IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC(I) 8

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] — [Intention to create legal relations]

[Contract] — [Breach]

[Tort] — [Inducement of breach of contract]

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

[2017] SGHC(I) 8

Singapore International Commercial Court — Suit No 6 of 2016
Steven Chong JA, Carolyn Berger IJ, Henry Bernard Eder IJ
10–11, 13 July 2017

21 September 2017 Judgment reserved.

Steven Chong JA (delivering the judgment of the court):

Introduction

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 ("FPSO") of which an integral part was the gas processing facilities ("the Topside Process Modules").[1]

2 The defendants (collectively referred to as "Bumi") intended to make a bid for the Project through the first defendant, Bumi Armada Offshore Holdings Limited ("BAOHL"), a wholly-owned subsidiary of the second defendant, Bumi Armada Berhad ("BAB"). They invited the plaintiff, then known as Tozzi Industries SpA ("Tozzi"), to support their bid given its expertise in gas

[1] Statement of Claim ("SOC") para 4.

processing facilities. Both parties formalised their working relationship in a Pre-Bid Agreement ("the PBA"). Tozzi's role in the PBA concerned the supply of some or all of the Topside Process Modules. Central to the PBA was the requirement for Tozzi to work exclusively with Bumi in respect of the bid for the Project. In exchange, Bumi granted Tozzi a right of first refusal.

3 Although the PBA was only valid for one year, both parties continued to work together on the bid notwithstanding the expiry of the PBA. Eventually when the expiry date was raised, both parties met to discuss and decided to continue the relationship on terms which were recorded in the Minutes of Meeting ("the 1 August MOM"). Crucially, although the 1 August MOM recognised Tozzi's right of first refusal, it also expressly stated that it was "subject always to successful negotiation and mutual agreement and execution of a formal contract".[2]

4 After BAOHL was awarded the contract for the Project, BAB's Chief Executive Officer ("CEO") stated that it would not favour any bidder for the subcontract to supply the Topside Process Modules, thereby implicitly denying that Tozzi had any right of first refusal.

5 As it turned out, BAOHL eventually awarded the subcontract for part of the Topside Process Modules to another party without first extending the right of first refusal to Tozzi. This led to the commencement of the present proceedings. Although several causes of action were pleaded to ground Tozzi's claim – breach of express contract, variation, estoppel, waiver and implied contract – ultimately they essentially advance the same claim which is premised on Tozzi's right of first refusal.

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[2] Affidavit of Evidence-in-Chief of Stefano Schiavo ("Schiavo AEIC"), exhibit "SS-2".

6 Tozzi called only one witness – Mr Stefano Schiavo, who was intimately involved throughout the period in the lead up to Bumi's bid for the Project. On the other hand, although Bumi was represented by many senior members of its management in the course of preparing the bid, none of them was offered as a witness for the trial. Instead, its sole witness was its in-house legal counsel, Ms Johana Rosli, who had no personal knowledge whatsoever of the events which led to the proceedings. In fact, she only joined Bumi *after* the dispute had arisen. For all intents and purposes, Bumi's defence is akin to a submission of no case to answer. Its principal defence is that the right of first refusal had no contractual force on the basis that it had either expired with the PBA or was in any event "subject to contract" in the 1 August MOM. This judgment will examine the legal effect of the "subject to contract" provision in the 1 August MOM, in particular whether it was intended to qualify the right of first refusal stated therein *or* the contract which the parties would have negotiated if the right of first refusal had been extended by Bumi and accepted by Tozzi.

Background

7 In the second quarter of 2012, Husky-CNOOC Madura Limited ("Husky") invited BAOHL, amongst other qualified companies, to submit a bid for the Project. Bumi invited Tozzi in April 2012 to submit a proposal for engineering, procurement and construction/fabrication ("EPC") services for two of the Topside Process Modules.[3] There were seven Topside Process Modules in total. Tozzi submitted its first unpriced proposal for the supply of those two modules on 1 June 2012. Between September 2012 and February 2013, Tozzi and Bumi discussed working together to prepare a technically compliant and commercially competitive bid to Husky. An issue that arose early on was the number of modules that Tozzi was to supply or design so as to enable it to

[3] SOC para 7.

guarantee, as Bumi desired, that the operation of the whole Topside Process would be in accordance with the specifications in the tender documents.[4] On 13 December 2012, Tozzi submitted a range of price proposals with a view to supplying EPC services for two modules and at least developing the designs for the remaining five.[5]

8 On 6 February 2013, Tozzi and BAOHL entered into the PBA which was to govern their working relationship in preparation for Bumi's bid to Husky.[6] The PBA was signed by Mr Schiavo for Tozzi and Mr Nicolas Abela (BAB's then Vice-President, Business Development Asia) for BAOHL. Clause 1(a) of the PBA provided that upon the successful award of the Project, Tozzi would be subcontracted to provide EPC services for three of the Topside Process Modules (namely the sulphur recovery unit, gas sweetening unit and gas dehydrating and dew pointing unit), known collectively as the "TI Packages".[7] As mentioned at [2] above, in exchange for Tozzi's exclusive cooperation under cl 3 of the PBA, cl 2 granted Tozzi a right of first refusal for the subcontract for the TI Packages, in the following terms:

> **2. Form of association**
>
> a. …
>
> b. [Tozzi] shall submit a technically compliant and commercially competitive proposal to [BAOHL] for the TI Packages. [BAOHL] reserves the right to procure alternative proposals for comparison purposes in order to ascertain the competitiveness of [Tozzi's] proposal. [Tozzi] shall ensure their prices are reflective of the current market trend and competitive for purposes of the Project, particularly but not limited to the full capital and operations cycle expenditure.

