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Holding Company's Liability for Inducing its Subsidiary's Contractual Breach

A decision by a company to breach a contract is necessarily made on its behalf by one or more natural persons. Although the relevant decision-makers may be said to have "procured" the company's breach of contract, there is authority, albeit not without detractors (see *Welsh Development Agency v Export Finance Co Ltd* [1992] B.C.L.C. 148; [1992] B.C.C. 270), for the proposition that these individuals are not to be made liable in the tort of inducing breach of contract, provided they had acted in good faith and within the scope of their authority (*Said v Butt* [1920] 3 K.B. 497). As decisions to breach contracts are mostly commercial in nature, the tort is usually considered in the context of decisions by the company's directors. The issue before the Singapore Court of Appeal in *Bumi Armada Offshore Holdings Ltd v Tozzi Srl (formerly known as Tozzi Industries SpA)* [2018] SGCA(I) 5; [2019] 1 S.L.R. 10, a rare appeal from the Singapore International Commercial Court ("SICC"), concerns, in contrast, a controlling shareholder, specifically the parent company of a corporate group, which was alleged to have induced its subsidiary's breach of contract. In a judgment delivered by Lord Neuberger I.J., the Singapore court recognised that there are basic differences between directors and shareholders, notwithstanding their common position as constitutional organs of the company, and established a modified test for the parent company's liability. Although alert to the potential for the *Lumley v Guy* (1853) 2 El. & Bl. 216; 118 E.R. 749 tort to provide redress for creditors of an insolvent company against its solvent holding company, the court remained acutely conscious that, unless suitably confined in the context of corporate groups, a successful claim in tort would effectively outflank the *Salomon* principle. This was an eventuality the court was not, at present, prepared to countenance.

The dispute arose out of a project for the development of a gas field in Indonesia. The defendants, comprising a Malaysian publicly-listed company ("the Parent") and its wholly-owned subsidiary ("the Subsidiary"), proposed to bid for the project in the Subsidiary's name. The plaintiff, Tozzi, was invited to support this bid by supplying the required gas processing facilities. Tozzi alleged that the defendants had extended it a "right of first refusal" with respect to the supply contract, and, in breach thereof, had ultimately awarded the supply contract to another party. Before the SICC ([2017] SGHC(I)

8; [2017] 5 S.L.R. 156), Tozzi succeeded in its claim against the Subsidiary for breach of contract and also against the Parent in the tort of inducing breach of contract. The decision with respect to the latter was overturned on the Parent's appeal.

The SICC had identified two fundamental elements necessary for establishing liability for the tort – the defendant must possess sufficient knowledge of the existence of the plaintiff's contract, and then acted intentionally to procure or persuade the other contracting party to breach that contract. The Court of Appeal accepted that the SICC had "rightly identified [the] two basic ingredients" (at [41]) which establish the defendant's "intentional causative participation" (*OBG Ltd v Allan* [2007] UKHL 21; [2008] 1 A.C. 1 at [191]) in the breach of contract necessary for liability in the tort. However, where a plaintiff was seeking to render a holding company liable for inducing its subsidiary's breach of contract, the court considered it necessary to focus less on the knowledge and intention of the individuals concerned, and more on first, whether the holding company had in fact induced the breach, and then if so, whether the circumstances were such that the holding company could "properly be held liable" (at [41]).

The first of these additional elements required the court to be satisfied that the individuals concerned, in doing the act that resulted in the breach of contract, were indeed acting for the holding company. Consideration of this issue was necessitated by the fact that the defendants had operated through the same individuals, with the crucial decisions resulting in the Subsidiary's contractual breach effectively made by senior employees of the Parent. It was this fact that led the SICC to conclude that the Parent had sufficiently participated in the Subsidiary's breach so as to deserve liability. The Court of Appeal disagreed. Given that the entity which accorded Tozzi the right of first refusal was the Subsidiary, and not the Parent, it logically followed that, in denying Tozzi its right of first refusal, the individuals concerned were acting as agents for the Subsidiary (at [51]). Lord Neuberger would require "cogent additional evidence to show that the individuals…were also acting for [the Parent]" (at [52]). The Parent, therefore, could not have factually induced the breach, and on this basis, Tozzi's claim in the tort against the Parent must fail.

The different conclusions arrived at by the Singapore courts highlight the significance of the corporate group context in which the issue arose and underscore the need to accord sufficient weight to the operational dynamics of the particular group. Two typical group

characteristics are especially pertinent: the prevalence of overlapping boards and common officers and employees, and the tendency for corporate decisions to be subject to a group-wide policy effected through a framework of authority dictated by the holding company. In this regard, two observations are proffered.

