**THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**
**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**
**CIVIL TRIAL DIVISION**

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| ROHM & HAAS CO., | : | November Term, 2001 |
| Plaintiff | : | |
| | : | No. 215 |
| v. | : | |
| | : | Commerce Case Program |
| CROMPTON CORP., | : | |
| Defendant | : | Control No. 020435 |

## OPINION

Defendant Crompton Corp. ("Crompton") has filed a motion for partial judgment on the pleadings ("Motion") as to a declaratory judgment claim asserted in the complaint ("Complaint") of Plaintiff Rohm and Haas, Co. ("R&H") and a counterclaim asserted by Crompton itself. For the reasons set forth in this Opinion, the Motion is granted.

## BACKGROUND

On February 15, 2001, R&H and Crompton entered into a requirement sales agreement dated as of January 1, 2001 ("Agreement"). Compl. Ex. A. Under the Agreement, Crompton agreed to satisfy all of its 2-Mercaptoethanol ("Product") needs with Product purchased from R&H, which in turn agreed to supply Crompton with all of the Product it required. Id. §§ 2(a), 6(a). This arrangement was to continue through January 1, 2004. Id. § 2(a).

In addressing the quantity of the Product to be supplied, the Agreement addressed R&H's facility in Moss Point, Mississippi ("Facility"):[1]

[1] It appears that the Facility may have been owned by R&H indirectly through its subsidiary, Morton International, Inc. ("Morton").

> Seller shall maintain at Seller's Moss Point, Mississippi facility, a minimum of one hundred fifty thousand (150,000) pounds of Product reserved for Buyer. In addition, Seller shall have available to Buyer, on-site at a location in North America, not less than one hundred fifty thousand (150,000) pounds of Product from an approved source, that Buyer may purchase under the terms of this Agreement.

Compl. Ex. A § 6(a). R&H asserts that the Facility was R&H's only facility capable of manufacturing the Product and that Crompton was aware of this fact, but there is no indication in the Agreement that the Facility was to be the sole source of the Product. Compl. ¶ 9.

On January 17, 2001, almost a month prior to the execution of the Agreement, the United States District Court for the Southern District of Mississippi entered a consent decree ("Consent Decree") that resolved a suit brought by the federal and Mississippi governments on account of certain environmental concerns and operational practices at the Facility. Mot. Ex. 3. R&H claims that the effect of the Consent Decree was to make the production of the Product at the Facility commercial impracticable and that the extraordinary costs of bringing the Facility into compliance constitute a force majeure event that relieves it of its obligations under the Agreement. Def. Resp. ¶ 8. R&H further asserts that it was unaware of these consequences of the Consent Decree at the time it entered into the Agreement. Id.

R&H closed the Facility on December 20, 2001 and has not supplied Crompton with the Product since that date. Mot. ¶ 9; Resp. ¶ 9. According to R&H, this closure left only two companies capable of supplying the Product in significant quantities, and these companies' per-pound selling price for the Product is more than 50 percent above the price at which R&H was obligated to sell the Product under the Agreement. Compl. ¶ 14.

The Parties amended the Contract on November 2, 2001 to allow Crompton to seek alternative sources for the Product, but have failed to resolve the dispute as to R&H's liability and responsibilities under the Agreement and any damages that R&H may owe Crompton. Accordingly, R&H is seeking a declaratory judgment to determine whether it is relieved of its contractual duties due to commercial impracticability or the occurrence of a force majeure and to what extent Crompton is entitled to damages from R&H. Crompton, in turn, has submitted a counterclaim for R&H's alleged breach of the Agreement ("Counterclaim") and has filed the Motion as to liability on R&H's claim and the Counterclaim.

**DISCUSSION**

The core of this dispute is whether R&H's failure to perform under the Agreement is excused by either the Agreement's force majeure provision or the doctrine of commercial impracticability. An examination of the pleadings reveals that neither excuses R&H's non-performance.

A Pennsylvania court must grant a motion for judgment on the pleadings "where, on the facts averred, the law says with certainty that no recovery is possible." Lindstrom v. City of Corry, 563 Pa. 579, 763 A.2d 394, 396 (2000). In considering such a motion, "[a]ll material facts set forth in the Complaint as well as all inferences reasonably deducible therefrom are admitted as true for the purpose of . . . review." Emerich v. Philadelphia Center for Human Dev., Inc., 554 Pa. 209, 213 n.1, 720 A.2d 1032, 1034 n.1 (quoting Kyle v. McNamara & Christe, 506 Pa. 631, 634, 487 A.2d 814, 816 (1985)).

