IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA(I) 05

Civil Appeal No 199 of 2017

Between

(1) Bumi Armada Offshore Holdings Limited
(2) Bumi Armada Berhad

… *Appellants*

And

Tozzi Srl (formerly known as Tozzi Industries SpA)

… *Respondent*

In the matter of Singapore International Commercial Court – Suit No 6 of 2016

Between

Tozzi Srl (formerly known as Tozzi Industries SpA)

… *Plaintiff*

And

(1) Bumi Armada Offshore Holdings Limited
(2) Bumi Armada Berhad

… *Defendants*

JUDGMENT

[Contract] — [Formation] — [Right of first refusal]

[Contract] — [Breach]

[Tort] — [Inducement of breach of contract]

Bumi Armada Offshore Holdings Ltd and another
v
Tozzi Srl (formerly known as Tozzi Industries SpA)

[2018] SGCA(I) 05

Court of Appeal — Civil Appeal No 199 of 2017
Sundaresh Menon CJ, Beverley Marian McLachlin IJ and David Edmond Neuberger IJ
7 May 2018

6 August 2018 Judgment reserved.

David Edmond Neuberger IJ (delivering the judgment of the court):

Introduction

1 This is 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 "Judgment"). 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.

2 The SICC found that BAOHL had breached the right of first refusal that it had granted to the respondent, Tozzi Srl ("Tozzi"), in respect of the supply of all seven Modules. The SICC additionally found in favour of Tozzi in its claim against the second appellant, Bumi Armada Berhad ("BAB"), BAOHL's parent company, for having induced BAOHL's breach of contract. BAOHL and BAB (collectively referred to as "Bumi") appeal against the whole of the Judgment.

The relevant factual background

3 BAOHL is incorporated in the Marshall Islands and provides services to offshore oil and gas companies. It is a wholly owned subsidiary of BAB, a Malaysian publicly listed company that provides offshore oilfield services. Tozzi is an Italian company, which provides engineering, procurement and construction services to the oil and gas industry.

4 In April 2012, the developer and owner of the Project, Husky-CNOOC Madura Limited ("Husky"), invited several companies, including BAOHL, to bid for the Project. To help prepare its bid, BAOHL asked Tozzi to provide engineering, procurement and construction ("EPC") services for three of the seven Modules, which were known as the "TI Packages".[1]

5 In February 2013, Tozzi and BAOHL entered into a Pre-Bid Agreement ("the PBA") which governed their working relationship in preparation for BAOHL's bid for the Project.[2] The PBA was signed by Mr Stefano Schiavo, Tozzi's Sales and Marketing Director, and Mr Nicolas Abela, BAB's then Vice-President of Business Development Asia, for and on behalf of BAOHL.

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1 RA vol III(A), p 8.

2 ACB vol II, pp 9–13.

6 Clause 1(a) of the PBA provided that, if and when BAOHL was awarded the Project, BAOHL would subcontract to Tozzi the provision of EPC services for the TI Packages. Clause 2(c) granted Tozzi a right of first refusal for the supply of the TI Packages.[3] Clause 8(D) provided that the PBA would expire after a year.

7 In March 2013, following further negotiations on various matters, Tozzi submitted a proposal for the supply of EPC services for the TI Packages.[4] In January 2014, Mr Schiavo sought to extend the scope of Tozzi's services to all seven Modules, but this was rejected by Bumi.[5]

8 The PBA expired on 5 February 2014, without Husky having awarded the Project to any bidder. Notwithstanding this, Bumi and Tozzi continued to work together on BAOHL's bid for the Project.[6]

9 On 28 July 2014, after Husky informed BAOHL that it would be awarded the Project (it was anticipated that the Project would be formally awarded by 1 September 2014),[7] BAB's then-Chief Executive Officer ("CEO"), Mr Hassan Basma, called for an urgent meeting with Tozzi, and the parties met on 31 July 2014 ("the 31 July Meeting"). The next day, Mr Schiavo e-mailed Mr Basma with the intention of summarising the effect of the previous day's discussions "as [the] basis for an MOU".[8] In his e-mail, Mr Schiavo recorded the following:[9]

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3 ACB vol II, pp 10–11.