First, the ubiquity of these characteristics explains why Lord Neuberger considered it necessary to focus on whom the common employees were acting for rather than concentrating on establishing the holding company's attributed mental state. This was despite the clear intentional nature of the *Lumley v Guy* tort. The fact, however, is that decisions in such corporate groups are often made by the same individuals effecting some central group policy. Against this background, his Lordship might have considered it unnecessary to belabour the point, implicitly accepting the practical reality of a "common corporate mind" between the holding company and its subsidiary (see also *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* [2001] NSWSC 886; (2002) 18 B.C.L. 57 at [79]). There is, of course, no general principle that a company is to be imputed with the knowledge of all of its officers, however acquired – much would depend on the context of the particular legal issue (Peter Watts & F.M.B. Reynolds, *Bowstead and Reynolds on Agency*, 21st edn. (2018) at [8-209]). In the case of a common officer of different companies, knowledge acquired in one capacity will only be imputed to the other company if he owes a duty not only to communicate that knowledge, but also to receive it in his alternate capacity (*In Re Hampshire Land* [1896] 2 Ch. 743; (1896) 75 L.T. 181; *In re Fenwick, Stobart & Co, Ltd; Deep Sea Fishery Co's (Ltd) Claim* [1902] 1 Ch. 507; [1902] 86 L.T. 193; *Belmont Finance Corporation v Williams Furniture Ltd (No 2)* [1980] 1 All E.R. 393). In the present context, given the Parent's ultimate interest in the project and the roles of each of the Parent's employees in pushing through that agenda, it should be relatively straightforward to conclude that each of the officers who were involved in the project, even when acting on the Subsidiary's behalf, would be under a duty to communicate such knowledge as was relevant to that project to the Parent. Any other conclusion, echoing Barrett J.'s observation in a similar context, would "disregard the realities of the wholly-owned group structure" (*LMI Australasia Pty Ltd v Baulderstone* [2001] NSWSC 886 at [93]).

Secondly, the presence of these characteristics could have, on the one hand, facilitated a finding that the holding company had applied direct inducement to the subsidiary to

breach its contract and yet, paradoxically, also justified the court's ultimate decision that the tort was not made out. Although trite that each company in the corporate group is, in law, a separate entity with interests that may be distinct from the interests of its holding and sister companies, the reality is that the holding company wields such control over the group as a whole that its subsidiaries will act as it dictates. As Staughton L.J. observed in *Atlas Maritime Co SA v Avalon Maritime Ltd (The Coral Rose) (No 1)* [1991] 4 All E.R. 769 at 779; [1991] 1 Lloyds' Rep. 563 at 571, "[t]he creation… of a subsidiary company with minimal liability, which will operate … on the parent's directions … is extremely common". When this central policy is operationalised through common officers, the decisions of a common officer could, by the rules of attribution, have a possible *dual* effect - as a decision of the subsidiary to breach the particular contract, and as a direction by the holding company to the subsidiary not to perform that contract. In such cases, decisions by the common officers, albeit strictly speaking on a subsidiary's behalf because the relevant transaction concerns only that subsidiary, may also be seen as being taken on behalf of the parent company in enforcing that central policy. In the present case therefore, the decisions of the Parent's employees might very well have represented, at the same time, decisions of both the Parent and the Subsidiary. Analysed in this manner, Lord Neuberger's requirement for actual inducement would, contrary to his Lordship's conclusion, have been satisfied.

Lord Neuberger, however, made it clear that even if there had been *"*cogent evidence*"* (at [52]) to support the SICC's finding of actual inducement, the Parent was still not liable for the tort. Lord Neuberger gave two reasons for this. First:

> "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" (at [56]).

His Lordship is not alone in expressing this sentiment. In *LMI Australasia Pty Ltd*, Barrett J. had stated in similar terms that:

> "there is a distinct air of unreality about the proposition that one wholly-owned subsidiary within and subject to the framework of authority acts intentionally to

cause another wholly-owned subsidiary within and subject to the same framework of authority to behave in a certain way when both are actuated by and subject to the common authority" (at [96]).

This judicial consensus is, with respect, justified. The essence of the *Lumley v Guy* tort is an intentional act by a *non-party* to the contract (*OBG Ltd v Allan* [2008] 1 A.C. 1 at [168]). This connotes, as Jordan C.J. explained in the New South Wales decision of *O'Brien v Dawson* (1941) 41 S.R. (N.S.W.) 295, affirmed (1942) 66 CLR 18 that the wrongdoer had to be some person *"*in the position of *outsiders* who are influencing the independent volition of a contracting party who is capable of exercising volition for himself*"* (at 307 – 308; emphasis added). Where the holding company wields absolute control over its stable of wholly-owned subsidiaries (as was the case presently and in *LMI Australasia*), decisions that that holding company makes and which percolate down through its subsidiaries are not decisions that are taken by the holding company as an outsider influencing the volition of the subsidiaries. Without those decisions of the relevant organ, those subsidiaries would not, indeed could not, have made any decision at all. In such situations, it is difficult to see how the holding company could be said to have engaged in *"*actionable intervention*"* (at [98]).

