1975 WL 22890 (E.D.Pa.)
United States District Court, E.D. Pennsylvania

PUBLICKER INDUSTRIES INC.
v.
UNION CARBIDE CORP.

January 17, 1975

Callaghan & Company's Headnote and Classification
P2615Impracticability of performance.
E.D.Pa. Jan. 17, 1975
Performance of a contract to supply ethanol to plaintiff over a three-year period was not rendered "impracticable" within the meaning either of the "force majeure" clause in the contract or § 2-615 of the Code because of a substantial increase in the cost of ethylene, the major cost element of ethanol, allegedly resulting from increases in the price of oil effected by the oil producing nations. The contract provided for passing certain foreseeable cost increases on to the buyer, but the existence of a specific provision which put a ceiling on contract price increases resulting from a rise in the cost of ethylene impelled the conclusion that the parties intended that the risk of a substantial and unforeseen rise in its cost would be borne by the seller. Query also whether the oil price rises were a "contingency the non-occurrence of which was a basic assumption on which the contract was made" in July of 1972.

Callaghan & Company's Headnote and Classification
P2615Cost increases as a factor in "impracticability" of performance.
E.D.Pa. Jan. 17, 1975
A cost increase of less than 100% has not been held to make a seller's performance "impracticable." Added expense alone is not usually enough to justify a finding of impracticability.
UCC Section Cited: § 2-615.

Attorneys and Law Firms

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Patrick Ryan, Esq., for defendant.

Opinion

WEINER, District Judge.

This case presents the problem of whether a seller's performance under a contract has become impracticable because its costs have nearly doubled due allegedly to unforeseeable events arising out of the 1973 Middle East War.

In July of 1972, Union Carbide Corporation and Publicker Industries entered into a contract whereby Union Carbide was to supply Publicker with a substance called "Spirits Grade Ethanol" for a period of three years. The price was to be determined by a detailed formula set forth in the contract. Essentially the price was ***990** to be adjusted once at the beginning of each year of the contract to reflect any change in the seller's cost. The major cost element of Ethanol is Ethylene, a type of natural gas, and the following clause indicates how fluctuations in its cost was to affect the selling price.

"(d) The contract price of $.2450 per gallon shall be adjusted by four-tenths of one cent ($.004) per gallon for each one-tenth of one cent ($.001) per pound increase or decrease from the 'base value' in the average of Seller's Standard Cost for Ethylene used in the manufacture of Ethanol at its Texas City, Texas plant during the calendar year immediately preceding the then current calendar year. The 'base value' referred to above shall be the average of Seller's Standard Cost for Ethylene used in the production of Ethanol at its Texas City, Texas plant during the calendar year 1972. Seller's Standard Cost for Ethylene shall mean the charge UNION CARBIDE makes to all of its Gulf Coast internal consumers for Gulf Coast produced Ethylene.

"In no event, however, shall the amount of said increase in the contract price for Ethanol 190 Proof, based upon Seller's increased Standard Cost for Ethylene, cause the price to be paid for Ethanol 190 Proof to exceed the price listed below:

During the calendar year 1974.............................	$.2550 per gallon [a]
During the calendar year 1975.............................	$.2650 per gallon*
During the calendar year 1976.............................	$.2750 per gallon*
During the calendar year 1977.............................	$.2850 per gallon*

By July of 19748 the price of Ethylene had risen so much that Union Carbide informed Publicker that it would insist on amending the contract to remove the price ceilings from the Ethylene price escalator provision quoted above. In August of 1974, Union Carbide told Publicker that unless it agreed to the proposed changes, it would cease supplying it with Ethanol. Thereupon, Publicker brought this action to require that Union Carbide specifically perform the contract.

After preliminary proceedings, it was agreed that until this suit was resolved, Union Carbide would continue to supply Publicker but at the higher price it had demanded. It was further agreed that the court would make an initial ruling on whether it had the power to alter the terms of the contract. That is the question that is presently before us. Essentially we must determine whether Union Carbide's refusal to honor the contract was justified, and if so, whether the contract can be enforced but at a higher price to be set by the court.

Defendant, Union Carbide, argues that the very substantial and allegedly unforeseen rise in the price of Ethylene excused it from ***991** further performance on two grounds: (1) that it was the type of occurrence which under the "force mjeure" clause of the contract relieved it of its duty to perform; and (2) that as a matter of general commercial law, the price rise was of such a nature as to render further performance impracticable (UCC § 2-615).