4 Schiavo's AEIC, exhibit "SS-26" (RA vol III(G), p 74).

5 ACB vol II, pp 24–25.

6 ACB vol II, p 119; Statement of Claim, paras 29–38 (RA vol II, pp 25–27).

7 ACB vol II, p 29, para 1.

8 ACB vol II, p 27.

> BAB and [Tozzi] agree the following:
>
> …
> - In the event [Tozzi] will confirm the given price for all the process topsides, then BAB will issue a [purchase order] with the original amount plus the amount for the e-house.
> - In the event [Tozzi] will not confirm the given price, they will highlight and justify all the changes.
> - If an agreement and complete understanding between BAB and [Tozzi] will be reached on such changes then will proceed with the issue of a [purchase order] to [Tozzi] with the agreed amount.
> - On the contrary BAB will involve other companies and seek quotations from them. However [Tozzi] will be granted right of first refusal.
>
> …

10 On 1 August 2014, Bumi prepared the minutes of the 31 July Meeting ("the 1 August MOM"), which were then signed by Mr Schiavo and Mr Abela for and on behalf of Tozzi and BAOHL respectively. The 1 August MOM contained ten numbered and indented paragraphs, followed by a single unindented and unnumbered paragraph. The SICC described the 1 August MOM in the following terms (Judgment at [13]):

> … The 1 August MOM similarly recorded Tozzi's right of first refusal:
>
> > 5. Tozzi will review their earlier price and confirm within 3 weeks for entire topsides. They will list assumptions made in confirmation or price. At the conclusion of FEED, Tozzi will adjust the price for assumptions. If adjusted price is acceptable to [BAOHL], Tozzi will be awarded the work. In case this is not, [BAOHL] will go out for a price check and offer first right of refusal to Tozzi for lowest price alternative offer.
>
> It also recorded that Bumi wished to carry out improved Front End Engineering and Design ("FEED") works and requested Tozzi to undertake the FEED. This proposal, as well as several other items recorded in the 1 August MOM, appeared to require further deliberation and follow-up action. For example, Tozzi was to provide details of the manpower available to perform the FEED works in Kuala Lumpur; the power generation and flare system "can be considered for supply by Tozzi"; and options for

[9] ACB vol II, pp 27–28.

> vendors for the detailed engineering works were proposed by both sides for further consideration. The last paragraph of the 1 August MOM contained what seems to be a "subject to contract" provision:
>
> > Both [BAOHL] and Tozzi agree that these minutes of meeting dated 1st August 2014 constitutes an understanding of the discussions, which took place on 31st July 2014 and is subject always to successful negotiation and mutual agreement and execution of a formal contract.
>
> [original emphasis omitted]

11 On or about 8 August 2014, Husky awarded the Project to BAOHL.[10] On 5 November 2014, whilst the Front End Engineering and Design ("FEED") works by Tozzi were still underway, Bumi issued a Request for Quote ("RFQ") inviting proposals for the supply of all seven Modules.[11] Mr Schiavo strongly objected to the RFQ on the basis that it was inconsistent with Tozzi's right of first refusal, and he also pointed out that Tozzi had commenced the FEED works in reliance on its right of first refusal.[12] Notwithstanding that, in January 2015, Tozzi submitted its quote for the EPC supply of the seven Modules.[13] Later that month, Bumi informed Tozzi that it had decided to subcontract only the supply of the TI Packages (*ie*, three instead of seven Modules),[14] and Tozzi submitted a revised quote for the supply of the TI Packages in February 2015.[15] In both submissions, Tozzi referred in its covering letter to an existing agreement between the parties.[16]

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10 ACB vol II, p 127.

11 ACB vol II, p 38.

12 Mr Schiavo's AEIC, paras 372–374 (RA vol III(D), pp 271–273).

13 ACB vol II, pp 47–48.

14 ACB vol II, p 53, para 2.2.

15 ACB vol II, pp 57–70.

16 ACB vol II, pp 42 and 58.

12 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, which was embodied in both the PBA and the 1 August MOM.[17] Mr Schiavo subsequently raised the same issue again in an e-mail sent on 1 March 2015.[18] Mr van de Korput responded in an e-mail, effectively denying Tozzi's entitlement to a right of first refusal. Mr Schiavo then met with Bumi's team involved in the Project on 1 April 2015 to discuss the commercial aspects of Tozzi's proposal,[19] and six days later Tozzi submitted its final bid for the supply of the TI Packages.[20]

13 Thereafter, 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"),[21] without Tozzi first being given the opportunity to exercise a right of first refusal – *ie*, to match VME's bid. This led to the commencement of the present proceedings by Tozzi against BAOHL and BAB.

The proceedings before the SICC

14 At the trial below, Tozzi called Mr Schiavo as a witness, who was, as the SICC said, "intimately involved throughout the period in the lead up to Bumi's bid for the Project". By contrast, the SICC explained, Bumi only called "its in-house legal counsel … who had no personal knowledge whatsoever of the events which led to the proceedings … [and had] only joined Bumi *after* the dispute had arisen" [emphasis in original] (Judgment at [6]). In the circumstances, the SICC observed, "[f]or all intents and purposes, Bumi's defence is akin to a submission of no case to answer" (Judgment at [6]).

