

Court of Appeal Clarifies Requirements for Tortious Claim for Inducement of Breach of Contract against a Parent Company

The Court of Appeal has clarified the requirements for the tortious claim for inducement of breach of contract against a parent company: *Bumi Armada Offshore Holdings Limited & another v Tozzi Srl (formerly known as Tozzi Industries SpA [2018] SGCA(I) 05.*

Our Comments

This is one of the first few Court of Appeal decisions against a first instance decision of the Singapore International Commercial Court ("SICC") and is a significant addition to the growing jurisprudence emanating from the SICC.

Besides reiterating two key legal principles concerning the application of "subject to contract" provisions and the application of section 108 of the Evidence Act (*Burden of proving fact especially within knowledge*), the Court of Appeal's decision in clarifying the requirements for proving a tort of inducement in the context of a parent company's alleged inducement of a breach by its subsidiary is especially welcome as it provides important clarity on what is permissible conduct for a parent company in making decisions concerning its subsidiary.

WongPartnership acted for Bumi Armada Offshore Holdings Limited and Bumi Armada Berhad at the trial before the SICC, and at the appeal before the Court of Appeal.

This Update examines the Court of Appeal's decision.

Background

The respondent in the appeal, Tozzi Srl ("Tozzi"), brought an action which was heard before a panel of three judges in the SICC, claiming for damages for breach of a right of first refusal to provide engineering, procurement and construction

services relating to certain modules for a gas processing facility in a Floating Production, Storage and Offloading unit in an Indonesian gas field project. The first appellant, Bumi Armada Offshore Holdings Limited ("BAOHL"), was the main contractor for the gas processing facility project. The second appellant, Bumi Armada Berhad ("BAB"), was BAOHL's parent company.

The right of first refusal was alleged to have been granted at a meeting between representatives of BAOHL and Tozzi and evidenced in minutes of the meeting signed by both parties. Tozzi had eventually submitted to BAOHL a bid for three modules but this was not accepted. Tozzi contended that BAOHL ought to have given Tozzi the right to match the price for the lowest bid for the three modules. Tozzi further alleged that its right had been breached in respect of a total of seven modules in the facility and not just three. Further, it alleged that BAB was liable to Tozzi for inducing BAOHL to breach its contract to grant Tozzi the right of first refusal. BAOHL contended that there was no binding right of first refusal granted as the minutes contained language making it "subject to contract" and BAB denied liability for inducing its wholly-owned subsidiary.

The SICC's Decision

The SICC, in *Tozzi Srl (formerly known as Tozzi Industries SpA) v Bumi Armada Offshore Holdings Ltd and another [2017] 5 SLR 156*, held that:

- A binding agreement had been reached that Tozzi would be granted a right of first refusal by BAOHL;
- The right extended to, and was breached in respect of, the supply of seven modules; and

- BAB was liable to Tozzi for inducing BAOHL to breach its contract to grant Tozzi the right of first refusal.

On appeal, the Court of Appeal (comprising Sundares Menon CJ, Beverley McLachlin IJ and David Neuberger IJ) allowed the appeal in part and:

- Affirmed that Tozzi was granted a right of first refusal;
- Reversed the SICC's finding on breach and held that the right was only breached in relation to three of the seven modules; and
- Overturned the SICC's finding that BAB was liable for inducing BAOHL's breach of contract.

The Court of Appeal's Decision

Interpretation of "subject to contract" clauses

The Court of Appeal affirmed that given the importance of certainty and clarity in the law, any court should be very cautious before holding that a clearly and unambiguously expressed "subject to contract" stipulation in an arrangement nevertheless gives rise to a binding contract. However, on the facts, the Court of Appeal agreed that a binding right of first refusal was granted to Tozzi.

Burden of Proof and application of section 108 of the Evidence Act

The Court of Appeal observed that although it was common ground that BAOHL was contracted to provide seven modules for the project, there was no evidence either way as to whether the supply of the remaining four modules had been subcontracted by BAOHL to third parties, or whether the supply had been effected by BAOHL itself. The SICC had concluded that since BAOHL did not adduce any evidence as to who supplied the remaining four modules, the burden lay on BAOHL to show that the remaining four modules were not subcontracted to another third party but were supplied in-house by BAOHL themselves.

The Court of Appeal rejected the SICC's approach which effectively reversed the standard evidentiary rule that the burden of proof is on the plaintiff to make out its claim. It rejected Tozzi's reliance on section 108 of the Evidence Act, which provides that "*when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him*". The Court of Appeal held that section 108 of the Evidence Act is only triggered if the plaintiff establishes a *prima facie* case against the defendant and Tozzi had failed to raise such a case. BAOHL's appeal was therefore allowed and the breach was only limited to the failure to honour the right of first refusal for three modules.

Analytical framework where a claim for inducement of breach of contract is brought against a parent company

The Court of Appeal affirmed the basic elements of the tort of inducing breach of contract as set out in *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407, that Tozzi had to show that BAB (a) acted with the requisite knowledge of the existence of the contract; and (b) intended to interfere with Tozzi's contractual rights, with such intention to be objectively ascertained.

The Court of Appeal added that in cases where it is contended that a parent company is liable for inducing a breach of contract by its subsidiary, a court has to also consider two additional issues: (i) whether the relevant employees are acting for the subsidiary and/or the parent, and (ii) if they were acting for the parent, whether the circumstances are such that the parent can properly be held liable for inducing its subsidiary's breach of contract. In considering issue (ii), the Court of Appeal reiterated that the fact that a company is wholly owned and entirely controlled by its parent company cannot, without more, mean that the parent had induced the subsidiary's breach of contract. If the law was otherwise, this would impermissibly undermine the *Salomon Principle* of independent corporate identity. However, the Court of Appeal also dismissed the

idea that a parent of a contract-breaking company can never be liable for inducing the breach of contract in question but considered in what circumstances a parent company would properly be held liable.

The Court of Appeal went on to hold that any owner or shareholder of 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 involve the owner or shareholder pursuing in good faith its own interest in its capacity as the owner of, or shareholder in, that company. In order to establish that a parent company is liable for inducing breach of contract by its subsidiary, some factor over and above an actual act of inducement was required. Such factors would include the parent company pursuing an interest unrelated to, or in addition to, its capacity as owners of shares in the subsidiary, or acting with a lack of good faith.

In this case, it was undisputed that BAOHL had no employees of its own. The SICC had concluded that the individuals who were responsible for negotiating with Tozzi were effectively acting for BAB. The Court of Appeal

disagreed with this finding and held that the fact that BAOHL had no employees cannot, in and of itself, mean that BAB was responsible for BAOHL's breach of contract. The Court of Appeal held that the fact that an individual is employed by the parent company does not prevent that individual from acting for a subsidiary rather than the parent company. Further, when acting for the subsidiary, the simple fact that the individual was employed by the parent does not mean that the individual was also acting for the parent. On the facts, the natural implication was that the relevant individuals had been acting for and on behalf of BAOHL.

The Court of Appeal further found that even if the relevant individuals responsible for breaching Tozzi's right of first refusal were acting for BAB, this was itself insufficient. There was also no evidence that if and insofar as they were acting for BAB, the individuals were doing anything other than pursuing BAB's own bona fide interests as the parent of BAOHL. The Court of Appeal therefore allowed BAB's appeal and found that it could not be liable for the tort of inducement of breach of contract.

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