the judge interprets the contract terms as a matter of law. . . . Left open to dispute was whether the text had been complied with – thus, whether the notices given were in the detail, etc., required by section 5.12.

Bardon Trimount, Inc., 49 Mass. App. Ct. at 770.

Further, both parties agree, as the Appeals Court ruled, that Section 5.12 is a “condition” that must be met before Bardon can recover from the former shareholders of the Guyott Company, who are the defendants here, any future costs for environmental cleanup at Haverhill. Id. at 771.

With this admittedly limited background, the Court now sets forth its findings and rulings

¹ After remand, in late 2001, the issues relating to the attorneys' fees and costs in the Federal action were resolved by Judge Hinkle. See, infra, at p. 18.

on the matters presented to it at the trial.

FINDINGS OF FACT

The parties, in their Joint Pre-Trial Memorandum, Paper #87, have agreed to the following facts:

In early 1979, Trimount Bituminous Products Company, a subsidiary of the Guyott Company ("Guyott"), purchased certain assets of Merrimack Paving Corporation, including a landfill in Haverhill, Massachusetts.

In October of 1984, the United States Environmental Protection Agency ("EPA") designated the Haverhill Municipal Landfill a Superfund site, and placed it on the National Priorities List ("NPL").

On May 4, 1988, Bardon purchased all of the shares of Guyott from the defendant shareholders for \$100 million. After substantial negotiation, Bardon and the Guyott shareholders set down the terms of the shares purchase in the Agreement.

As part of this transaction, the Guyott shareholders transferred all of the assets of Guyott to Bardon. These assets included the Haverhill landfill that had been designated a Superfund site by the EPA (the "Haverhill Site").

The parties to the Agreement agreed to the cost-sharing provision in the Agreement which is set forth in Section 5.12.

On April 26, 1993, before the end of the five-year time limit for giving notice of future costs at the Haverhill Site, Bardon sent a notice (the "Notice") to the Guyott shareholders. Exhibit A to the Notice was a letter from Balsam Engineering Consultants, Inc. ("Balsam"), an environmental engineering firm engaged by Bardon.

The remaining facts are found by the Court based upon the evidence presented at the trial.

The Haverhill Site was, at the time of the shares purchase Agreement, under a closure program begun in 1981 as settlement of a Superior Court action brought by the Massachusetts Department of Environmental Quality Engineering (“DEQE”) under G.L. c. 21E. As agreed above, in 1984, the U.S. EPA had placed the site on the National Priorities List (“NPL”) pursuant to the CERCLA statute, 42 U.S.C. secs. 9601 et seq.²

At the time of closing the shares purchase Agreement, the EPA had not proceeded beyond continuing to identify potentially responsible parties (“PRPs”) for the Haverhill Site. At some later date the EPA entered into negotiations with Bardon about conducting a Remedial Investigation and Feasibility Study (“RI/FS”) of the site. Bardon Trimount, Inc., 49 Mass. App. Ct. at 766.

Section 5.12 of the shares purchase Agreement deals with the expenses for the Haverhill Site’s and others’ environmental matters by which the Guyott shareholders agreed to share costs in excess of \$1 million equally with Bardon. For these purposes, Section 5.12 reads as follows:³

With respect to the environmental matters disclosed in Schedule 3.19 . . . the parties acknowledge that costs, expenses, liabilities and obligations will arise in connection with and out of the existing conditions which have given rise to such matters, including without limitation those relating to investigations, corrections and remediation. . . . No liabilities or obligations shall be regarded as such for purposes of this Section until they have been reasonably identified and reasonably quantified either by reference to an amount or a range of possible exposures through investigation or negotiation with third parties or the like. . . . If and when there have been Environmental Costs in an amount equal to [\$1 million] . . . [Bardon] shall deliver to the [shareholders] . . . a description of such

² This Federal statute is commonly known either as “CERCLA” or the “Superfund” law.

³ Essentially the full text appears in the Appendix to the Appeals Court decision, found in 49 Mass. App. Ct. at 781-782.