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4 Schiavo AEIC, paras 98 and 99.

5 SOC para 12; Schiavo AEIC, para 94.

6 Schiavo AEIC, exhibit "SS-1".

7 SOC para 15.

> c. *[Tozzi] shall be given the right of first refusal for the TI Packages provided [Tozzi's] prices are competitive as determined by [BAOHL].*
>
> d. Upon award of the Project and acceptance of the technical and commercial proposal by [BAOHL], the Parties shall enter into a subcontract, in its name or that of its affiliates, which shall contain particularly but not limited to the following provisions …
>
> [emphasis added]

9 The PBA was valid for one year because, according to Tozzi, the parties expected Husky's award to be issued within a year.[8] Tozzi claims that in the course of the year, it contributed several critical modifications to the design, technology and material selection of various Topside Process Modules so as to increase savings and enhance the effectiveness and reliability of the modules.[9] According to Tozzi, its design and proposed construction of the Topside Process Modules was integral to Bumi's successful bid for the Project. These proposals required substantial engineering work and were markedly different from the designs described in the Project's tender documents. Tozzi submitted a lump-sum price proposal to Bumi for the supply of EPC services for the TI Packages on 28 March 2013.[10] Thereafter, the parties continued to correspond on the technical details, culminating in a visit by BAB's Head of Proposal Engineering to Tozzi's facilities in Ravenna, Italy on 6 November 2013.

10 On 5 February 2014, BAB's Project Manager – Major Projects, Mr Kailash Chandra Gupta, emailed Mr Schiavo asking for an updated material selection diagram for the Project.[11] The expiry of the PBA was not raised and the collaboration between Bumi and Tozzi did not terminate, although there were admittedly few developments in relation to the Project between February

8 Schiavo AEIC, para 132.

9 SOC para 25; Schiavo AEIC, paras 181–192.

10 SOC para 26.

11 Schiavo AEIC, para 245.

and July 2014. The parties merely corresponded on the status of the bid, the timeframe for delivery and various technical queries.[12] Mr Schiavo also tried to persuade Bumi to allow Tozzi to consolidate the design of all the Topside Process Modules, not only the TI Packages.[13]

11 Mr Schiavo gave unchallenged evidence that notwithstanding the expiry of the PBA, the parties adverted to Tozzi's anticipated subcontract on a few occasions. In fact, it seems that as late as May 2014, Mr Schiavo was still labouring under the impression that the PBA was extant.[14] On 27 March 2014, BAB's then-CEO, Mr Hassan Basma, assured Mr Schiavo at a conference in Kuala Lumpur, Malaysia, "Don't worry, you [*ie*, Tozzi] will get your orders for the modules."[15] An apparently contrary position was taken by Mr Gupta on 28 May 2014, when he informed Mr Schiavo, "Please note that we will have to go through competitive bidding to bench mark price and every bidder including you will be free to optimise the solution based on input / output specifications."[16] Mr Schiavo testified that he had "no idea" what Mr Gupta meant because Tozzi's solution was unique in the market; however, he suggested that competitive bidding was not incompatible with the PBA in that Bumi could source for quotes in the market as long as Tozzi was offered a right of first refusal.[17] Mr Schiavo replied on 30 May 2014, reminding Mr Gupta of an "agreement" with Bumi under which Bumi could "check [Tozzi's] price" but after which Tozzi would "have a first right of refusal".[18] Mr Gupta did not reply to this email. However, in a telephone conversation with Mr Schiavo sometime

12 SOC paras 29–38; Schiavo AEIC, paras 241 and 245.

13 SOC paras 27, 33 and 35.

14 NE 10/07/17, 54:12–13.

15 Schiavo AEIC, para 252.

16 Schiavo AEIC, para 276.

17 NE 10/07/17, 53:1–20; Schiavo AEIC, para 277.

18 Schiavo AEIC, para 281 and exhibit "SS-42".

in June or July 2014, Mr Gupta informed Mr Schiavo that the PBA had expired but he understood there to be a "gentlemen's agreement" between the parties.[19]

12 On 29 July 2014, having obtained a draft letter of award from Husky, Mr Basma called for an urgent meeting with Tozzi. At this stage, it was anticipated that the Project would be awarded to BAOHL on 1 September 2014.[20] This led to the pivotal meeting on 31 July 2014 ("the 31 July Meeting") at which Tozzi contends an agreement was reached to grant it a right of first refusal to supply all seven Topside Process Modules. The next day, Mr Schiavo emailed Bumi to capture the discussions "as [the] basis for an MOU".[21] He recorded the following agreement for Tozzi to review its earlier price proposal and be granted a right of first refusal if Bumi chooses to seek alternative quotations:

> - 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.*
>
> [emphasis added]

13 On 1 August 2014, Bumi prepared the 1 August MOM, which was again signed by Mr Schiavo for Tozzi and Mr Abela for BAOHL. The 1 August MOM similarly recorded Tozzi's right of first refusal:[22]

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19 Schiavo AEIC, para 282.