The "force majeure" clause provided in relevant part that:

"Neither party shall be liable for its failure to prform hereunder if said performance is made impracticable due to any occurrence beyond its reasonable control, including act of God, fires, floods, wars, sabotage, accidents, labor disputes or shortages, governmental laws, ordinances, rules and regulations, . . ., inability to obtain material, equipment or transportation, and any other similar or different occurrence. The party whose performance is made impracticable by any such occurrence shall have the right to omit during the period of such occurrence all or any portion f the quantity deliverable during such period . . ."

It is comparable to that portion of the Uniform Commercial Code also relied upon by defendant which provides that:

"Delay in delivery or non-delivery in whole or in part by a seller . . . 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 . . ."

12A Pa Stat Ann § 2-615 (Purdon's 1970).

Under either of the theories put forth by the defendant, the key to success is a finding by us that performance under the terms of the contract would be "impracticable." This would essentially require us to find that increased costs alone are sufficient to render performance impracticable. Comment 4 to § 2-615 quoted above indicates that:

"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 in the market in itself a justification, for that is exactly the type of business risk which business contracts 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, 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."

Union Carbide argues that it has suffered excessive cost increases as a result of allegedly unprecedented Arab price hikes. Testimony was presented to show the connection between oil prices and natural gas prices. Various experts testified that at the time of the contract, ***992** it was completely unforeseeable that the oil producing nations would bring about such exorbitant price increases. Union Carbide's experts further testified that the price ceiling established for 1974 in the contract was based upon their forecast that the Ethylene price for 1974 would be 3.75 cents a pound but that in fact by July 1974 the price had risen to 7 cents a pound. As a result, defendant's cost per gallon of Ethanol rose from 21.2 cents a gallon in 1973 to 37.2 cents a gallon by the middle of 1974. Confronted with a contract sale price fixed at 26.5 cents a gallon for 1974, defendant was losing over 10 cents a gallon at the time it refused to continue performance. It now alleges that if it is forced to complete performance under the present contract, it will suffer an aggregate loss in excess of 5.8 million dollars.

However, plaintiff Publicker contends that because the oil producing nations had joined together in 1971 to effect a 25% price increase, further price increases of the same kind were not unforeseeable at the time of the contract. Furthermore, it argues that the precise purpose of the ceiling provision in the contract was to place upon Union Carbide the risk of any unusual rise in the price of Ethylene. It is contended that in any event, the mere fact that the cost of performance has doubled does not make such performance impracticable.

We agree with the plaintiff. We are not aware of any cases where something less than a 100% cost increase has been held to make a seller's performance "impracticable." It is clear that in the present case, the contract contemplated that foreseeable cost increases would be passed on the the buyer. However, the existence of a specific provision which put a ceiling on contract price increases resulting from a rise in the cost of Ethylene impels the conclusion that the parties intended that the risk of a substantial and unforeseen rise in its cost would be borne by the seller, Union Carbide.

"While it may be an overstatement to say that increased cost and difficulty of performance never constitute impracticability, to justify relief there must be more of a variation between expected cost and the cost of performing by an available alternative than is present in this case, where the promisor can legitimately be presumed to hve accepted some degree of abnormal risk, and where impracticability is urged on the basis of added expense alone."

Transatlantic Financing Corporation v. United States, 363 F2d 312, 319 [3 UCC Rep 401, 406-07] (DC Cir 1966). While Transatlantic involved a much smaller cost increase, we feel that its reasoning is equally applicable here. See American Trading & Pro. Corp. v. Shell Internat'l Mar. Ltd., 453 F2d 939, 942 (2d Cir 1972); ***993** Maple Farms Inc. v. City School Dist., 76 Misc2d 1080, 353 NYS2d 784 [14 UCC Rep 722] (Sup Ct 1974).

As a finding that performance would be impracticable is necessary for defendant to prevail under either of the theories it has advanced, out conclusion that performance was not made impracticable puts defendant in breach of the contract. While not necessary to our holding, we also note that we have some doubt as to whether the Arab oil price rises were a "contingency the non-occurrence of whether because of the rule of on which the contract was made" or whether because of the rule of ejusdem generis they would be covered by the "force majeure" clause of the contract. See Wheeling Valley Coal Corp. v. Mead, 186 F2d 219, 222-223 (4th Cir 1950); 2 Anderson, Uniform Commercial Code § 2-615:17 at 309.

This opinion is filed in lieu of any findings of fact and conclusions of law that might be required under Fed R Civ P 52(a).

All Citations

1975 WL 22890, 17 UCC Rep.Serv. 989

Footnotes

* plus the amount of any increase, or minus the amount of any decrease, purs uant to paragraphs (a)(b) and (c) above." [1]

1 Paragraphs (a), (b) and (c) of the contract are price escalator provisions for the other cost elements of Ethanol.