UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RAND-WHITNEY CONTAINERBOARD LIMITED PARTNERSHIP, PLAINTIFF	:	
V.	:	CIV. NO. 3:96CV413 (HBF)
TOWN OF MONTVILLE and TOWN OF MONTVILLE WATER POLLUTION CONTROL AUTHORITY DEFENDANTS	:	

RULING ON PLAINTIFF'S MOTIONS IN LIMINE

On May 2, 2005, the Court issued a preliminary ruling on plaintiff's consolidated motion *in limine*, and stated that a detailed statement of reasons would follow. In that ruling, the court, *inter alia*, granted plaintiff's motion to preclude evidence regarding the force majeure defense, and granted plaintiff's motion to limit evidence on the mitigation defense. These two rulings warrant further discussion.

Plaintiff's motion *in limine* to preclude evidence regarding the force majeure defense

Defendants allege that their performance under the contract is excused under the terms of the force majeure clause of the Supply Agreement. Defendants argue that the jury should decide whether any action of the Department of Environmental Protection ("DEP"), including, but not limited to, its denial of the Town's application for a permit to segregate Rand-Whitney's waste

stream, also known as "Phase II," excuses further performance by the Town. Plaintiff argues that this defense should be precluded as a matter of law because 1) the failure to obtain a DEP permit is not an act or order of a governmental authority sufficient to trigger the force majeure clause; and 2) under the terms of the contract, defendants took on the responsibility to obtain all necessary permits, including future permits from the DEP to implement Phase II.

Where there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law. Thompson & Peck, Inc. v. Harbor Marine Contracting Corp., 203 Conn. 123, 131, 523 A.2d 1266, 1270 (1987).

Section 1.1 of the Supply Agreement states:

> Force majeure shall mean any cause or causes which wholly or partly prevent or delay the performance of obligations arising under this Agreement and which are not reasonably within the control of the non-performing Party, and shall include, without limitation, an act of God, nuclear emergency, explosion, fire, epidemic, landslide, lightning, unusually severe weather condition, earthquake, flood, windstorm or similar cataclysmic occurrence, an act of public enemy, war, blockade, embargo, insurrection, riot, civil disturbance, restrictions or restraints imposed by law or by rule, regulation or order of governmental authorities, whether Federal, state, or local, theft, accident, unauthorized sewer discharge, chemical contamination, and any other cause beyond reasonable control of the Party relying on such cause to excuse its performance

hereunder....

[Supply Agreement §1.1.]

Section 10.5(a)(iv) further provides that "no obligation of either Party that arose prior to the occurrence of the event of Force Majeure shall be excused as a result of such occurrence." [Supply Agreement §10.5(a)(iv).]

The only event at issue here is the denial of the Town's application for a permit to operate Phase II. Defendants have not presented any evidence of any other DEP action that would arguably constitute a force majeure event. The Court has already ruled that the force majeure issue is limited to a specific action of the DEP, and will therefore not allow any force majeure defense based upon the characteristics of Rand-Whitney's effluent.

The issue here is whether the force majeure clause can be interpreted to include the denial of a DEP permit to segregate the waste streams as an event or occurrence that may relieve the Town of its obligation to supply Treated Water under the Supply Agreement. Plaintiff argues that this defense should be precluded as a matter of law because there has been no change in the status quo, or "occurrence," that would trigger the force majeure clause. Since the moment the Supply Agreement was signed, plaintiff argues, both parties were aware of the need for permits, [see Supply Agreement §6.5(f) & §6.6], and the permit

for segregation has not been obtained. Defendants contend that the DEP's prohibition of segregation was an "occurrence" that is covered by the specific language of the force majeure clause, "regulation or order of a governmental authority." Defendants assert that the DEP's action did effect a change in the status quo by completely preventing implementation of Phase II.

No case in Connecticut has dealt with this precise situation. However, cases from other jurisdictions lead to the conclusion that, in this case, the force majeure clause cannot be interpreted to include the denial of the DEP permit. In URI Cogeneration Partners L.P. v. Board of Governors for Higher Educ., 915 F. Supp. 1267 (D.R.I. 1996), for example, the parties entered into an Energy Services Agreement ("ESA") governing the construction and operation of a cogeneration facility. Plaintiff, UCP, sued defendants after being notified that the ESA was being terminated for failure to obtain the appropriate project license and construction financing without zoning approval. The contract between the parties contained a "catch-all" force majeure provision that excused performance for "causes beyond the reasonable control of and without the fault or negligence of the party claiming Force Majeure." URI Cogeneration Partners L.P. v. Board of Governors for Higher Educ., 915 F. Supp. at 1276. The provision included examples of force majeure events including, but not limited to "an act of God; sabotage;

accidents; appropriation or diversion of steam energy, equipment, materials or commodities by rule or order of any governmental or judicial authority having jurisdiction thereof; any changes in applicable laws or regulations affecting performance; war; blockage; insurrection; riot; labor dispute....” Id. Defendants argued that the zoning denial qualified as a force majeure event under the contract, arguing that “the capriciousness of the South Kingstown Town Council amounted to an event ‘beyond the reasonable control of and without the fault or negligence of UCP.’” URI Cogeneration Partners L.P. v. Board of Governors for Higher Educ., 915 F. Supp. at 1286. The court disagreed, reasoning that zoning was an issue long before the ESA was signed:

> [t]hus it was foreseeable that the South Kingstown Town Council would prove less pliable than UCP hoped, that zoning approval would be denied, and that the parties would have to cope with the consequences. Hence, failure to win zoning permission was a foreseeable event, unlike the catastrophes listed in ESA § 21, and not of the nature and kind commonly excused by force majeure clauses. UCP and the Board could have provided for this eventuality -- instead, they left everything in UCP's hands.

URI Cogeneration Partners L.P. v. Board of Governors for Higher Educ., 915 F. Supp. at 1287. The court also discussed the fact that the defendant assumed the risk of obtaining governmental approval of the project, and thus could not rely on a force

majeure clause to excuse performance. Id.

In Northern Indiana Public Service Co. v. Carbon County Coal Co., 799 F.2d 265, 275 (7th Cir. 1986), a case involving a contract to purchase coal at a set price and quantity, the Seventh Circuit found that a force majeure clause could not shield a party from the normal risks of a contract. Northern Indiana Public Service Co. v. Carbon County Coal Co., 799 F.2d 265, 275 (7th Cir. 1986)("A force majeure clause is not intended to buffer a party against the normal risks of a contract.") The court reasoned that to excuse the buyer from the consequences of the risk he expressly assumed would "nullify a central term of the contract." Id.

In this case, at the time the contract was signed, the need for permits was contemplated by both parties. As discussed previously by the Court in precluding the impossibility defenses, the Town expressly assumed the risk of obtaining all necessary permits. This included, the court concluded, the permits for Phase II. [Ruling on Motion to Preclude Expert Report and Testimony, April 13, 2005 (doc. #365)]. This was one basis upon which the court precluded a legal impossibility defense to damages. Id.

Since the need for permits existed long before the contract was signed, the DEP's denial of a permit to segregate the waste streams cannot be considered an event beyond the control of the

parties. Therefore, defendants are foreclosed from alleging that performance is excused by the final, "catch-all" provision in the force majeure clause. Defendants recognize this, arguing that URI is distinguishable from this case in its entirety, because under the force majeure clause here, the parties specifically included a "regulation or order of governmental authorities" as a possible force majeure event. Defendants argue that this provision controls, raising a jury question about whether a DEP action in denying the permit is such a regulation or order, regardless of the foreseeability of the DEP's actions. Because the court finds that other provisions of the contract preclude the force majeure defense, as discussed below, this question need not determine the outcome of plaintiff's motion.[1]

Defendants' argument fails because it disregards the other operative provisions of the contract. As in URI, the Town assumed the risk of obtaining permits, including those necessary for future operation of the treatment facility.[2] Section 6.6 of

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[1]The Court questions whether, in light of the ongoing need for operating permits, the DEP's denial of the permit can be considered an "occurrence" at all, and is inclined to the position, as plaintiff argues, that the status quo has been maintained since the Town never had a permit for Phase II, and still does not.

[2]Defendants argue that this case is inapposite because the defendants in URI had an option to choose zoning approval which was denied, where as the Town has no option but to obtain DEP approval for the segregation plan. However, this argument is contingent upon reasoning that the court has already flatly rejected - that Phase II was the only way for the Town to Supply

the Supply Agreement states:

> The Authority shall obtain all permits necessary to construct the Project and to operate the Pipelines and the Pre-Treatment Facility and shall ensure that the the Project is constructed and operated in compliance with all Environmental Laws and Permits. The Authority shall take all other actions necessary to ensure that the Authority shall be able to perform its obligations hereunder at all times after the Project Completion Date.

[Supply Agreement §6.6.]

To interpret the force majeure clause to apply in this situation would, in effect, be to declare Section 6.6 void. See Northern Indiana Public Service Co. v. Carbon County Coal Co., 799 F.2d 265, 275 (7th Cir. 1986). Defendants raise the argument once again that Section 6.6 was not intended to cover permits for all possible future changes to the facility. However, the testimony of Tom Bowen at the first trial indicated that segregation was in fact contemplated as a possibility from the very outset. [Ruling on Plaintiff's Motion for Judgment, or, in the Alternative, for a New Trial, September 30, 2003 at 16-17.]