17 RA vol III(E), p 7.

18 ACB vol II, p 72.

19 Schiavo's AEIC, paras 431–436 (RA vol III(E), pp 9–12).

20 ACB vol II, pp 88–96.

21 ACB vol II, pp 104–113.

15 In the Judgment (at [5]–[6] and [20]), the SICC explained that Tozzi's case against BAOHL was that BAOHL had acted in breach of contract in not giving effect to Tozzi's right of first refusal, and that BAOHL's principal defence was that the right of first refusal had no contractual force because of the "subject to contract" stipulation contained in the 1 August MOM. The SICC also considered two other issues: first, whether the right of first refusal extended to the supply of all seven Modules (as Tozzi contended) or only to the TI Packages (as BAOHL argued); and second, whether Tozzi was also entitled to succeed against BAB for the tort of inducing that breach of contract if BAOHL was liable to Tozzi for breach of contract.

16 The SICC determined all three issues in Tozzi's favour. It held that a binding agreement had been reached at the 31 July Meeting that Tozzi would be granted a right of first refusal as recorded in para 5 of the 1 August MOM (see [10] above) (Judgment at [24]). The SICC also held that the right extended to, and was infringed in respect of, the supply of all seven Modules (Judgment at [30] and [32]). 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 (Judgment at [44]).

Issues to be determined

17 BAOHL and BAB now appeal to this Court, and in their appeal they contend as follows:

> (a) the SICC was wrong in holding that there was a binding agreement for a right of first refusal in favour of Tozzi in relation to the supply of *any* Modules because the arrangement made at the 31 July Meeting was expressly "subject to contract";

(b) alternatively:

(i) the SICC was wrong to hold that the right of first refusal extended to the supply of all seven Modules, as on the evidence it could only have found that it extended to the supply of the TI Packages; and/or

(ii) the SICC was wrong to hold that BAB was liable for inducing the breach of contract committed by BAOHL.

18 If the appeal succeeds on point (a), then Tozzi's claims against BAOHL and BAB would fall to be dismissed in their entirety, as the agreement on which those claims are based will not have existed. If the appeal fails on point (a), but succeeds on point (b)(i), then it would not affect BAOHL's or BAB's liability, but it would no doubt significantly reduce the damages awarded to Tozzi. If the appeal succeeds on point (b)(ii), then Tozzi's claim against BAB would fail, but it would have no effect on its claim against BAOHL.

19 We will address these three issues in turn.

First issue: was the agreement made at the 31 July Meeting "subject to contract"?

20 On the first issue, Bumi argues that the SICC was wrong to conclude that the oral agreement made between BAOHL and Tozzi on 31 July 2014 gave rise to a binding contract for a right of first refusal. Bumi's argument is uncomplicated and can be summarised in the following propositions. First, the terms of that alleged oral agreement were found by the SICC to be set out in the 1 August MOM, which were signed on behalf of the two parties by their respective representatives who had attended the meeting the previous day. Secondly, it is clear from the final sentence of the 1 August MOM that all

aspects of the agreement which it recorded in paras 1 to 10, including those in para 5, were "subject to contract". Thirdly, it is very well established that any agreement which is stipulated to be "subject to contract" cannot, barring exceptional circumstances, give rise to a legally binding contract between the parties, unless something is subsequently said or done to expunge the stipulation. Fourthly, there are in this case neither any relevantly exceptional circumstances nor any subsequent events which can be relied on to expunge the effect of the final sentence of the 1 August MOM.

21 We would have accepted that argument were it not for the testimony given at the trial by Mr Schiavo that there was an unqualified oral agreement concluded at the 31 July Meeting. In the absence of that testimony, the only directly relevant and reliable evidence as to what had been said at the 31 July Meeting would have been in the 1 August MOM. In those circumstances, we would have found it impossible to reject the contention that the effect of its final sentence was to render the whole of the preceding part of the document, including para 5, as being "subject to contract", and therefore incapable of giving rise to contractual rights and obligations as a matter of law. The convention that a clearly expressed "subject to contract" stipulation in an arrangement, which would otherwise give rise to a contract as a matter of law, negatives the existence of such a contract, is very well established in both legal and commercial circles in Singapore and in other common law jurisdictions. It would therefore be wrong, both as a matter of principle and as a matter of practice, for a court to undermine this convention by introducing uncertainty through either overriding this convention or by imposing an unnatural interpretation on a document.

22 Of course, this does not mean that in every case where an arrangement is expressed to be "subject to contract", the court is inexorably bound to find

that there is no contract. As with any issue of interpretation, all relevant and admissible features of the arrangement have to be taken into account – see *eg*, *Norwest Holdings Pte Ltd (in liquidation) v Newport Mining Ltd and another appeal* [2011] 4 SLR 617 at [24], and *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd and another appeal* [2018] 1 SLR 50 at [41]. However, 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.