Environmental Costs in reasonable detail, including the payees or expected payees. . . . The Shareholders shall not be liable for payment of one-half of any such excess Environmental Costs as to which such notice has not been given within five (5) years after the Closing Date with respect to the property in Haverhill, Massachusetts. . . . Payments with respect to such Environmental Costs required to be made by the Shareholders shall be made within thirty (30) days after submission by [Bardon] . . . to one of . . . [the shareholders] of evidence that such an excess Environmental Cost, of which notice has been given as aforesaid, has been paid or is due and payable. . . .

(Emphasis added.)

As noted above, the Appeals Court has remanded only those issues relating to the payment of estimated future environmental costs associated with the Haverhill Site as described in the April 26, 1993 Notice. The April 26, 1993 Notice consists of three documents: a two-page letter dated April 26, 1993, from Bardon to the Guyott shareholders; a two-page letter dated April 21, 1993, from Balsam to Bardon; and a one-page "Estimate of Potential Costs for Superfund Remediation Haverhill Municipal Landfill." It is this packet of documents that the parties debate as to whether they comply with the requirements of Section 5.12 of the Agreement, as now illuminated by the Appeals Court.

The April 26, 1993 Notice was within, albeit just barely, the five-year cutoff date for notice on the Haverhill site.

Because of the significance of these three documents to the case before the Court, they are quoted here in some detail.

The April 26, 1993 letter from Bardon to the Guyott shareholders reads in material part as follows:

Pursuant to Sections 5.12 and 8.7 of the Share Purchase Agreement . . . notice is hereby given of certain Environmental Costs (as defined in the Agreement).

We are hereby informing you that Environmental Costs have been identified with respect to the Haverhill Superfund site in an aggregate amount estimated to range from \$10,300,000 to \$52,638,000. A copy of the letter from Balsam Environmental Consultants, Inc. detailing this estimate (exclusive of legal costs estimated to range from \$300,000 to \$5,000,000) is attached hereto as Exhibit A.

* * * * *

For your reference, attached hereto as Exhibit B is a schedule showing Environmental Costs of \$1,112,052.94 incurred with respect to all sites including the Haverhill Superfund site through December 31, 1992 together with copies of invoices for the period from February 1, 1991 through December 31, 1992.⁴

The April 21, 1993 Balsam letter, attached as Exhibit A to the April 26, 1993 letter, reads in material part as follows:

At your request, Balsam . . . prepared an estimate of potential costs for remediation of the Haverhill Landfill Superfund site. The estimated range of costs for remediation under Superfund is summarized in the attached table.⁵ The ranges of potential costs were estimated based upon a combination of:

- * experience in performing elements of the remedial activities listed in the table;
- * U.S. Environmental Protection Agency (EPA) estimates of typical costs required for remedial activities at Superfund sites;
- * reported costs for performing remedial activities listed in the table at other Superfund sites of similar type; and
- * estimated costs for remediation at a similar municipal landfill Superfund site in EPA Region 1, the Dover Landfill Superfund site.

* * * * *

⁴ These invoices were among the claims by Bardon that were found inadequate by the Superior Court, and that decision was affirmed on appeal. See Bardon Trimount, Inc., 49 Mass. App. Ct. at 773, 780-781.

⁵ The "attached table" is the one-page "Estimate of Potential Costs for Superfund Remediation Haverhill Municipal Landfill" attached as Exhibit B to the April 26, 1993 Notice.

If site closure under Superfund is not required, then significant savings in investigation, negotiation, and design costs can be realized for closure under solid waste requirements. A hydrogeologic investigation can be accomplished for \$500,000 to \$1 million. Typical regrading and capping costs, including revegetation of the cover, range from \$100,000 to \$200,000 per acre. For the 75-acre Haverhill Landfill site, construction costs could range from \$7.5 million to \$15.0 million. Design and construction oversight costs typically are in the range of 5 to 7 percent of construction costs, or \$370,000 to \$1.0 million in this case. Allowing a contingency of 20 percent, solid waste closure costs for the Haverhill Landfill site could range from approximately \$10 million to \$20.4 million. If leachate or ground water management and treatment is required, additional costs of approximately \$5 million to \$7 million could be incurred for construction and operation and maintenance of collection and treatment systems.

