SUPREME COURT OF SINGAPORE

6 August 2018

Case Summary

Bumi Armada Offshore Holdings Limited and another v Tozzi Srl (formerly known as Tozzi Industries SpA) [2018] SGCA(I) 05
Civil Appeal No 199 of 2017 and Court of Appeal Summons No 46 of 2018

Decision of the Court of Appeal (delivered by International Judge David Edmond Neuberger)

The Court of Appeal ("COA") dismisses the appeal of Bumi Armada Offshore Holdings Limited ("BAOHL") on liability but allows its appeal on quantum against Tozzi Srl ("Tozzi") in relation to the breach of Tozzi's right of first refusal. The COA also allows the appeal of BAOHL's parent, a Malaysian publicly listed company, on the tort of inducing BAOHL's breach of contract, reasoning that a parent company would not be liable for the tort of inducing its subsidiary's breach of contract where the parent merely pursued in good faith its own interest in its capacity as the owner of that company.

Pertinent and significant points of the judgment

- The court should be very cautious before holding that an arrangement which is clearly and unambiguously expressed to be "subject to contract" nonetheless gives rise to a binding contract: at **[21]–[22]**.
- A plaintiff must first establish a *prima facie* case against a defendant before it is entitled to invoke s 108 of the Evidence Act (Cap 97, 1997 Rev Ed): at **[35]–[36]**.
- The mere fact that a shareholder with a controlling interest acts in such a way as to induce a company to breach its contract as a matter of fact, is not enough to render the shareholder liable for inducing the breach of contract as a matter of law: something more is required. The owner of, or indeed any shareholder in, a company cannot be held to be liable for inducing a breach of contract by that company if the actions said to give rise to its liability merely involved the owner or shareholder pursuing in good faith its own interest in its capacity as the owner of, or shareholder in, that company: at **[45]** and **[47]**.

Background

1 Civil Appeal No 199 of 2017 was an appeal against the decision of the Singapore International Commercial Court ("the SICC") in *Tozzi Srl (formerly known as Tozzi Industries SpA) v Bumi Armada Offshore Holdings Ltd and another* [2017] 5 SLR 156.

The material facts

2 The underlying dispute arises from a project for the supply of facilities and services in connection with the development of the Madura BD Gas and Condensate Field in Indonesia ("the Project"). The Project included the construction and lease of a Floating Production, Storage and Offloading unit, a key part of which was the gas processing facilities, which consisted of seven Topside Process Modules (the "Modules"). The first appellant, Bumi Armada Offshore Holdings Limited ("BAOHL"), was awarded the contract for the Project. In connection with this Project, BAOHL and the second appellant, Bumi Armada Berhad ("BAB"), BAOHL's parent company, (collectively referred to as "Bumi"), had first asked the respondent,

Tozzi Srl ("Tozzi"), to provide engineering, procurement and construction ("EPC") services for three of the seven Modules, which were known as the "TI Packages".

3 On 28 July 2014, BAB's then-Chief Executive Officer called for a meeting with Tozzi and the parties met on 31 July 2014 ("the 31 July Meeting"). The minutes of this meeting, which were prepared by Bumi ("the 1 August MOM"), recorded in numbered paragraphs various arrangements including, in paragraph 5, that BAOHL agreed to grant Tozzi a right of first refusal in relation to all seven Modules. The 1 August MOM also contained a final unnumbered paragraph that provided that the discussions that took place during the 31 July Meeting were subject to "mutual agreement and execution of a formal contract".

4 On 5 November 2014, Bumi issued a Request for Quote ("RFQ") inviting proposals for the supply of all seven Modules. Mr Stefano Schiavo, Tozzi's Sales and Marketing Director, strongly objected to the RFQ on the basis that it was inconsistent with Tozzi's right of first refusal. Subsequently, in January 2015, Bumi informed Tozzi that it had decided to subcontract only the supply of the TI Packages (*ie*, saying nothing about the other four Modules ("the four Modules")).

5 In late February 2015, Mr Schiavo met with Mr Jesse van de Korput, BAB's new CEO, and raised Tozzi's right of first refusal. Mr van de Korput responded in an e-mail, effectively denying Tozzi's entitlement to a right of first refusal. On 20 May 2015, the subcontract for the supply of the TI Packages was awarded by BAOHL to VME Process Asia Pacific Pte Ltd ("VME"), without Tozzi first being given the opportunity to exercise a right of first refusal – *ie*, to match VME's bid. Tozzi then commenced proceedings against BAOHL for breach of its right of first refusal and against BAB in the tort of inducing BAOHL's breach.