23 The final sentence of the 1 August MOM is a classic, if somewhat verbose, "subject to contract" stipulation, and it would be quite unrealistic to give it any other meaning. Indeed, very sensibly, counsel for Tozzi, Mr Mohammed Reza, did not suggest otherwise. The SICC said that it "seems to be a 'subject to contract' provision" (Judgment at [13]); but that is an understatement: it ***is*** a "'subject to contract' provision". And, bearing in mind that it is an unnumbered, unindented paragraph at the end of a document, whose other paragraphs are numbered and indented, it is difficult to conceive of any surrounding circumstance which could justify the conclusion that, as a matter of documentary interpretation, para 5 is somehow carved out of the "subject to contract" stipulation. It is perfectly true that the anticipated time-scale for the awarding of the Project was such that one would have expected the parties to have bindingly committed themselves to the right of first refusal by the end of July 2014, and it is also true that the right of first refusal had been the subject of earlier discussions which suggested that it was to be embodied in a contractually binding arrangement. However, in respectful disagreement with the SICC, we consider that, in the absence of a claim for rectification or the like, those factors on their own would have been quite insufficient to justify the conclusion that

para 5 of the 1 August MOM created a legally binding obligation on BAOHL as a matter of documentary interpretation.

24 Having said that, the 1 August MOM was not the only evidence of what transpired at the 31 July Meeting. Mr Schiavo gave oral testimony about what transpired at the meeting, and, while his evidence was challenged in cross-examination, no witness was called by Bumi to contradict it, even though as the SICC noted, "Bumi was represented by many senior members of its management in the course of preparing the bid" (Judgment at [6]), and indeed 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 para 5 of the 1 August MOM, and that that agreement was not negatived or qualified by anything that was said at the meeting.[22] And the SICC found him to be "a credible witness" whose evidence they accepted on "disputed questions of fact" (Judgment at [28]).

25 Quite apart from the fact that it was not contradicted by any witness (in circumstances where there was no apparent reason why a BAOHL representative who attended the 31 July Meeting could not have been called to give evidence), Mr Schiavo's evidence that a binding agreement as to the right of first refusal was reached on 31 July 2014 is supported by a number of other factors. Those factors are (a) what would have been thought by BAOHL and Tozzi to be the urgency for a binding agreement, bearing in mind the anticipated imminence of the awarding of the Project to BAOHL (see [9] above); (b) the implication of the need for such an agreement in the e-mail exchanges between the parties prior to the 31 July Meeting; (c) the assertion that there had been

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22 SCB, pp 37–38 and 50–51.

such an agreement in e-mails after 1 August 2014; and (d) as was accepted by Bumi, "there was nothing more to negotiate in respect of the right of first refusal" (Judgment at [26]).

26 Having said that, BAOHL undoubtedly had what might, in many cases, been a decisive argument the other way, namely that the 1 August MOM, which was a virtually contemporaneous document signed by the individuals who made the alleged oral agreement, plainly recorded the fact that the right of first refusal was "subject to contract". As already mentioned, we do not think it is possible to rely on the facts set out in [23] above in order to interpret para 5 of the 1 August MOM as being "carved out of" the "subject to contract" proviso, as the SICC did: rectification or some similar remedy would be the only way of achieving that. Nevertheless, the contract alleged by Tozzi was not a documentary agreement contained in the 1 August MOM, but an agreement reached at the 31 July Meeting.[23] Indeed, this is what the SICC had found (Judgment at [24]). As such, we do not see why it was not 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 there was a binding oral agreement as to the right of first refusal on 31 July 2014 notwithstanding the 1 August MOM. Once this view is taken, the 1 August MOM effectively becomes irrelevant for the purposes of the first issue, and consequently there is no need to consider the effect of the "subject to contract" clause.

27 We also note that Mr Schiavo was, unsurprisingly, cross-examined about the 1 August MOM, and he explained that he was presented by BAOHL with it "as a take it or leave it".[24] He also said that he was "not familiar with the 'subject to contract' language used in the [1 August MOM]", and did "not think

23 ROA vol II, p 83, para 69.

24 SCB, p 33.

much about it", not least because there were "things like payment terms … financing etc. [that] had not been finalised yet", in relation to some of the other items in the 1 August MOM.[25] And, as already mentioned, Mr Schiavo was emphatic in his evidence that a binding agreement had been reached as to the right of first refusal at the 31 July Meeting, a view he had expressed consistently thereafter.