## I. The Force Majeure Provision in the Agreement Does Not Excuse R&H's Failure to Perform

Section 17 of the Agreement contains the force majeure clause ("Force Majeure Provision"):

> Deliveries may be reduced or suspended by either party upon the occurrence of any event beyond the reasonable control of such party or, in the event of labor trouble, strike, lockout or injunction, which makes impracticable the manufacture, transportation, acceptance or use of a shipment of the Product or of a raw material or intermediate upon which the manufacture of the Product is dependent. If, because of any such event, it is impracticable for Seller to supply the total demand for the Product, Seller will nonetheless use reasonable efforts to continue to supply Buyer's demand for the Product from alternative sources approved by Buyer, and will do so under the terms of this Agreement. Deliveries suspended under this section may be canceled without liability, but this Agreement shall otherwise remain unaffected. In the event that deliveries hereunder have been suspended due to force majeure for any consecutive three (3) month period, either party may cancel this Agreement upon thirty (30) days written notice.

Compl. Ex. A § 17 (emphasis added).[2]

Pennsylvania state cases addressing force majeure are surprisingly few and far between. The Superior Court in Martin v. Pennsylvania, Department of Environmental Resources, 120 Pa. Commw. 269, 548 A.2d 675 (1988), engaged in the most extensive discussion to date by any Pennsylvania appellate court:

> In order to use a force majeure clause as an excuse for non-performance, the event alleged as an excuse must have been beyond the party's control and not due to any fault or negligence by the non-performing party. Furthermore, the non-performing party has the burden of proof as well as a duty to show what action was taken to perform the contract, regardless of the occurrence of the excuse. Gulf Oil Corp. v. Federal Energy Regulatory Commission, 706 F.2d 444 (3d Cir. 1983), cert. denied, 464 U.S. 1038, 104 S. Ct. 698, 79 L. Ed.2d 164 (1984).

120 Pa. Commw. at 273, 548 A.2d at 678 (emphasis added).

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[2] As an aside, the Court notes that the Consent Decree includes a force majeure provision of its own. Mot. Ex. 3 ¶¶ 145-149.

In the similar case of Senseri v. Garcia & Maggini Co., 298 Pa. 249, 148 A.2d 81 (1929), the Pennsylvania Supreme Court considered whether a contractual provision excusing the defendant's obligation to deliver five carloads of garlic in the event of a "crop failure" applied where the garlic crop failure had only been partial in nature. The court held that "crop failure" meant a total crop failure and applied general principles of contract interpretation:

> [I]f the intention had been to cover a partial failure from an unavoidable cause, the words used would naturally have been "crop shortage," [and] the change in language indicating a change in meaning. If the intention had been to allow a prorating in case of a partial failure, it would have been easy to say so, but it was not said. Apt language to that effect appeared in the contracts construed in Wilson v. Carpp, 223 Mich. 79, 193 N. W. 776, and Ranney-Davis Mercantile Co. v. Shawano Canning Co., 111 Kan. 68, 206 P. 337, relied on by appellants. No such language appears here, and hence the general rule of law and the principles of construction above referred to apply, and defendants, having contracted to deliver a specific quantity of garlic, can only excuse their failure so to do by proof of impossibility of performance, of which there is no evidence in this record. On the contrary, there was testimony that San Juan garlic was being offered in the fall of 1924 at high prices and plaintiffs actually bought some; furthermore it is admitted by appellant that additional garlic could have been obtained, at a price higher than that named in the contract, and that it made no endeavor to purchase any to meet its undertaking.

298 Pa. at 253-54, 148 A. at 82-83.

In general, courts outside the Commonwealth considering a force majeure provision have focused on the language of the provision itself:

> "Force majeure" is a term that describes a particular type of event which may excuse performance under a contract. To determine whether a certain event excuses performance, a court should look to the language that the parties specifically bargained for in the contract to determine the parties' intent, rather than resorting to any traditional definition of the term. Contractual terms are controlling regarding force majeure with common law rules merely filling in gaps left by the document. In other words, when the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure.

R&H Falcon Drilling Co. v. American Exploration Co., 154 F. Supp. 2d 969, 973 (S.D. Tex. 2000) (citations and quotation marks omitted). See also Unicover World Trade Corp. v. Tri-State Mint, Inc., No. 91-CV-0255-B, 1994 WL 383244, at *10 (D. Wyo. 1993) (concentrating on the terms of the force majeure provision to find that events were not sufficient to allow party to invoke provision). In any event, most definitions ascribed to the term "force majeure" echo both the language used in the Force Majeure Provision and the description provided in Martin by focusing on the party's control. See, e.g., Phillips Puerto Rico Core, Inc. v. Tradax Petroleum, 782 F.2d 314, 319 (2d Cir. 1985) ("[T]he basic purpose of force majeure clauses . . . is in general to relieve a party from its contractual duties when its performance has been prevented by a force beyond its control or when the purpose of the contract has been frustrated."); Goldstein v. Lindner, No. 01-2068, 2002 WL 523786 (Wis. Ct. App. Apr. 9, 2002) ("Force majeure clauses extend leases only when the non-performance is 'caused by circumstances beyond the reasonable control of the lessee or by an event which is unforeseeable at the time the parties entered into the contract.'").