The one-page "Estimate of Potential Costs for Superfund Remediation Haverhill

Municipal Landfill" attached as Exhibit B to the April 26, 1993 notice reads in material part as follows:

REMEDIAL ACTIVITY	RANGE OF ESTIMATED COSTS		
Remedial Investigation	\$2,000,000	to	\$4,000,000
Feasibility Study	\$300,000	to	\$500,000
RD/RA Negotiations	\$50,000	to	\$100,000
Pre-Design Investigations	\$1,500,000	to	\$3,000,000
Remedial Design	\$2,400,000	to	\$2,800,000
Remedial Action			
Landfill Cap	\$15,800,000	to	\$16,400,000
Groundwater Treatment	\$5,970,000	to	\$8,520,000
Sediment Excavation	\$110,000	to	\$270,000
Hotspot Remediation	\$500,000	to	\$1,000,000
Operation & Maintenance	\$4,740,000	to	\$4,910,000
Contingency (20%)	\$4,476,000	to	\$5,238,000
EPA Oversight and Past Cost	\$700,000	to	\$900,000

TOTAL \$38,546,000 to \$47,638,000

NOTES:

- 1) Costs for Remedial Investigation through Pre-Design investigations estimated from experience at other sites.
- 2) "RD/RA" means remedial design and remedial action.
- 3) Costs for Remedial Design and Remedial Action based upon cost estimates for the Dover Landfill Superfund site.
- 4) EPA oversight and past costs based upon costs for the Dover Landfill Superfund site.

On May 14, 1993, the Guyott shareholders, by their then counsel, notified Bardon in writing that, in their view, the April 26, 1993 Notice was "insufficient for any purpose under Section 5.12 with respect to any Environmental Costs relating to the Haverhill Site."

After the closing of the Agreement in 1988, and through 1990, Bardon and the City of Haverhill (the "City") employed a number of engineering firms and contractors who worked on the Haverhill Site, expending over \$500,000 in costs. The work included stabilizing and improving drainage at the Site. Bardon also expended more than \$400,000 at the Haverhill Site between January of 1991 and December 31, 1992.

On August 9, 1990, the EPA sent Bardon a letter stating that the EPA believed Bardon was a Potentially Responsible Party with respect to the Haverhill Site.

On March 4, 1991, the EPA sent Bardon a letter pursuant to Section 104(e) of the CERCLA or Superfund statute, 42 U.S.C. sec. 9604(e), in which an array of information was requested from Bardon. Bardon, with assistance from counsel, promptly responded.

Recognizing the need for outside expertise to determine how best to proceed at the Haverhill Site, Bardon retained Balsam. Bardon's objective and strategy was "to get the situation to the lowest costs resolution." In this process, Bardon recognized that it was preferable for it,

along with the City and any other identifiable PRPs, to take an active role in the cleanup efforts rather than permitting the EPA to proceed on its own. There followed a series of meetings between and among Bardon, the EPA, Bardon's engineering consultants and its legal counsel.

A principal effort by Bardon was directed to attempting to get the EPA to remove the Haverhill Site from the NPL list. This might enable the EPA to then permit the cleanup to be conducted under the supervision of the Massachusetts Department of Environmental Protection ("DEP")⁶ rather than the EPA. Such a situation could be dramatically simpler, and vastly less expensive.

During the same time period, Balsam advised Bardon of Balsam's experience with a somewhat similar landfill site in Dover, New Hampshire, which was at a level of remediation of about \$30 million.

Essentially everyone who testified on the subject characterized Bardon's business strategy as one of "constructive delay," employed to defer costs into the future, in the hopes of being able to effect the least costly governmentally approved cleanup. It was a plan to move forward in a manner that showed the EPA that Bardon was doing something, but not moving forward in a manner that it was spending funds that were a waste of money. From a business point of view this was a prudent and reasonable strategy – and so far, at least, it seems to be working.

Considering its various meeting and strategic objectives, Bardon, by the end of January, 1993, was able to reduce the uncertainty at the Haverhill Site to three possible outcomes:

- (1) A "[b]est" scenario: Delist and pursue no further remediation;

⁶ By then the DEQE had become succeeded by the DEP. See Taygeta, Inc. v. Varian Assocs., Inc., 436 Mass. 217, 219 n.3 (2002).

- (2) A “[g]ood scenario: The EPA agrees to require no further action, but refers the matter back to the Massachusetts DEP for closure under the Massachusetts solid waste regulations; and
- (3) A “[r]ealistic [w]orst” scenario: A full CERCLA remediation under EPA control.