28 It may have been open to the SICC to conclude that the BAOHL had slipped in a "subject to contract" stipulation during the discussions at the 31 July Meeting, and that its meaning had not been appreciated by Mr Schiavo. (If that had been the conclusion, then it might have raised a difficult issue, *ie*, the effect of the stipulation if BAOHL's representatives had appreciated that Mr Schiavo did not appreciate the effect of the stipulation.) However, in light of the evidence given by Mr Schiavo and the other factors mentioned in [25] above, it seems to us that the SICC was plainly entitled to conclude that, at the 31 July Meeting, BAOHL did bindingly agree that Tozzi should have a right of first refusal, as recorded at para 5 of the 1 August MOM, and that the agreement was not "subject to contract" despite the final paragraph of the 1 August MOM. It was unnecessary for the SICC to speculate, let alone to decide, whether the last paragraph of the 1 August MOM was inserted by BAOHL by mistake, with a view to gaining a negotiating advantage, or, as the SICC concluded, on the basis that it was not intended to apply to para 5.

29 For completeness, we should add that the SICC made no findings as to whether there was a binding agreement in relation to the matters dealt with in paras 1–4 and 6–10 of the 1 August MOM. There was no evidence to suggest that there was a binding agreement in relation to those matters, as Mr Schiavo's

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[25] SCB, p 106 (paras 320–321).

testimony on the effect of the 31 July meeting was limited to the right of first refusal, and he did not suggest that an unconditional oral agreement was reached on the other matters that the parties also discussed at that meeting. The only evidence as to what was said in relation to those matters was accordingly in the 1 August MOM, and there is no reason not to give full effect to the "subject to contract" stipulation insofar as paras 1–4 and 6–10 are concerned.

30 For the foregoing reasons, we affirm 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.

Second issue: is there liability for three Modules or seven?

31 Before us, it was common ground that (i) if, as we have concluded, there was a binding contract that BAOHL would give Tozzi a right of first refusal, then that right would have applied to seven Modules; (ii) BAOHL would only be in breach of that contract in relation to a particular Module if it had contracted with a third party to supply the Module without first giving Tozzi the opportunity to match the third party's bid; (iii) in particular, BAOHL would not be in breach of contract in relation to a Module which it supplied itself, as opposed to subcontracting its supply to a third party; and (iv) the documentary evidence disclosed by BAOHL demonstrated that there were three Modules, namely the TI Packages, whose supply had been subcontracted to VME without BAOHL giving Tozzi the opportunity to match VME's bid, and, accordingly, in respect of which Tozzi is entitled to damages.

32 The issue arising from this ground of appeal is a narrow one: whether the SICC was right to hold that BAOHL was *also* liable to Tozzi in respect of the four Modules other than the TI Packages ("the four Modules"). Although it

was common ground that seven Modules were eventually provided by BAOHL to Husky under the Project, there was no evidence either way as to whether the supply of the four Modules had been subcontracted by BAOHL to third parties, or whether the supply had been effected by BAOHL itself. The SICC held that, given that BAOHL "did not adduce any evidence as to who supplied the remaining four [M]odules", one was "led to the conclusion that BAOHL acted in breach of the agreement to grant Tozzi the right of first refusal to supply … all seven Modules". This was justified by the SICC on the ground that "the burden [lay] on [BAOHL] to show that the remaining four [M]odules were not subcontracted to another third party but were supplied in-house by [BAOHL] themselves" (Judgment at [34]).

33 This rather brief reasoning involves placing the burden of proof on the defendant, BAOHL, to show that it had supplied the four Modules itself rather than subcontracting their supply to a third party. Such an approach reverses the standard evidentiary rule that the burden of proof is on the plaintiff to make out its claim, which is embodied in s 103 of the Evidence Act (Cap 97, 1997 Rev Ed), *ie*, it was for Tozzi to establish, albeit only on the balance of probabilities, that BAOHL had breached its contractual duty to Tozzi. On that basis, given that that duty related to seven Modules, Tozzi's claim could only succeed in relation to any of those Modules in respect of which it established that BAOHL had subcontracted to a third party without giving Tozzi the opportunity to match the third party's bid.

34 However, in holding that the burden of proof was on BAOHL, the SICC no doubt had in mind s 108 of the Evidence Act, which provides:

> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Mr Reza argued for Tozzi that the SICC had approached the question correctly because it was peculiarly within BAOHL's knowledge whether it had supplied the four Modules itself or had subcontracted their supply to a third party.

35 In our view, that argument gives s 108 of the Evidence Act too revolutionary an effect. As was noted by this Court in *Phosagro Asia Pte Ltd v Piattchanine, Iouri* [2016] 5 SLR 1052 at [71]:

> The Appellant, accepts (correctly, in our view) that a mere allegation that the expenses are personal will not suffice to trigger the application of Section 108; instead, it accepts that it must first establish a *prima facie* case that the expenses were personal in nature before Section 108 may be invoked (see *Surender Singh* at [221]). …

The same point was made by this Court in *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [80(c)], citing *Surender Singh s/o Jagdish Singh and another (administrators of the estate of Narindar Kaur d/o Sarwan Singh, deceased) v Li Man Kay and others* [2010] 1 SLR 428 at [221]):