It is difficult to see how the closure of the Facility is beyond R&H's reasonable control. In the Complaint, R&H alleges as follows:

> 11. The closure of the Moss Point plant is due to factors beyond Rohm and Haas's control, namely, the dramatic costs associated with bringing Moss Point into compliance with a Consent Decree that Rohm and Haas entered into with the United States Environmental Protection Agency.

Compl. ¶ 11. No "events" other than the entry of the Consent Decree are mentioned as factors leading to the Facility's closure.[3]

A close examination of the Consent Decree supports Crompton's argument that its entry was not an event beyond R&H's reasonable control. In the Consent Decree, Morton agreed to extensive corrective measures and supplemental environmental projects, as well as a detailed compliance plan. However, the Consent Decree was, in its own language, "negotiated by the Parties in good faith" and was executed by Morton, an R&H subsidiary. Mot Ex. 3. Because R&H, acting through its subsidiary, had substantial control over the negotiations and ultimate language of the Consent Decree, it cannot be said that the Consent Decree amounts to an "event beyond the reasonable control" of R&H.

R&H's attempt to focus the Court's attention solely on the portion of the Force Majeure Provision addressing impracticability is without success. The Force Majeure Provision's language allows such impracticability as an excuse for performance only if its underlying basis is an event beyond R&H's reasonable control. Moreover, R&H would have the Court ignore the Force Majeure Provision's requirement that R&H "use reasonable efforts" to continue to supply Crompton's demand for the Product from alternative sources approved by Buyer and that it will do so under the terms of this Agreement. R&H has not even alleged that it made any effort to do so. Thus, the fact that the "event" requirement has not been met obviates the need to consider whether R&H's performance was impracticable.

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[3] R&H mentions several other factors in its decision to close the Facility, including the few suppliers of the Product and the relatively high cost of securing the Product. However, there is no indication in the Complaint that any of these factors constitutes an "event."

Further undermining R&H's position is the fact that the Consent Decree was agreed to and entered before the Agreement was executed. There can be no doubt that R&H was aware of the specific requirements the Consent Decree imposed on it and Morton prior to February 15, 2001. R&H was therefore able to take into consideration the effects of the Consent Decree when negotiating and entering into the Agreement. Its failure to do so accurately or properly cannot absolve it for its breach of the Agreement.

In many regards, the instant dispute is similar to that faced in Macalloy, Inc. v. Metalurg, Inc., 728 N.Y.S.2d 14 (N.Y. App. Div. 2001). There, the plaintiff sought a declaratory judgment to excuse its performance under the relevant contract's force majeure provision when the plaintiff's operations ceased as a result of enforcement actions taken by the Environmental Protection Agency. The court found the plaintiff's contention to be without merit:

> Plaintiff was not relieved of its obligations to perform under the contract with defendant based on the "plant shutdown" language contained in the force majeure provision of the contract. Such force majeure clauses excuse non-performance only where the reasonable expectations of the parties have been frustrated due to circumstances beyond the control of the parties. Plaintiff shut down its plant voluntarily due to financial considerations brought about by environmental regulations. Those are not circumstances constituting a force majeure event, and financial hardship is not grounds for avoiding performance under a contract. Furthermore, plaintiff was fully aware of the environmental regulations, and the Environmental Protection Agency's intention to enforce them fully, prior to entering into the contract with defendant.

728 N.Y.S. at 14-15 (citations omitted and emphasis added). Cf. Senseri, 298 Pa. at 254, 148 A. at 83 (noting that the defendant "expected that there would be a shortage in the crop" at the time the agreement was entered into). For these reasons, R&H's failure to fulfill its contractual obligations and breach of the Agreement is not excused by the Force Majeure Provision.

## II. R&H's Failure to Perform Is Not Excused by the Doctrine of Commercial Impracticability

The doctrine of commercial impracticability is codified in Uniform Commercial Code ("UCC") section 2-615, which is set forth in 13 Pa. C.S. § 2615 ("Section 2615"):

> Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (2) and (3) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

13 Pa. C.S. § 2615(1).[4]

The comments on Section 2615 elaborate further on what constitutes commercial impracticability. The first comment addresses the timing of the occurrence in question:

> 1. This section excuses a seller from timely delivery of goods contracted for, where his performance has become commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting.

13 Pa. C.S. § 2615 cmt. 1 (emphasis added). Comment Four speaks to the effect of an increased cost of the product:

> 4. Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. But a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like,

[4] Paragraphs (2) and (3) of Section 2615 address the seller's allocation and notification obligations.

> which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section.