20 Schiavo AEIC, exhibit "SS-2" at para 1.

21 Schiavo AEIC, exhibit "SS-46".

22 Schiavo AEIC, exhibit "SS-2".

> 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 BA, Tozzi will be awarded the work. In case this is not, BA will go out for a price check and *offer first right of refusal to Tozzi for lowest price alternative offer.* [emphasis added]

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 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 BA 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.* [emphasis added]

14 Following from the 31 July Meeting, the parties signed a contract on 26 September 2014 for Tozzi to perform the FEED works. It was clear from the parties' correspondence and Mr Schiavo's undisputed evidence that Tozzi was not interested in performing the FEED works because substantial engineering manpower would have to be deployed to Kuala Lumpur.[23] It only agreed to do so because it anticipated being awarded the EPC subcontract given the right of first refusal allegedly granted or affirmed to it on 31 July. Furthermore, Bumi had assured Tozzi at the 31 July Meeting that Tozzi was to be part of Bumi's

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23 Schiavo AEIC, para 332; NE 10/07/2017, 132:6–14.

supply value chain, a critical status which acknowledged Tozzi's support in the bidding phase and connoted loyalty and mutual benefit.[24]

15 On 8 August 2014, Husky awarded the bid to BAOHL. A contract taking effect from 8 August 2014 was eventually signed on 10 December 2014 by Husky, BAOHL and its joint venture company PT Armada Gema Nusantara.[25]

16 With Husky's award secured, Bumi issued a Request for Quote ("RFQ") on 5 November 2014, whilst the FEED works by Tozzi were still underway. The RFQ invited proposals from qualified vendors for the supply of all seven Topside Process Modules. Mr Schiavo stridently protested this move because, in his view, it was contrary to the process agreed at the 31 July Meeting. As agreed, Tozzi was to submit a revised price proposal only after the completion of the FEED. It was only if this price was unacceptable that Bumi would source for quotes in the market, but offer Tozzi a right of first refusal. Nonetheless, apparently due to Bumi's assurance that the RFQ would not prejudice Tozzi's right of first refusal, Tozzi submitted a bid to supply the Topside Process Modules on 12 January 2015.[26] A revised bid for the TI Packages was submitted on 26 February 2015 after Bumi narrowed the scope of its RFQ.[27] In both submissions, Tozzi referred to an agreement reached at the 31 July Meeting in its cover letter.[28]

17 On 27 February 2015, Mr Schiavo met with Mr Jesse van de Korput, BAB's new CEO after Mr Basma's departure. Mr Schiavo asserted Tozzi's right

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24 Schiavo AEIC, exhibit "SS-2"; NE 10/07/2017, 79:4–80:2; 103:22–104:5.

25 SOC para 63; Schiavo AEIC, exhibits "SS-83" to "SS-88".

26 SOC para 55; Affidavit of Evidence-in-Chief of Johana Rosli ("Rosli AEIC"), exhibit "JR-7".

27 Rosli AEIC, exhibit "JR-9".

28 Rosli AEIC, pp 386 and 880; NE 10/07/2017, 158:2.

of first refusal at the meeting and sought to reiterate these terms over email.[29] However, Mr van de Korput responded on 1 March 2015, denying that Tozzi was entitled to a right of first refusal:

> As explained during the meeting; *we are bound to follow a sealed bid competitive tendering process. We will select the best proposal based on price, schedule, risk assessment and track record.* We believe Tozzi is well qualified and stand a fair chance to become the successful bidder. Our final selection however shall always be based on the aforementioned criteria. *We also explained that we can and will not favour any of the bidders.* We hope however that Tozzi continues to be interested to tender for our project work. [emphasis added]

18 Although Mr Schiavo began to entertain doubts about whether Bumi would grant it a right of first refusal, he nevertheless met with Bumi's Project team on 1 April 2015 to discuss the commercial aspects of Tozzi's proposal.[30] On 7 April 2015, Tozzi submitted a final proposal in which further discounts were offered.

19 Eventually, on or about 26 May 2015, BAOHL awarded the subcontract for the TI Packages to VME Process Asia Pacific Pte Ltd ("VME").[31] Tozzi was not informed of the price offered by VME or any other bidder. Neither was it given an opportunity to exercise a right of first refusal.[32] This prompted the present suit.

Was Tozzi entitled to a right of first refusal?

20 Tozzi's primary case is that Tozzi and BAOHL reached a binding agreement to extend a right of first refusal to Tozzi at the 31 July Meeting. This right of first refusal extended not only to the TI Packages but all seven Topside

29 Schiavo AEIC, exhibit "SS-92".

30 Schiavo AEIC, paras 431–432.

31 Schiavo AEIC, para 452; exhibit "SS-96".

32 Schiavo AEIC, paras 450–451.

Process Modules. The "subject to contract" provision in the 1 August MOM did not qualify the right of first refusal but was intended to qualify the contract for the EPC supply of the Topside Process Modules or FEED works. However, if the "subject to contract" provision did in fact preclude an agreement for a right of first refusal, Tozzi contends that BAOHL is estopped by its subsequent conduct from relying on this provision. To be clear, Tozzi identifies BAOHL as the contractual counterparty because the 1 August MOM was signed by Mr Abela on BAOHL's behalf (see [13] above).