> …[I]n order for s 108 of the EA to apply, a mere allegation that there are facts which are solely within the knowledge of the defendant is insufficient; instead, the plaintiff has to establish at least a *prima facie* case against the defendant. It is only after this has been done that s 108 of the EA operates to place the burden on the defendant to avoid liability by proving the facts which are especially within his knowledge…

36 In our judgment, applying this principle, Tozzi failed to establish the *prima facie* case which is required to bring s 108 of the Evidence Act into operation. In other words, unfortunately for Tozzi, 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. The fact that there was clear evidence that BAOHL subcontracted three Modules cannot, in our judgment, be invoked to justify an inference that the other four Modules must have been similarly

subcontracted. It would be just as logical to say that the fact that BAOHL had adduced documents which showed that three Modules had been subcontracted, but had adduced no such documents in relation to the four Modules, suggests that the position in relation to the four Modules was different. The only relevant evidence on the point, and it is little more than a straw in the wind, is the fact referred to in [11] above that, in January 2015, Bumi informed Tozzi that it had resolved to subcontract the supply of only the TI Packages. In so far as that is of evidential value, it is unhelpful to Tozzi.

37 We accordingly allow BAOHL's appeal on the second issue and overturn the SICC's conclusion that BAOHL had breached the right of first refusal in relation to the four Modules.

38 For completeness, we should add that the conclusion we have reached that Tozzi cannot make out a breach by BAOHL in relation to the four Modules does not mean that it would have been without remedies to make good the deficiencies in BAOHL's evidence had it chosen to invoke them. For instance, Tozzi could have made a formal application for an order for specific discovery of documents relating to the supply of the four Modules, or it could have raised interrogatories in relation to the supply of the four Modules (see O 110 rr 15–17 and 22 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed)); and it could have sought appropriate sanctions if documents were not provided or the interrogatories were not answered. Further, even though the one witness called on behalf of Bumi was not employed by Bumi at the relevant time (see [14] above), she could have been asked in the course of her cross-examination to search for and/or to produce documents relevant to this issue.

Third issue: is BAB liable for inducing breach of contract?

39 Turning to the third issue, the SICC noted that, in order to make out that BAB was liable to Tozzi for inducing BAOHL's breach of contract, 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" (Judgment at [37], citing *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [17]).

40 In considering those questions, the SICC noted the undisputed fact that "BAOHL [did] not have any employees of its own" as well as Mr Schiavo's unchallenged evidence that "Tozzi only corresponded [and, we would add, only dealt with] BAB's employees and executives" (Judgment at [40]). A little later, the SICC said that they considered that "the evidence does not support the inference that BAB's employees were at all times corresponding only on behalf of BAOHL" (Judgment at [43]), and then explained why. The SICC began by pointing out that there was no evidence that BAB's employees "held formal appointments in BAOHL". The SICC then said that the individuals with whom Mr Schiavo dealt "were known to [him] only as BAB's executives", a number of crucial documents "were circulated by BAB's strategic procurement team", the individuals who attended the meetings with Mr Schiavo in January and April 2015 did so "expressly in their capacity as BAB's personnel", and "[c]rucially, there is nothing to indicate that Mr van de Korput's e-mail dated 1 March 2015 conveying the decision to breach Tozzi's right was sent on BAOHL's behalf rather than in his capacity as BAB's CEO" (Judgment at [43]).

41 We accept that, as recorded in [39] above, the SICC rightly identified two basic ingredients of the tort of inducing breach of contract. However, rather

than simply concentrating on the knowledge and intention of the individuals involved, in a case where it is contended that a parent company is liable for inducing a breach of contract by its subsidiary the court has to focus on two additional issues. Those issues are (i) whether those individuals were acting for the subsidiary and/or the parent, and, if they were acting for the parent, (ii) whether the circumstances are such that the parent can properly be held liable for inducing its subsidiary's breach of contract.

42 As to the second of those issues, the question whether a person who exercises control over a company which has breached its contractual obligations, can be liable for inducing that breach has been considered in several cases in various common law jurisdictions, but normally in the context of a director of the company rather than a shareholder who owns a controlling interest in the shares of the company. In both types of case, it is important that tort law should not be invoked to blur the principle that a company is a separate legal personality. However, given that a director is an agent of the company, whereas a shareholder is not, it may be dangerous when considering the question in a case such as this, involving a shareholder who owns all the shares in the company, to rely on cases concerning the position of directors, such as *Said v Butt* [1920] 3 KB 497 and the recent decision of this Court in *PT Sandipala Arthaputra and others v ST Microelectronics Asia Pacific Pte Ltd and others* [2018] 1 SLR 818 – see especially at [63]. Rather, it is appropriate to address the question from first principles with such assistance as one can get from previous judgments.