13 Pa. C.S. § 2615 (emphasis added).

The vast majority of Section 2615 and the accompanying text supports Crompton's position. The entry of the Consent Decree cannot be "a contingency the non-occurrence of which was a basic assumption on which the contract was made," because it had already occurred at the time the Agreement was consummated. For the same reason, the Consent Decree's existence does not qualify as an "unforeseen supervening circumstance[] not within the contemplation of the parties at the time of contracting." Thus, the timing of the Consent Decree precludes the application of the doctrine in even a general sense.

The Consent Decree's effect of increasing the costs of producing or securing the Product are also not grounds for invoking the doctrine of commercial impracticability. As stated in Comment Four, increased cost generally does not constitute commercial impracticability. Case law stands in support of this conclusion. In W.R. Grace Co. v. Local Union 759, 461 U.S. 757 (1983), for example, the plaintiff planned employee layoffs that would have breached either a collective bargaining contract it had inked with the defendant or an agreement it had voluntarily entered into with the United States Equal Employment Opportunity Commission. The Court held that this conflict did not permit the plaintiff to breach the defendant's contract:

> Economic necessity is not recognized as a commercial impracticability defense to a breach of contract claim. Thus, while it may have been economic misfortune for the Company to postpone or forgo its layoff plans, its extant, conflicting, and voluntarily assumed contractual obligations exposed it to liability regardless of the layoff procedure it followed. In order to avoid

> liability under either contract, the Company, of course, could have accepted the economic losses of foregoing its reduction-in-force plans.

461 U.S. at 769 n.14. The Pennsylvania Superior Court has also employed a narrow definition of impracticability:

> "[I]mpracticability" means more than "impracticality." A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover.

Dorn v. Stanhope Steel, Inc., 368 Pa. Super. 557, 585, 534 A.2d 798, 812 (1987). See also Commonwealth v. Neff, 271 Pa. 312, 317, 114 A. 267, 269 (1921) (To excuse performance under doctrine of commercial impracticability, it must be averred that "that the contract could not be performed, not that it merely became difficult and expensive of performance."). While R&H endeavors to distinguish these cases, it does not do so convincingly and fails to provide citations that bolster its position.

Only one portion of Section 2615 and its entourage arguably supports R&H's position: Section 2615's reference to an "applicable foreign or domestic governmental regulation or order."[5] Comment Ten of Section 2615 sets forth the limited conditions under which this provision may apply:

> [G]overnmental interference cannot excuse unless it truly "supervenes" in such a manner as to be beyond the seller's assumption of risk. And any action by the party claiming excuse which causes or colludes in inducing the governmental action preventing his performance would be in breach of good faith and would destroy his exemption.

[5] R&H does not invoke the clause in Comment Four referencing an "unforeseen shutdown of major sources of supply" that leads to a price increase.

13 Pa. C.S. § 2615 cmt. 10.

R&H argues that the Consent Decree qualifies as an applicable governmental order that made delivery of the Product impossible. In doing so, R&H asserts that nothing in Section 2615 or elsewhere "excludes orders that predate the execution of a sales agreement or those that were entered into with the consent of the" breaching party. Def. Resp. 10. If the Court were to accept this argument, it would expand Section 2615 and the doctrine of commercial impracticability to such a degree that it would nearly eclipse the Article Two of the UCC entirely and would make a mockery of sales contracts. Surely the drafters of the UCC could not have intended for this provision to apply to a contracting party's pre-contractual obligation under a prior order or to an order to which a contracting party consented and in whose construction a contracting party was actively involved. Although the Court would not say that R&H's behavior amounts to "collusion," it would be inappropriate to treat the Consent Decree as an order to which Section 2615 applies.

In short, R&H's argument essentially boils down to the twin assertions that the Consent Decree entered before the contract was signed made it too expensive to produce the Product at the Facility and that the market price for the Product was too high. When taken either separately or together, these assertions do not justify R&H's breach of the Agreement either under the Force Majeure Provision or the doctrine of commercial impracticability.

## CONCLUSION

Because the Complaint alleges no justification for R&H's breach of the Agreement, Crompton is entitled to summary judgment on R&H's claim and on the Counterclaim.

BY THE COURT:

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JOHN W. HERRON, J.

Dated: April 29, 2002

**THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**
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**ORDER**

AND NOW, this 29th day of April, 2002, upon consideration of Defendant Crompton Corporation's Motion for Partial Judgment on the Pleadings, Plaintiff Rohm and Haas Company's response thereto and all other matters of record, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that the Motion is GRANTED, and that judgment as to liability shall be and hereby is entered in favor of the Defendant and against the Plaintiff on both the Plaintiff's claim for a declaratory judgment and on Crompton's counterclaim, with damages to be assessed.

BY THE COURT:

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JOHN W. HERRON, J.