6 The SICC ruled in favour of Tozzi. The SICC held that, despite the existence of the "subject to contract" clause in the 1 August MOM, a binding agreement had been reached at the 31 July Meeting that Tozzi would be granted a right of first refusal. The SICC found that Tozzi's right extended to, and was infringed in respect of, the supply of all seven Modules. The SICC further held that BAB was liable to Tozzi for inducing BAOHL to breach its contract to grant Tozzi the right of first refusal. BAOHL and BAB appealed against the whole of the SICC's decision.

The court's decision

7 BAOHL's appeal on liability was dismissed because BAOHL was found to have granted Tozzi a valid and binding right of first refusal which was breached. BAOHL's appeal on quantum was allowed to the extent that BAOHL was found not liable in respect of the four Modules. BAB's appeal on liability was allowed such that BAB was found not liable in the tort of inducing BAOHL's breach of contract: at **[59]**.

8 With respect to BAOHL's appeal on liability, the Court of Appeal affirmed the SICC's conclusion that BAOHL had granted Tozzi a legally enforceable right of first refusal in respect of all seven Modules during the 31 July Meeting. However, the Court of Appeal disagreed with the SICC's reasoning that Tozzi's right of first refusal, as recorded in the 1 August MOM, was not caught by the "subject to contract" clause. Given the importance of certainty and clarity in the law, particularly in the commercial field, any court should be very cautious before holding that an arrangement which is clearly and unambiguously expressed to be "subject to contract" nonetheless gives rise to a binding contract. Nevertheless, BAOHL's appeal on liability was dismissed because the 1 August MOM was not the only evidence of what transpired at the 31 July Meeting. Mr Schiavo was both firm and clear in his written and oral evidence that an unqualified binding agreement was reached at the 31 July Meeting that BAOHL would grant a right of first refusal to Tozzi on the terms set out in the 1 August MOM. It was open to the SICC

to accept Mr Schiavo's evidence, supported as it was by other factors and uncontradicted as it was by any other witness, that a binding oral agreement as to the right of first refusal was made during the 31 July Meeting. Once this view had been taken, the 1 August MOM effectively became irrelevant, and, consequently, there was no need to consider the effect of the "subject to contract" clause: at **[21]–[26]** and **[30]**.

9 With respect to BAOHL's appeal on quantum, the Court of Appeal allowed the appeal and overturned the SICC's conclusion that BAOHL had breached the right of first refusal in relation to the four Modules. There was simply no evidence which could fairly be said to raise enough of an implication or presumption that BAOHL had subcontracted the supply of the four Modules to third parties rather than supplying the four Modules itself (in which case there would be no breach). In the circumstances, Tozzi was unable to establish the *prima facie* case, which was required to place the relevant burden of proof on BAOHL pursuant to s 108 of the Evidence Act: at **[36]–[37]**.

10 On BAB's appeal on liability, the Court of Appeal allowed the appeal and overturned the SICC's conclusion that BAB was liable for inducing BAOHL's breach of contract. The evidence was insufficient to justify a finding that the individuals responsible for breaching Tozzi's right of first refusal were acting for BAB. Even if the evidence had been sufficient, the individuals were also, indeed primarily, acting for BAOHL, and it was difficult to see how the same individual doing the same thing on behalf of the contract-breaking company and a third party could lead to the third party doing anything to induce the contract-breaking company to breach its contract. In any event, the mere fact that a shareholder with a controlling interest acted in such a way as to induce a company to breach its contract as a matter of fact, was not enough to render the shareholder liable for inducing the breach of contract as a matter of law: something more was required. The owner of, or indeed any shareholder in, a company cannot be held to be liable for inducing a breach of contract by that company if the actions said to give rise to its liability merely involved the owner or shareholder pursuing in good faith its own interest in its capacity as the owner of, or shareholder in, that company. On the facts, there was nothing in the evidence to support the proposition that – if and in so far as they were acting for BAB – the individuals were doing anything other than pursuing BAB's *bona fide* interests as the owner of all the shares in BAOHL: at **[45]**, **[47]** and **[49]–[58]**.

11 Separately, BAOHL and BAB applied for leave to adduce further evidence on appeal in Court of Appeal Summons No 46 of 2018. This application was refused with costs on the ground that there was no reason why the evidence in question could not have been produced at trial: at **[61]**.

This summary is provided to assist in the understanding of the Court's judgment. It is not intended to be a substitute for the reasons of the Court. All numbers in bold font and square brackets refer to the corresponding paragraph numbers in the Court's judgment.