21 Alternatively, Tozzi grounds its right of first refusal on the PBA, on the premise that BAOHL is prevented from relying on the expiry of the PBA by waiver or estoppel. If so, Tozzi would be entitled to a right of first refusal in respect of either the TI Packages only (under the PBA's original terms) or all seven Topside Process Modules (if the PBA was varied to this effect at the 31 July Meeting). Tozzi's final alternative argument was that it had a right of first refusal under an implied contract commencing 6 February 2014, on the same terms as the PBA save that the implied contract was terminable on reasonable notice.

22 Bumi contends that, considering the 1 August MOM in its entirety, no agreement was reached at the 31 July Meeting. 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 1 August MOM expressly rendered all matters discussed "subject to contract". This demonstrates the parties' intent to defer legal relations and qualifies the possibility of reading paragraph 5 as a standalone right. Bumi relied on *Norwest Holdings Pte Ltd (in liquidation) v Newport Mining Ltd and another appeal* [2011] 4 SLR 617 ("*Norwest*") for the proposition that the phrase "subject to contract" makes clear that even if the parties agree on all essential terms, neither

party intends to be contractually bound until a contract is signed, unless there is strong and exceptional evidence to the contrary (at [23] and [29]).

23 Since Bumi submits that the 1 August MOM must be construed as a whole, we set out its text in full here:

> 1. BA informed Tozzi that the draft LOA is under review/discussion, the project will kick off … by 1st September 2014 and the overall project schedule will be approx. 28 months.
>
> 2. BA would like to do a revalidation of the FEED and improve the quality of Technip FEED. The extended FEED will be done in Kuala Lumpur ("KL") and will last for about 4 months. All the key deliverables will be identified and detailed out, including HAZOP and "case for Safety" workshops.
>
> 3. BA informed in view of H2S presence and sulphur handling, the Rainbow I will be maintained as donor vessel.
>
> 4. BA offered Tozzi to be value chain partner starting this project and asked them to undertake extended FEED by providing qualified high calibre manpower in KL. BA will reimburse extended FEED manhour cost to Tozzi. Tozzi to provide hourly rates, names, CV's of the people for BA approval. Expected number of people required from Tozzi is up to 20. Draftsman and designers will be arranged locally by BA. BA people will participate and supervise the extended FEED in KL.
>
> 5. Tozzi will review their earlier price and confirm within 3 weeks for entire topsides. They will list assumptions made in confirmation [of] price. At the conclusion of FEED, Tozzi will adjust the price for assumptions. If adjusted price is acceptable to BA, Tozzi will be awarded the work. In case this is not, BA will go out for a price check and offer first right of refusal to Tozzi for lowest price alternative offer.
>
> 6. Tozzi will be free to fabricate some modules (gas modules) in Italy. For other modules, Tozzi will use either SMOF or Dynamac to build in Singapore, Batam or Johor. Keppel Shipyard Limited will undertake the hull and marine conversion work.
>
> 7. Power generation and flare system i.e. flare stack, KODs modules will be done by BA. E-house, though not part of Topsides, can be considered for supply by Tozzi. Tozzi will arrange for BA technical team visit to Bukit Tua/ other

> places in Indonesia where their supplied E-House/ electrical gears are in operation.
>
> 8. Tozzi price will include license for use of any technology for sulphur block, performance guarantees and extra warrantees [*sic*] as required, first fill supply of catalysts, etc.
>
> 9. Tozzi proposed to use Sidwin, India for detailed engineering. BA suggested that they use Oiltech if resources are available (BA/KC to check internally with Jay/Paul). Tozzi to revert on the proposal.
>
> 10. Liquid molten sulphur will be the way forward. It will be stored in container cars on the FPSO which will be off loaded to supply boats. Heating of containers to be investigated (something similar to Bitumen cars). Containers will be stored in hull of FPSO with required provisions of venting, gas detection etc and open hatch for loading/offloading. Molten sulphur storage, handling and disposal to be worked out in detail and agreed with HCML.
>
> Both BA 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.

24 We are of the view that Tozzi succeeds in its primary case. A contract was formed at the 31 July Meeting for Tozzi to be granted a right of first refusal in respect of all the Topside Process Modules.

25 To begin, the right of first refusal is, in our view, a standalone right. In other words, the agreement concerning it was independent of the other matters discussed at the 31 July Meeting. The content of a right of first refusal was helpfully clarified in *Astrazeneca UK Ltd v Albemarle International Corporation and another* [2011] EWHC 1574 ("*Astrazeneca UK*") at [35] and [44]:

> … [A]s an irreducible minimum, a right of "first refusal" by its nature confers a right to obtain the subject matter of the right, whether it is land or another asset or a service or a business opportunity to enter a contract. In other words, it confers *a right to be given an opportunity to match any third party offer which the grantor of the right might be otherwise minded to accept, and,*

> *in the event that the grantee matches the offer, to be awarded the business* to which the offer relates. …
>
> …
>
> … [A] right of first refusal constitutes a right to receive a contractual offer on terms which the party who has granted the right of first refusal is prepared to accept, *even though the detailed terms of any contract may require further negotiation* and might ultimately not eventuate in a contract at all. …
>
> [emphasis added]