43 We start with the proposition 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. As a matter of principle, the mere fact that the parent could have prevented the subsidiary

from breaching its contract, *ie*, mere inaction, would plainly not be enough to render the parent liable for the tort of inducing a breach of contract. Quite apart from that, if the law was otherwise, it would impermissibly undermine the fundamental principle of independent corporate identity laid down in *Aron Salomon (Pauper) v A Salomon and Company Limited* [1897] AC 22 ("*Salomon*") (at 51), which is "the bedrock of company law not just in Singapore but also throughout the common law world" (see this Court's decision in *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592 at [75]). The point is not dissimilar from that made by the High Court in *ARS v ART and another* [2015] SGHC 78 at [252]:

> … [T]he mere fact that a company is a wholly owned subsidiary controlled by the parent company does not enable the court to draw the inference that the directors of the subsidiary treated the requests of the parent company as if they were instructions to be executed. Such an inference ignores the fact that the subsidiary is, unless proven otherwise, a separate legal entity.

44 On the other hand, the mere fact that a company is the parent of a contract-breaking company cannot mean that, whatever the circumstances, the parent cannot be liable for inducing the breach of contract in question. The question of principle which arises is: in what circumstances can a parent company properly be held liable for inducing a breach of contract by its subsidiary?

45 In our view, 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. If the sole, or majority, shareholder in a company formed the view that the company would be better off (and his shares

would therefore be worth more) if the company breached a contract, and summoned a shareholder's meeting, or persuaded the directors, to give effect to that view, it would seem wrong that the injured party should be able to proceed against the shareholder for inducing or procuring the company's breach of contract. Such a result is essentially dictated by the rationale behind the decision in *Salomon*, as, if it were otherwise, a shareholder would effectively have to choose between sacrificing his right of pursuing his self-interest *bona fide* as a shareholder or finding himself liable for the company's breach of contract. Such an outcome could also lead to practical difficulties.

46 The point has been considered, albeit briefly, in a decision in the English Commercial Court in *Stocznia Gdanska SA v Latvian Shipping Co and others* [2001] 1 Lloyd's Rep 537. At [244], Thomas J described as "powerful" the argument that "it would have been open to Latco [*ie*, the parent company] to act in that way and, properly as shareholders, to make a decision that Latreefers [*ie*, the subsidiary company] would not perform the contracts" (although it is right to record that he did not decide the case on this point as it was unnecessary to do so). When the case came to the Court of Appeal, it was conceded (with the court's apparent approval) that Latco "would have committed no tort if it had merely decided without more that its own interests did not recommend the commitment of its resources to Latreefers' contracts; or if Latco had taken a formal decision as Latreefers' shareholders that Latreefers should not perform its contracts" (see *Stocznia Gdanska SA v Latvian Shipping Company and others (No. 2)* [2002] EWCA Civ 889 at [132]).

47 We agree with Thomas J: indeed, we go further and say that the argument he described as "powerful" was right; and, in agreement with the Court of Appeal, we consider that the concession was rightly made. In order to establish that a parent company is liable for inducing a breach of contract by its

subsidiary, some factor over and above an actual act of inducement would be needed. In other words, 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. At least in the present case, we consider that what would be needed would be a finding that, in so acting, the parent company was pursuing an interest unrelated to (or, possibly, in addition to) its capacity as owner of the shares in the subsidiary. However, it would be unwise for us to suggest that this could be the only additional factor which would cut it: for instance, a finding of lack of good faith might suffice.

48 It follows from the above discussion that BAB could properly be made liable for BAOHL's breach of Tozzi's contract only if:

(a) BAB had, as a matter of fact, induced BAOHL to breach the contract; and

(b) in inducing the breach, BAB had acted in a way other than in good faith in pursuing its own interest as the owner of BAOHL.

49 It seems to us that, properly analysed, the evidence does not make out either of these two requirements, which Tozzi must satisfy if it is to succeed in establishing that BAB is liable for inducing BAOHL's breach of contract. In other words, there is insufficient evidence which can fairly be said to support the contention that, as a matter of fact, BAB induced BAOHL to breach its contract with Tozzi, and, even if there were sufficient evidence for that purpose, there is no evidence to suggest that BAB acted in this way other than in good faith in pursuing its own interest as the owner of BAOHL.

50 Turning to the question whether BAB factually induced BAOHL's breach of contract, it is true that the individuals who decided to subcontract, and who subcontracted, the supply of the TI Packages to VME, without honouring Tozzi's right of first refusal, were employees of BAB, because BAOHL had no employees. However, that cannot, in and of itself, mean that BAB, as a matter of fact, was responsible for BAOHL's breach of contract. 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. 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 – let alone that he was only acting for the parent.