At oral argument, plaintiff argued that the force majeure defense is also precluded by Section 10.5(a)(iv), which states that "no obligation of either Party that arose prior to the occurrence of the event of Force Majeure shall be excused as a

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Treated Water to Rand-Whitney. Just as URI had the option to seek zoning approval, the Town was not limited to one method of supplying compliant water.

result of such occurrence." Assuming that the "occurrence" is the failure of the DEP to approve Phase II, plaintiff argues, it is clear that defendants' obligation to obtain permits for the project arose prior to the "occurrence" of the force majeure event.[3] The Court agrees with plaintiff's interpretation. This provision is not intended to excuse performance for the failure to get a permit, which was an obligation the Town assumed prior to the alleged force majeure event. Rather, the clause applies to a governmental action that was completely unanticipated at the time the Town assumed the obligation to obtain the permit, such as an order prohibiting a municipality from supplying water to any privately-held company.

Defendants also argue that because the court allowed the jury to consider this question during the first trial, it must submit this question to the second jury. During the first trial, the jury was permitted to consider whether a specific DEP action constituted a force majeure event, and whether the Town's

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[3]Defendants attempt to raise a question of fact about when the force majeure event actually occurred. It is clear that the event must have occurred at some point after the signing of the contract, and the assumption of the risk of obtaining permits. Otherwise, the issue would not be one of force majeure, but rather one of breach of warranty. [See Ruling on Cross Motions for Summary Judgment, March 4, 2002.] Assuming for sake of argument that there was an actual "event", [see note 1], at what moment the "event" actually occurred triggering the clause is irrelevant, as the contract terms barring this defense were operative upon the signing of the contract.

performance was excused. The jury made no findings on this issue because it found for defendants on their misrepresentation defense, and did not reach the force majeure issue. Since the first trial, the Court has heard all the evidence defendants chose to offer on the force majeure defense. The Court has determined that the evidence is insufficient as a matter of law, and therefore does not raise a jury question.

Plaintiff's motion *in limine* regarding the mitigation defense is granted.

The court granted plaintiff's motion *in limine* regarding the mitigation defense, and limited the evidence as follows:

> Evidence of lack of mitigation is limited to the time period beginning at defendants' breach of the Supply Agreement and must be limited to the failure to mitigate damages caused by the defendants' delivery of water exceeding the TDS levels in Schedule 1.1 Defendants will not be permitted to offer evidence concerning the characteristics of Rand-Whitney's effluent in their defense that Rand-Whitney failed to mitigate damages caused by defendants' failure to supply water low in TDS.

[Preliminary Ruling on Plaintiff's Motion in Limine, May 2, 2005, at 1.]

Defendants argue that Rand-Whitney's duty to mitigate its damages arose at some time prior to the breach, when it first became aware that its effluent would be high in TDS. The law in

Connecticut is clear, however, that the duty to mitigate damages only arises at the time of the breach. Rametta v. Stella, 214 Conn. 484, 492 (1990)("The concept of mitigation of damages presupposes that an injured party has one or more courses of conduct available *at or after the time a breach occurs* and an obligation therefore exists to pursue that course that results in the least damages to the offending party.")(emphasis added); Labrie Asphalt & Constr. Co. v. Quality Sand & Gravel, Inc., 2001 U.S. Dist. LEXIS 12561 (D. Conn. 2001)(same). Defendants' argument is based on a mischaracterization of the holdings in the cases they cite. In Morgan v. Young, 203 S.W.2d 837, 849 (Tex. App. 1947), the court noted that the duty to mitigate may arise at some point before the *extent* of the damage done to plaintiff by a breach can be ascertained. Id. The court in Morgan however, also found that "[d]efendant's obligation to minimize came into existence when plaintiff breached his contract..." Id. In Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322, 1329 (9th Cir. 1995), the court stated that "the duty to mitigate damages does not arise until the party upon whom the duty is impressed is aware of facts making the duty to mitigate necessary." Id. Defendants interpret this to mean that the duty to mitigate can arise before breach. However, the next sentence of that opinion forecloses this interpretation, stating that, "Home had no duty to mitigate until it actually discovered the damage done to it by

Lane Powell." Id. When read in their entirety, both cases support the rule that the duty to mitigate arises at the time of breach.

The defendants will not be permitted to offer evidence about the characteristics of Rand-Whitney's effluent in their mitigation defense. As the Court has stated previously, no term of the Supply Agreement imposed on Rand-Whitney the responsibility to determine for defendants what the characteristics of the mill's effluent would be. [Ruling on Cross Motion for Summary Judgment and on Plaintiff's Motion for Order Discharging It from Settlement Bond Obligations, March 4, 2002, at 19.] Secondly, the Supply Agreement left the design of the treatment facility up to the Town, and the Town was not limited to a closed loop method of supplying Treated Water. [Id.; Supply Agreement §8.3(b).] Thus, evidence of the characteristics of Rand-Whitney's effluent is not relevant to the issue of mitigation. Accordingly, plaintiff's motion to limit the evidence on the mitigation defense is granted.

SO ORDERED at Bridgeport this 31st day of August, 2005.

___/s/_____
HOLLY B. FITZSIMMONS
UNITED STATES MAGISTRATE JUDGE