Scenario (1) was considered by Bardon to be not likely. Scenario (2) was considered, a good possibility. Scenario (3), which would be like the Dover, N.H. situation, was also considered not likely.

Although discussions continued, everyone seemed to agree that it was too early in the process to determine which route the EPA would follow. The EPA needed much more basic information, including confirmatory groundwater tests, before it would permit an RI/FS to be performed on a more focused basis.

Here, this Court pauses to include and adopt in these findings some language from the Appeals Court’s Opinion in Bardon Trimount, Inc. at pp. 774-76:

The cleanup of a Superfund location is not the fleetest of government-orchestrated endeavors. A remediation . . . is a “long-term, permanent cleanup[]” that “takes years or, in some cases, decades to complete.” A commentator notes an average of eight years of study on a site before cleanup even begins, and it may take ten to twelve years from initial investigation to final completion of the site cleanup. Add to this that EPA’s timing of projects can be eccentric, so certain sites may languish for years, then suddenly spurt forward.

The remedial process under CERCLA is described as having six phases:

“(1) the remedial investigation (RI) . . . ‘an assessment of the nature and extent of contamination and the associated health and environmental risks’; (2) the feasibility study (FS), an analysis of ‘potentially applicable remedy technologies, usually undertaken concurrently with the Remedial Investigation’; (3) remedy selection, ‘usually a combination of treatment, containment and other technologies’; (4) the record of decision (ROD) preparation, which documents site conditions and explains and justifies the choice of remedy; (5) remedial design, which involves preparation

of plans and specifications for implementing the chosen remedy; and (6) remedial action, where construction and other work is undertaken to implement the remedy.”

The literature and common experience testify to the inveterate intricacy, protraction, and high expense of these routines as superintended by the EPA. The Haverhill project seems characteristic. This landfill was placed on CERCLA’s national priorities list in 1984, yet, four years later when the agreement here in suit was executed, the EPA, according to schedule 3.19, was still in the process of identifying PRPs and would only thereafter begin negotiations (presumably with those PRPs) for the performance of an RI/FS study (the first two quoted phases). From the fact that Balsam’s estimate of future costs included projected figures for the costs of an RI/FS, it can be inferred that the study had not been completed (or, perhaps even started) by the date of the estimate, April 21, 1993, some two weeks before the five-year notice deadline under the agreement. Indeed, it is quite possible that even the search to round out the cast of PRPs, a job that often takes substantial time and effort, lay ahead.

The Appeals Court was correct in all of its assumptions about the Haverhill Site at the time the Notice was given. The RI/FS had not even begun. Consequently, this Court accepts the Appeals Court’s conclusion that “it could not be held as a matter of law on the record [as developed at the time of the Notice] that Bardon behaved unreasonably in respect to reducing the uncertainties about future costs that confronted the shareholders as well as itself.” *Id.* at 776. But, the issue is not whether Bardon was reasonable in a general way in its approach to the dilemma posed by the government’s inaction involving the Haverhill Site; the issue is whether Bardon met the requirements of Section 5.12.

The Court observes and finds that the two scenarios presented by Balsam in Exhibit A to the Notice were based almost entirely on generic information from other sites, particularly the Dover, N.H. site, then simply arithmetically applied to the presumed acreage of the Haverhill Site.

RULINGS OF LAW

In order to determine whether Bardon complied with the condition precedent that was Section 5.12, the Court must first determine what it was that Section 5.12 was designed to accomplish.

Before stating its conclusions, this Court pauses to observe that the parties in this case are sophisticated, all certainly had constant advice and assistance from highly competent counsel, and all benefitted from their prior experience and knowledge about the Haverhill Site. These sophisticated parties negotiated and chose specific language to state their intentions in the share purchase Agreement specifically to deal with the potential for cost-sharing in the future. Here, there was no disparity in bargaining power or lack of sophistication about the matter at hand. Where knowledgeable and fully represented parties choose to embody their relationship in a carefully crafted document, negotiated over several months, they are entitled to and should be held to the language they chose. See, e.g., Cabot Corporation v. AVX Corporation, 448 Mass. 629, 638 (2007).