26 It is evident from the text of both the 1 August MOM and Mr Schiavo's minutes in his email to Bumi on the same day that the parties agreed to grant Tozzi a right on these terms (see [12]–[13] above) and in consideration for this promised right, Tozzi agreed to undertake the FEED works. It is clear to us that if Tozzi had not been granted the right of first refusal for the EPC supply of the Topside Process Modules, it would not have agreed to undertake the FEED works as it had repeatedly reiterated its reluctance to do those works (see [14] above). Importantly, the right of first refusal was necessarily independent of and anterior to a subcontract for the EPC supply of the Topside Process Modules. It is a right that concerns the *process* by which Tozzi would be offered a contract, rather than the *substantive* terms of the contract that would be offered. It is true that there were numerous matters raised at the 31 July Meeting that required further deliberation. However, the details that had to be worked out pertained to the EPC subcontract and FEED contract that the parties envisaged. The fact that the precise terms of those contracts were still open to negotiation does not preclude the *independent* right of first refusal from having contractual effect. Indeed, in oral closing submissions, Bumi's counsel accepted that there was nothing more to negotiate in respect of the right of first refusal.[33] This was, in our judgment, a clear concession by counsel that Bumi's agreement to grant the right of first refusal to Tozzi had attained the requisite certainty for contractual

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33 NE 13/07/2017, 9:12–17.

formation in the minds of the parties, who were *ad idem* as to the nature and content of that right.

27 Further, the context of the 31 July Meeting must be considered. Mr Basma urgently called the 31 July Meeting because Bumi anticipated the letter of award from Husky to be finalised on 1 September 2014. Given the Project's timelines, there was no time for delay once the award was issued. It is entirely unrealistic to suggest that the parties envisaged engaging in further negotiations on the right of first refusal when that right was only to be exercisable during the process of awarding the subcontract, which was likely to occur soon.

28 It is, moreover, telling that the parties' correspondence after 31 July 2014 was replete with references to an "agreement" without any suggestion as to a need to negotiate further or formalise the agreement granting the right of first refusal in a written contract:

(a) On 15 August 2014, Mr Schiavo emailed Mr Gupta a revised version of Tozzi's technical proposal and stated that "*as per agreement* between the companies, [Tozzi] will confirm … the price" [emphasis added] indicated in its earlier December 2012 price proposals by the end of August.[34] Mr Gupta did not dispute Mr Schiavo's assertion.

(b) In a draft FEED proposal sent by Tozzi to the defendant on 21 August 2014,[35] Mr Schiavo again set out the agreed mechanics for the award of the EPC contract and the exercise of its right of first refusal:

> *As per discussions had in your offices on July 31st*, if the final investment cost for all the process topsides which are subject of our scope of supply will not exceed the

34 SS AEIC, para 343 and exhibit "SS-55".

35 SS AEIC at [350]–[354] and exhibit "SS-62".

> amount proposed to Bumi on December 2012, then we will enter into EPC contract. Any amount in excess of the a.m. value … has to be justified and it will be at BAB discretion to check that price on the market or not and then proceed with the EPC contract. *As per BAB concession, we will be given, the first right of refusal in any case.*[36] [emphasis added]

Although the contract for the FEED works was ultimately issued in a revised form, the defendant did not demur or suggest that the right of first refusal was still subject to review or confirmation.

(c) On 29 August 2014, Mr Gupta conveyed certain management directions to Mr Schiavo via email in which he expressly acknowledged Tozzi's right of first refusal:[37]

> 4. For compliance issues, we will have to issue an Invitation to Tender for all Modules. *In line with existing MOU however, Tozzi will have first right of refusal on the Sulphur Modules on a Lump Sum EPC basis. For the other modules, we may need to meet local content requirements.* …
>
> 5. For *modules which will be awarded to you*, we want you to use Oiltech Chennai for detailed engineering. …
>
> [emphasis added]

Mr Gupta thus affirmed that the upcoming invitation to tender for all modules would not in any way qualify or derogate from Tozzi's right of first refusal. While a cursory reading of his email may suggest that the right of first refusal extended only to the TI Packages, a more careful reading of the email reveals that Tozzi had a right of first refusal in respect of the other modules *unless there were local content requirements in place*. There was no indication or evidence that Tozzi

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36 SS AEIC p 1209.

37 Schiavo AEIC, exhibit "SS-62".

was refused the subcontract for any or all of the modules because of local content requirements.

(d) On 25 September 2014, while the parties were negotiating the draft FEED agreement, Mr Schiavo drew Bumi's attention to a clause which he perceived as conflicting with the right of first refusal as it envisaged Bumi placing purchase orders even before Tozzi could issue a revised price at the completion of the FEED works. He explained why the clause ought to be cancelled:[38]

> *As you are aware there is an agreement between our companies.* That agreement foresees that after the [FEED] validation we will revised [*sic*] the EPC price and Bumi Armada will check the competitiveness of our price. *After that we have the right of first refusal.* In principle we cannot, therefore, build anything which is in conflict with that agreement … [emphasis added]

In response, BAB's contracts manager, Mr Paul Cooper, did not dispute the existence of the agreement but "updated the documents based on what [he understood was] agreed".

(e) On 5 November 2014, when the RFQ was circulated, Mr Schiavo promptly protested, reiterating Tozzi's right of first refusal:[39]

> I wonder whether you are aware of *the agreement between our companies*. …
>
> *As per existing agreement*, we are supposed to complete the [FEED] and confirm to Bumi Armada we will be able to supply the process topsides at a price not exceeding what we offered to Mr. Basma a couple of years ago, before we entered into agreement.
>
> The *agreement* foresees also that in the event we will be lower than that price , then we will be awarded them while if our price exceeds what we previously offered , we will provide justifications for it and it is up to BAB to

[38] Schiavo AEIC, exhibit "SS-69".

