

SUPREME COURT OF SINGAPORE

21 September 2017

Media Summary

Singapore International Commercial Court Suit No 6 of 2016
Tozzi Srl (formerly known as Tozzi Industries SpA) v Bumi Armada Offshore Holdings Ltd and another [2017] SGHC(I) 8

1 This dispute can be traced to a project for the supply of facilities and services in relation to 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, of which an integral part was the gas processing facilities (“the Topside Process Modules”). The defendants intended to make a bid for the Project and invited the plaintiff to support their bid given its expertise in gas processing facilities.

2 Both parties formalised their working relationship in preparation for the bid in a Pre-Bid Agreement (“PBA”) under which the plaintiff was required to work exclusively with the defendants in respect of the bid for the Project. In exchange, the defendants granted the plaintiff a right of first refusal for the subcontract to provide engineering, procurement and construction/fabrication (“EPC”) services for three of the seven Topside Process Modules known as the “TI Packages”. As the Court explained in its judgment, a right of first refusal confers a right to be given an opportunity to match any third party offer which the grantor of the right might otherwise be minded to accept, and, in the event that the grantee matches the offer, to be awarded the business to which the offer relates. Although the PBA was valid for one year and expired on 5 February 2014, both parties continued to work together on the bid after the PBA’s expiry.

3 On 31 July 2014, the parties held an urgent meeting (“the 31 July Meeting”), in anticipation that the Project would be formally awarded to the defendants on 1 September 2014. The plaintiff contended that at the 31 July

Meeting, an agreement was reached to grant it a right of first refusal to supply all seven Topside Process Modules. The minutes of meeting (“the MOM”) were recorded in writing and signed by representatives of the plaintiff and the first defendant.

4 The defendants were awarded the bid for the Project on 8 August 2014. Between November 2014 and February 2015, the defendants invited proposals from qualified vendors for the supply of, initially, all seven Topside Process Modules and later, only the TI Packages. On 1 March 2015, the second defendant’s Chief Executive Officer informed the plaintiff that it would not favour any bidder for the subcontract to supply the Topside Process Modules, thereby implicitly denying that the plaintiff was entitled to any right of first refusal. Eventually, the first defendant awarded the subcontract for the TI Packages to a third party. The plaintiff was not informed of the price offered by this third party or given an opportunity to exercise a right of first refusal.

5 The plaintiff’s primary case was that the plaintiff and the first defendant reached a binding agreement at the 31 July Meeting to extend a right of first refusal over all seven Topside Process Modules to the plaintiff. The plaintiff argued that this agreement was breached by the first defendant, whose breach was induced by the second defendant, its parent company. The defence was that no agreement was reached at the 31 July Meeting because the matters discussed either did not give rise to contractual rights and obligations or were too uncertain to constitute a binding contract. Further, the last paragraph of the MOM expressly rendered all matters discussed “subject to contract”.

6 In its judgment, the Court found that a contract was formed at the 31 July Meeting for the plaintiff to be granted a right of first refusal in respect of all the Topside Process Modules. It was evident from the MOM that the parties agreed to grant the plaintiff a right of first refusal and, in consideration for this promised right, the plaintiff agreed to undertake the Front End Engineering and Design (“FEED”) works which it was otherwise reluctant to undertake. While

the details of the EPC subcontract and FEED contract required further deliberation, the right of first refusal – which concerned the *process* by which the plaintiff would be offered the EPC subcontract rather than the *substantive* terms of the subcontract that would be offered – was sufficiently certain. The context of the 31 July Meeting made it entirely unrealistic to suggest that the parties envisaged engaging in further negotiations on the right of first refusal. The parties’ correspondence after 31 July 2014 was replete with references to an “agreement” without any suggestion as to the need to negotiate further or formalise the agreement granting the right of first refusal in a written contract. Thus the “subject to contract” provision in the MOM was only intended to defer legal relations in respect of the EPC works and FEED works.

7 The Court was satisfied that the first defendant breached the agreement to grant the plaintiff a right of first refusal, in respect of all seven Topside Process Modules. The subcontract for the TI Packages was awarded to a third party without the plaintiff being given an opportunity to match the third party’s offer. For the remaining four modules, the defendants did not adduce evidence that these modules were supplied in-house by the defendants such that there was no third party offer that the first defendant was obliged to grant the plaintiff an opportunity to match.

8 Finally, the Court found the second defendant liable in tort for inducing the first defendant, its wholly-owned subsidiary, to breach the right of first refusal. The first defendant had no operational independence as it had no employees of its own and was completely controlled by the second defendant.

9 Accordingly, the Court granted the plaintiff’s claim against both defendants with damages to be assessed in the next tranche.

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.