The Court must be careful not to impose its own views on the contracting parties or to let matters outside the four corners of the instrument that are specifically anticipated and addressed therein overwhelm or change the document itself. “[A]greements are made to be performed, and relief should be given in the absence of special circumstances showing that it would be inequitable to do so.” Freedman v. Walsh, 331 Mass. 401, 406 (1954). Once again, this is not a time for the Court to attempt to be smarter than the parties.

The parties gave the Court little guidance about the purpose for Section 5.12, aside from being in accord that the language used was not ambiguous.

[T]his may be a question that the parties simply never considered. Should the trial court so determine, that does not frustrate a sensible resolution. “When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court. . . . In these circumstances, the court does not base a decision upon evidence of prior negotiations or agreements, although such evidence may be admitted as bearing on what may be reasonable. . . . “[W]here there is in fact no agreement, the court should supply a term which comports with community standards of fairness and policy rather than analyze a hypothetical model of the bargaining process.”

President and Fellows of Harvard College v. PECO Energy Company, 57 Mass. App. Ct. 888, 896 (2003).

Presumably, therefore, the Court can look at the language and make its own rational conclusions.

The Court’s decision here depends to a great degree upon a proper interpretation of the language of the Agreement itself, particularly Section 5.12. These are questions of law for the Court. Lumber Mut. Ins. Co. v. Zoltek Corp., 419 Mass. 704, 707 (1995). “In the absence of an ambiguity, [the Court] will ‘construe the words of the [Agreement] in their usual and ordinary sense.’” 116 Commonwealth Condominium Trust v. Aetna Casualty & Surety Company, 433 Mass. 373, 376 (2001).

The Agreement is to be read in light of the circumstances of its execution, which may enable a Court to see whether its words can be understood or are actually ambiguous. Robert Industries, Inc. v. Spence, 362 Mass. 751, 753 (1973). “The object of the [Court] is to construe the [Agreement] as a whole, in a reasonable and practical way, consistent with its language, background and purpose.” USM Corp. v. Arthur D. Little Systems, Inc., 28 Mass. App. Ct. 108, 116 (1989). The Court must act in a way to give effect to the Agreement as a rational business instrument in order to carry out the intent of the parties. Starr v. Fordham, 420 Mass. 178, 192

(1990).

Justice, common sense and the probable intention of the parties upon consideration of the words in question are guides to the construction of an agreement. City of Haverhill v. George Brox, Inc., 47 Mass. App. Ct. 717, 720 (1999).

Here, the parties were faced with a dilemma that they both fully understood. The Haverhill Site was already under EPA surveillance, but the parties were perhaps years away from any definitive knowledge of what the EPA would mandate for a cleanup or what that mandate would cost. Bardon wanted to keep the Guyott shareholders on the hook for cost-sharing for as long a time as possible. The Guyott shareholders wanted a definite time limitation on when they forever could be free from liability for the unknown future costs of the Haverhill Site cleanup.

The parties compromised. The Guyott shareholders agreed to remain committed to cost sharing for a full five years after the closing, but if, and only if, they were given meaningful notice of what may be a realistic potential for environmental cleanup costs. The Guyott shareholders did not sign up for an indefinite period as part of a plan for constructive delay. While it might ultimately cost them more, they wanted as much certainty as they could get in no longer than five years. Then they wanted freedom from anything more. This is what produced Section 5.12.

As noted, this compromise was reached by parties fully knowledgeable about the vagaries of CERCLA cleanup programs described above. The only true answer to the ultimate costs has always been in the total control of the EPA, and it remains there to this day. While steps – including “constructive delay” – taken by Bardon might reduce the ultimate costs, neither Bardon nor the Guyott shareholders could know what the costs would be unless and until the EPA issued

its ROD or otherwise affirmatively acted on the project.

This being the case, the parties attempted to structure an exit point for the Guyott shareholders on Bardon's ability to hold them for any future costs by requiring Bardon, through investigation, negotiation or otherwise, to come up with a reasonable estimate and an explanatory Notice within five years.

Balsam, which created Exhibit A to the Notice, however, was not charged with the task of, by investigation or otherwise, coming up with a reasonable estimate. Indeed, Balsam never saw Section 5.12 or understood what it required.

Balsam did not do inferior work in creating Exhibit A. It did not know, however, that what it was doing was going to become Exhibit A. In short, Balsam was not aware that the estimates it was providing to Bardon were supposed to establish liabilities or obligations reasonably identified and reasonably quantified either by reference to an amount or a range of possible exposures through investigation or negotiation with third parties or the like.