[39] Schiavo AEIC, exhibit "SS-74".

> accept or not the justifications. *However we have been granted, in any case , the right of first refusal.*
>
> Based on all the above , I wonder if something has changed because there is no need of receiving our proposal.
>
> You are free to look for alternative prices, but if we will be able to stick to the original price , then the competition will end. *Should we not be able to reach that price level , then we will be given the chance to meet the price you got on the market.*
>
> [emphasis added]

BAB's Strategic Procurement officer, Mr Mohamed Sharil bin Zulkifli, responded on 6 November 2014, stating that Bumi was "*aware of the existing agreement* between both Companies" [emphasis added]. Notably, he did not dispute or seek to qualify the terms of the agreement as described by Mr Schiavo. Instead, he went on to suggest that the RFQ should not affect Tozzi's plans to revise its proposal after the FEED works:[40]

> The objective of this RFQ is to carry out the formality according to our sealed bid process *in parallel* to revalidate the Proposal as the [FEED] verification work progressed. Hope above explain [*sic*] and you may further concentrate on the expected result. [emphasis added]

(f) Dissatisfied with what he perceived to be a vague response, Mr Schiavo objected that Mr Mohamed Sharil's email was "not clear and is not in line with what we understood and we would have expected,"[41] attaching a copy of the 1 August MOM. This elicited a heated response from Mr Gupta on 7 November 2014: "Call me and I will explain. You are lost. We are listed company and have external audit procedures". According to Mr Schiavo, he was informed by

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40 Schiavo AEIC, exhibit "SS-77" at p 1940.

41 Schiavo AEIC, para 380 and exhibit "SS-77" at p 1938–1939.

Mr Gupta during their subsequent call "not to worry about the proposal", and that Tozzi's right of first refusal still subsisted.[42] Mr Schiavo's impression was that the RFQ was a mere formality for regulatory compliance.[43] (Indeed, we note that Mr Mohamed Sharil himself had used the term "formality" to describe the RFQ process (see [28(e)] above).) In contrast, Bumi pleaded that Mr Gupta had reiterated to Mr Schiavo during their telephone conversation that Tozzi did not have an exclusive bid agreement and had to participate in the RFQ. This version was denied by Mr Schiavo;[44] Bumi did not adduce any supporting evidence.

(g) Lastly, Tozzi's cover letters for its proposals on 12 January 2015 and 26 February 2015 referred to "the agreement existing between our companies related to the supply of the process topsides".[45] This was a reference to the agreement made at the 31 July Meeting. Bumi highlighted that Tozzi failed to delete generic terms in Bumi's RFQ form which were inconsistent with its alleged right of first refusal. In addition, Tozzi submitted bids in February and April 2015 even after the scope of the RFQ was narrowed to the TI Packages and after Mr van de Korput clearly conveyed on 1 March 2015 that Bumi did not intend to favour any bidders. It was suggested that by doing so, Tozzi acknowledged that the EPC contract was subject to competitive bidding and agreed to bid for only the TI Packages. Mr Schiavo flatly rejected these suggestions.[46] He claimed it was not open to him to delete parts of a form prepared by his client's procurement team, but that he referenced the 31 July 2014

42 Schiavo AEIC, para 382; NE 10/07/2017, 144:11–145:2.

43 NE 10/07/2017, 145:20–24.

44 NE 10/07/2017, 149:19–22.

45 Rosli AEIC, pp 386 and 880.

46 NE 10/07/2017, pp 154, 159, 162; NE 11/07/2017, 13:1–4.

> agreement in his own cover letter instead. Tozzi also reserved its right over all the Topside Process Modules by proposing pricing for the remaining four modules as "provisional extra scope of work". Moreover, Tozzi was acting on the prior assurance by Mr Gupta that the RFQ process would not prejudice its right of first refusal (see [28(e)] above).

Bumi did not provide any alternative theory to challenge Mr Schiavo's evidence. That evidence clearly demonstrates the parties' understanding that a right of first refusal was indeed agreed upon on 31 July 2014. We found Mr Schiavo to be a credible witness and resolved disputed questions of fact in Tozzi's favour.

29 For similar reasons to the above, considering the relationship of a right of first refusal to the actual subcontract, the immediate context of the 31 July Meeting and the parties' subsequent conduct, we conclude that the last paragraph of the 1 August MOM was *only* intended to defer legal relations in respect of the EPC works and FEED works. It does not prevent a legally binding agreement to grant a right of first refusal from arising. The proposition in *Norwest* cannot sensibly apply to a right of first refusal, the exercise of which must necessarily precede the adoption of the final contract that is the subject matter of the right itself.

30 Finally, we are of the view that the right of first refusal pertained to all seven Topside Process Modules. Bumi submits that it is not entirely clear that paragraph 5 of the 1 August MOM referred to all seven modules.[47] We disagree. On the face of the 1 August MOM and Mr Schiavo's minutes, Tozzi's right of first refusal applied to the "entire topsides" or "all the process topsides". In our

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47 NE 13/07/2017, 4:7–10; 7:17–25.

judgment, it is sufficiently clear that the right was exercisable with respect to the scope of work that Tozzi was to submit a revised proposal for – *ie,* all the Topside Process Modules.