51 The decision not to give effect to Tozzi's right of first refusal (whether it was due to a positive decision or, less likely, an oversight) must have been made by the individuals concerned as agents for BAOHL, as it was BAOHL which granted the right of first refusal to Tozzi initially in the PBA in 2013, and subsequently at the 31 July meeting in 2014, it was BAOHL which owed the consequential obligation to Tozzi to offer a right of first refusal. Moreover, it was BAOHL which was the main contractor under the Project and was therefore in a position to comply with this obligation, and it was BAOHL which deprived Tozzi of the opportunity for which it had contracted by subcontracting with VME.

52 In those circumstances, it seems to us that it would require cogent additional evidence to show that the individuals responsible for BAOHL's failure to honour Tozzi's right of first refusal were also acting for BAB – let alone that they were acting solely for BAB.

53 The reasoning which led the SICC to conclude that the individuals were acting for BAB in a way which rendered BAB liable to Tozzi in tort, is summarised at [40] above. That evidence has two components. The first amounts to no more than saying that the individuals acting for BAOHL were actually employed by its parent company. As just explained, that, of itself, takes matters no further, particularly in a case such as this where the contracting subsidiary company has no employees of its own, and necessarily has to act through individuals employed by its parent company. The fact that those individuals did not "[hold] formal appointments in BAOHL" may make it a little easier to argue that they were also acting for BAB, their actual employers. However, in our judgment, it cannot, in and of itself, establish that they were also acting for BAB at a time when they were plainly acting for BAOHL.

54 Further, we do not consider that the second component of the SICC's reasoning is convincing, namely that those individuals "were known to Mr Schiavo only as BAB executives". It does not take matters any further. In any event, if he thought about it at all, Mr Schiavo must have considered that, in the negotiations and agreements he had with individuals employed by BAB, they were acting for BAOHL. This is not only because he knew that both the PBA and the 1 August MOM were executed for and on behalf of BAOHL; in the e-mails after the 31 July meeting refusing to recognise Tozzi's right of first refusal, the natural implication was that they were sent on behalf of the person who was alleged to have granted the right in the first place and who was the only party that could give effect to it (or breach it), namely BAOHL.

55 It is true that many of the relevant e-mails were sent, and many of the relevant meetings were attended, by individuals who were, and were sometimes described as being, employed by BAB. However, that merely reflects the fact that they were so employed, and, as already stated, that does not take matters

much further in this case, particularly given that BAOHL had no employees. SICC's "crucial" point that "there is nothing to indicate that Mr van de Korput's e-mail … conveying the decision to breach Tozzi's right was sent on BAOHL's behalf rather than in his capacity as BAB's CEO", substantially over-estimates the significance of Mr van de Korput's having been employed by BAB, and it ignores the fact that the e-mail was obviously sent on behalf of BAOHL as the grantor and prospective infringer of the right of first refusal.

56 Even if the evidence had been sufficient to justify a finding that the individuals responsible for breaching Tozzi's right of first refusal were acting for BAB, it still would not justify the conclusion that BAB is liable in tort to Tozzi. In the first place, the finding would not alter the fact that the individuals were also, indeed primarily, acting for BAOHL, and it is a little difficult to see how the same individual doing the same thing on behalf of the contract-breaking company and a third party can lead to the third party doing anything to induce the contract-breaking company to breach its contract.

57 Secondly, and quite apart from that, there is 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.

58 Accordingly, we conclude that the SICC's conclusion that BAB is liable for inducing BAOHL's breach of contract cannot stand.

Conclusion

59 In these circumstances, (i) we dismiss BAOHL's appeal on liability and find that BAOHL had granted Tozzi a valid and binding right of first refusal which was breached; (ii) we allow BAOHL's appeal on quantum, to the extent

that BAOHL is not liable in respect of the four Modules; and (iii) we allow BAB's appeal on liability on the tort of inducing BAOHL's breach of contract.

60 BAOHL's appeal is therefore allowed in part and BAB's appeal is allowed in full.

61 We should add two final points. First, at the start of the hearing of this appeal, BAOHL and BAB applied for leave to adduce further evidence on appeal in Court of Appeal Summons No 46 of 2018. Applying the reasoning of this Court in *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 (at [68]), we refuse the application with costs on the ground that there is no reason why the evidence in question could not have been produced at trial.

62 Secondly, following the conclusion of the hearing of the appeal, at a time when this judgment was close to completion, the parties informed this Court that they had settled their differences. In those circumstances, the court has a discretion whether or not to issue its judgment. Having given the parties an opportunity to express their views on this issue, we note that the parties did not object to this judgment being released. Further, since the three points this judgment considers are each potentially of some significance, we are of the view that this is a judgment which should be published.

Sundaresh Menon	Beverley Marian McLachlin	David Edmond Neuberger
Chief Justice	International Judge	International Judge

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