What the Guyott shareholders were entitled to was something more than what the parties knew or understood at the time of the closing; and Bardon had five years to come up with that something. But what Balsam did – using only generic information, mostly from the Dover, N.H. site, and applying it to acreage believed, incorrectly, to be that involved at Haverhill, with essentially nothing more than an over-gloss of sophisticated guesswork by environmental experts – was not enough. This was not “investigation or negotiation with third parties” of or about the Haverhill Site, nor did it “reasonably identif[y] and reasonably quantif[y]” the anticipated costs of cleanup there. The Guyott shareholders were not looking for a picture of “typical costs” for a generic Superfund site cleanup. They wanted realistic information about the Haverhill Site in

particular and they did not get it.

Balsam's letter, Exhibit A to the notice, describes precisely what formed the basis for its estimates. The letter reads, in material part: "The ranges of potential costs were estimated based upon a combination of: experience in performing elements of the remedial activities listed in the table; U.S. Environmental Protection Agency (EPA) estimates of typical costs required for remedial activities at Superfund sites; reported costs for performing remedial activities listed in the table at other Superfund sites of similar type; and estimated costs for remediation at a similar municipal landfill Superfund site in EPA Region 1, the Dover Landfill Superfund site." Nowhere is there any mention or description of an independent investigation of conditions at the Haverhill Site.

Similarly, the one-page "Estimate of Potential Costs for Superfund Remediation Haverhill Municipal Landfill" attached as Exhibit B to the April 26, 1993 Notice explains its source as: "Costs for Remedial Investigation through Pre-Design investigations estimated from experience at other sites"; "Costs for Remedial Design and Remedial Action based upon cost estimates for the Dover Landfill Superfund site"; and "EPA oversight and past costs based upon costs for the Dover Landfill Superfund site." Again, nowhere is there any mention or description of any independent investigation of conditions at the Haverhill Site.

The Guyott shareholders should not be required to hold back the Balsam high-end estimate of \$52,638,000 or even its low-end estimate of \$10 million during an indefinite period of "constructive delay" by Bardon in connection with the Haverhill Site. As stated above, "constructive delay" ultimately may be economically prudent. But it is not what was called for by Section 5.12.

Bardon has made an argument on a point that this Court reserved, with skepticism, until after trial. That is that the Guyott shareholders have failed to demonstrate prejudice to themselves as a result of Bardon's failure to fulfill its obligations under Section 5.12. This Court, although specifically finding that there was no prejudice proven, now rules that such proof was not necessary. See Cheschi v. Boston Edison Co., 39 Mass. App. Ct. 133, 141 (1995).

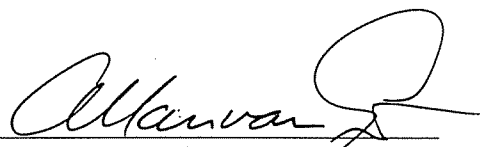
As stated above in the procedural description, this Court read the Appeals Court opinion as setting forth two issues for determination. The foregoing findings and rulings address the first. The second was Bardon's claim for costs and counsel fees in the Federal Action.

The Court, however, now has been advised that on October 30, 2001, that matter was resolved by Judge Hinkle. Reference is made to a Memorandum of Decision and Order on Motion for Entry of Judgment Following Rescript on Separate Claim for Attorney's Fees and Costs, Paper #55, in which Judge Hinkle awarded Bardon fees and costs of \$51,529.86. A month later a judgment was entered by the Clerk on Judge Hinkle's Order. See Paper #56. An Amended Judgment was then entered on January 10, 2002. See Paper #59. The fee amount was not changed in the Amended Judgment.

The second issue, therefore, already has been resolved.

ORDER FOR JUDGMENT

The Court will enter final judgment on all aspects of this case. Before doing so, however, it will grant both sides the opportunity to submit proposed forms of judgment consistent with these findings and rulings, the determinations previously made, and the rulings of the Appeals Court. Any such proposed form must be filed, with the Court, no later than 3:00 p.m. on September 14, 2007.



Allan van Gestel
Justice of the Superior Court

DATED: September 4, 2007