31 Since Tozzi succeeds in its primary case, it is unnecessary to deal with its alternative arguments. Even if Tozzi succeeds in its argument that the expiry of the PBA was waived, the right of first refusal in the PBA extended only to the TI Packages; to benefit from a right of first refusal over the full Topside Process Modules, Tozzi would still have to establish the contractual effect of the events at the 31 July Meeting. Similarly, even if a contract could be implied by conduct following the expiry of the PBA on 5 February 2014, it would, in Mr Schiavo's words, be "superseded" by the agreement reached on 31 July 2014.[48]

Did BAOHL breach the right of first refusal?

32 Turning to the question of breach, we are satisfied that BAOHL breached the agreement to grant Tozzi a right of first refusal, in respect of all seven Topside Process Modules.

33 There is no doubt that BAOHL was in breach in respect of the three modules in the TI Packages. The evidence showed that VME was awarded the subcontract for the TI Packages. Tozzi was not given an opportunity to match VME's offer before a purchase order was issued to VME. This was a clear breach, as explained in *Astrazeneca* at [51]:

> … [W]here what has occurred … is that the grantor of the right of first refusal has received an offer from a third party the terms of which it is minded to accept, what is required to comply with the obligation to grant a right of first refusal is that the grantee be afforded the opportunity to match that offer.

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48 NE 10/07/2017, 107:3.

34 The remaining question is whether the breach was established in respect of the remaining four modules given that the revised RFQ in January 2015 covered only the TI Packages. Bumi accepted that as Husky's main contractor for the Project, BAOHL provided all seven Topside Process Modules. Yet Tozzi was not offered a right of first refusal for any of the seven modules. In our view, the burden lies on Bumi to show that the remaining four modules were not subcontracted to another third party but were supplied in-house by Bumi themselves. If this could be shown, there would be no third party offer that BAOHL were obliged to grant Tozzi an opportunity to match. However, Bumi did not adduce any evidence as to who supplied the remaining four modules. We are therefore led to the conclusion that BAOHL acted in breach of the agreement to grant Tozzi the right of first refusal to supply the Topside Process Modules, *ie*, all seven modules.

Did BAB induce BAOHL to breach the right of first refusal?

35 The final issue is whether BAB induced BAOHL to breach the right of first refusal. As a preliminary matter, we deal with Bumi's submission that the tortious claim against BAB was inadequately pleaded. Bumi highlights that Tozzi's sole pleading against BAB was that BAB "procured and/or otherwise induced [BAOHL] to breach the Pre-Bid Agreement (as varied or amended by the agreement between the parties on 31 July 2014 or otherwise)".[49] Bumi submits that if the right of first refusal that has been breached by BAOHL is not grounded in the PBA (as varied or amended or otherwise), Tozzi's claim against BAB must fail.[50] This submission must be addressed because the breach established above was premised on a standalone agreement reached during the 31 July Meeting.

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49 SOC at para 71.

50 Defendants' Closing Submissions, para 70.

36 In our view, it is sufficiently clear from the pleadings that the tort alleged to have been committed by BAB relates to the breach by BAOHL of the right of first refusal, regardless of how that breach by BAOHL is grounded. As we noted at the outset, although several causes of action were pleaded, they ultimately advance the same claim based on Tozzi's right of first refusal. The particulars pleaded in support of the tortious claim against BAB related to the agreement reached at the 31 July Meeting.[51] The same particulars were pleaded in support of not only a variation of the PBA but also a standalone agreement and an implied contract.[52] While we have found that the right of first refusal was indeed a standalone agreement which is enforceable in its own right, it does not follow that it was unrelated to the PBA. After all the right of first refusal owes its genesis to the PBA and on the cusp of Husky's award, the 31 July Meeting was convened precisely to discuss the parties' continued relationship despite the expiry of the PBA, in particular the right of first refusal. Hence we find that the pleading against BAB is sufficient to encompass inducement of a breach of the right of first refusal as a standalone agreement.

37 To establish that BAB induced BAOHL to breach the right of first refusal, Tozzi must show that BAB (a) acted with the requisite knowledge of the existence of the contract (although knowledge of the precise terms is unnecessary); and (b) intended to interfere with Tozzi's contractual rights, with such intention to be objectively ascertained (*Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [17]).

38 Tozzi argues that BAB knew of the precise terms of the agreement between Tozzi and BAOHL, which was negotiated by BAB's employees. It was Mr van de Korput, BAB's CEO, who expressly denied Tozzi's right of first

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51 SOC at para 71(a)(ii).

52 SOC at paras 39–44; 68(a); 69(a); 71A.

refusal on 1 March 2015 after having been copied in emails where the right of first refusal was previously raised.[53] Further, apart from the fact that it is BAB's wholly-owned subsidiary, BAOHL has no operational independence as it has no employees of its own and is completely controlled by BAB.

39 Bumi submits that the fact that BAB controls BAOHL does not, *ipso facto*, mean that BAB is liable for BAOHL's breach. Bumi relies on the following passage from *ARS v ART and another* [2015] SGHC 78 ("*ARS*") at [252]:

> … [T]he fact that [BD] was one of the subsidiaries controlled by the [parent company] would not, without more, suffice to constitute inducement. I agree with the view of Thomas J in *Stocznia Gdanska SA v Latvian Shipping Co, Latreefer Inc and others* [2001] 1 Lloyd's Rep 537 ("*Stocznia*") at [233] that *the 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.* On the facts, Thomas J held that there was no basis to find that the subsidiary in question was a sham company or that the directors treated the requests of the parent company as if they were instructions simply to be carried out (at [235]–[236]). … [emphasis added]

40 In our view, the facts of this case are clearly distinguishable. In *ARS*, the court had earlier found that the acts of the subsidiary's directors – who were neither employees nor directors of the parent company – could not be attributed to the parent company. To establish inducement by the parent company, the plaintiff there contended that the subsidiary must have acted with the approval of its parent company (at [247]). The observations quoted above were made in response to this contention that the subsidiary was a mere puppet despite having acted through *its own directors and employees*, and not those of the parent company. In contrast, the parent company here, BAB, is not liable merely by

[53] Schiavo AEIC, exhibit "SS-92".

virtue of the fact that BAOHL is its wholly-owned subsidiary. It is undisputed that BAOHL does not have any employees of its own.[54] Mr Schiavo gave unchallenged evidence that Tozzi only corresponded with BAB's employees and executives.

41 Bumi also relies on the decision of the New South Wales Supreme Court in *Australian Development Corporation Pty Ltd v White Constructions (Act) Pty Ltd & Ors* (unreported) ("*ADC*") to show that it is insufficient that BAOHL has no employees of its own. The parent company was sued for inducing its wholly-owned subsidiary to breach an undertaking given by the subsidiary to the plaintiff to carry out a construction project diligently. The subsidiary's breach consisted partly in dismissing and standing down certain workers during an industrial dispute. The plaintiff submitted that the parent company induced the breach because the subsidiary had no employees at the relevant level to make the decision to dismiss and stand down workers, such that in reality it was the parent company that made that decision. The court rejected this submission, finding instead that the relevant employees of the parent company were acting in their capacity as the subsidiary's executives or representatives; as such, it remained the subsidiary that made the decision, albeit by or with the involvement of persons employed by the parent company. The court explained (at p 47):

> All of Messrs Bendeich, Houlahan and Hitchings [*ie*, the persons who made the decision to carry out the breach in question] were employed by [the parent company], [the subsidiary] had no employees of its own at their level, and hence [the plaintiff] submitted that it should be found that in reality the decision was made by [the parent company] and that it followed that [the parent company] induced [the subsidiary's] breach of contract. There was some debate over the second aspect of this submission: is there a difference between A inducing B to breach B's contract and A acting for B in breaching B's contact [*sic*]? But in my opinion the first aspect

54 Defence, para 12(b).

> of the submission should not be accepted. *Mr Bendeich had been appointed acting project manager for the project, and if he were to be regarded as a decision- maker (which I doubt) he was acting on behalf of [the subsidiary], which he represented for all purposes within his authority.* Although Mr Houlahan was employed by [the parent company], he had been appointed Building Manager of [the subsidiary] … and *acted in his capacity of an executive of [the subsidiary].* When Mr Hitchings concurred in the decision he also was *acting on behalf of [the subsidiary]*, because by the chain of command he was responsible for [the subsidiary's] project at the Quadrant site and the superior of the relevant executive of [the subsidiary]. *[The subsidiary] made the decision, albeit by or with the involvement of persons employed by [the parent company].* [emphasis added]

42 Again, there are crucial distinguishing facts here. In *ADC*, the subsidiary did not have employees of the relevant level of seniority but the parent company had appointed its employees as project manager and other roles in the chain of command for the subsidiary's project. As such, when making the relevant decisions, they were regarded as acting *on behalf of the subsidiary* and not the parent company. In the case before us, Bumi made the point in oral closing submissions that BAB's employees and executives were similarly acting on BAOHL's behalf only. Mr Gupta, an employee of BAB, was appointed the project manager for the Project undertaken by BAOHL. It was BAOHL that was awarded the contract by Husky and tendered out the subcontracts.[55] Further, Bumi submits that when Mr van de Korput decided not to honour the right of first refusal, he was acting on BAOHL's behalf.

43 In our view, the evidence does not support the inference that BAB's employees were at all times corresponding only on behalf of BAOHL. There is no evidence they held formal appointments in BAOHL unlike the situation in *ADC*.[56] In the course of their collaboration, they were known to Mr Schiavo only as BAB's executives. Both the original invitation to bid in April 2012 and the

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55 Schiavo AEIC, exhibits "SS-83" to "SS-88"; PCB p 753–761.

56 Schiavo AEIC, para 9.

RFQ in November 2014 were circulated by BAB's strategic procurement team.[57] Although the PBA and the 1 August MOM were signed by Mr Abela on BAOHL's behalf, Mr Gupta and other personnel attended the meetings in January and April 2015 regarding Tozzi's proposal expressly in their capacity as BAB's personnel.[58] Crucially, there is nothing to indicate that Mr van de Korput's email 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.

44 With Bumi's objections out of the way, we find that Tozzi succeeds in establishing that BAB induced BAOHL's breach of Tozzi's right of first refusal.

Conclusion

45 For the foregoing reasons, we grant the plaintiff's claim against both defendants with damages to be assessed. We also order the defendants to bear the costs of this trial on liability, to be taxed if not agreed following the assessment of the damages. Costs of the assessment will be dealt with separately.

Steven Chong Judge of Appeal	Carolyn Berger International Judge	Henry Bernard Eder International Judge

57 Schiavo AEIC, exhibit "SS-3"; Rosli AEIC, exhibit "JR-5".

58 Schiavo AEIC, exhibits "SS-91" and "SS-93".

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