This same logic underpinned Thomas J.'s judgment in *Stocznia Gdanska SA v Latvian Shipping Co* [2001] All E.R. (D.) 275; [2001] 1 Lloyd's Law Rep. 537. Unlike the present case, the defendant parent-subsidiary companies in *Stocznia* did not share common directors. This notwithstanding, the control exerted over the subsidiary by the parent company was, in every sense, as absolute. Indeed, the wholly-owned subsidiary had been specifically incorporated for the purposes of contracting with the plaintiff. Counsel for the parent company had argued that, even if the court had found on the facts that the parent company had instructed the directors of the subsidiary to breach the contracts, that act of instruction, regardless of whether the directors had simply complied with those instructions or otherwise, was one that was undertaken by the parent company as shareholders of the subsidiary (at [239]). This was an act of the subsidiary itself, and could not amount to actionable inducement. Thomas J. considered this a *"*powerful*"* argument (at [244]). In his Lordship's view, the parent company could have legitimately decided, in its capacity as an organ of the subsidiary, that the subsidiary would not perform the relevant contract. In such an eventuality, the holding company could not be

made liable for inducing breach of contract because its decision was not an independent act and did not, therefore, emanate from some third party. As Thomas J. noted, this reasoning is analogous to that which underlay the immunity accorded to directors and agents in *Said v Butt* [1920] 3 K.B. 497.

In the present case, Lord Neuberger had explicitly stated that it would be "dangerous" (at [42]) to rely on *Said v Butt* as well as decisions such as the Singapore Court of Appeal decision of *PT Sandipala Arthaputra v ST Microelectronics Asia Pacific Pte Ltd* [2018] SGCA 17; [2018] 1 SLR 818 to excuse the parent company from liability as those cases concerned directors, and not shareholders. This is undoubtedly a valid basis for distinction given the clear division in roles between the organs. Nevertheless, it is submitted that his Lordship's reluctance to impose liability on the Parent is in fact underpinned, and indeed justified, by a parallel rationale: the Parent could not be made liable for inducing the breach of contract by the Subsidiary even if its employees had been found to have acted on its behalf, as that decision was a decision of the Subsidiary itself.

Lord Neuberger gave a second reason for not ascribing liability for the tort to the holding company. He stated:

> "the owner of, or indeed any shareholder in, a company cannot be held to be liable for inducing breach of contract by that company if the actions said to give rise to its liability merely involved the owner or shareholder pursuing in good faith its own interest in its capacity as the owner of, or shareholder in, that company" (at [45]).

As there was no evidence suggesting that the impugned actions had been taken for any purpose other than the pursuit of the Parent's bona fide interests as the sole shareholder of the Subsidiary, the SICC's conclusion could not stand.

This ground, which may well be the true basis of the Court of Appeal's decision, appears to be better aligned with some version of the defence of justification. Such a defence had been alluded to by Lord Nicholls in *OBG Ltd v Allan.* A defendant would be justified in procuring a breach of contract if he was acting to protect "an equal or superior right of his own" (at [193]). Although cases that have succeeded on the defence have tended to

involve "a higher moral purpose, justifying as a matter of public policy what would otherwise be a tortious interference with contract relations" (*Lictor Anstalt v MIR Steel UK Ltd* [2011] EWHC 3310 (Ch.); [2012] 1 All E.R. (Comm.) 592 at [55]), the defence is not so restricted. In *Edwin Hill & Partners (a firm) v First National Finance Corp Plc* [1989] 1 W.L.R. 225, for example, a mortgagee bank, which held a first legal charge over the debtor's property, had imposed a condition for its provision of additional finance to the debtor. The debtor's compliance with that condition resulted in a breach of the debtor's contract with the plaintiffs. The plaintiffs' claim against the bank for procuring a breach of that contract was dismissed on the ground that the bank was justified in imposing the condition in defence and protection of its equal or superior right under the first legal charge. Stuart-Smith L.J., however, made it clear that this right, whether derived from property or from contract, had to be a legal right. The pursuit of mere commercial or other best interests would not be sufficient justification to excuse procuring a breach of contract. Nevertheless, the precise boundaries of the defence under English and Singapore law remain mostly undefined (for a detailed consideration of the defence in Australia, see *Zhu v Treasurer of New South Wales* (2004) 218 C.L.R. 530; (2004) 211 A.L.R. 159).

Lord Neuberger's pronouncement in the present case suggests that a shareholder's pursuit of its *interest* as sole or controlling shareholder of the subsidiary suffices to excuse an act of inducement, a proposition that is significantly more generous than the traditional defence of justification. Although a shareholder does have proprietary rights over its shares in the company, performance of the company's contract is not likely to interfere or compete with these rights (see Peter Edmundson, (2006) 30 Melb. U. L. Rev. 62 at 83). If, on the other hand, Lord Neuberger's proposition is taken to extend the idea of justification to protecting the *value* of those shares, it could mean that a shareholder is *always* justified in interfering in the company's contracts, provided only that it had acted in good faith. It seems clear that this was not Lord Neuberger's intent, as his Lordship had expressly accepted the possibility that shareholders can be held liable for the tort (at [44]).

In the final analysis, the Court of Appeal had placed greater emphasis on maintaining the integrity of the *Saloman* principle. As noted at the start of this note, imposing liability in tort would deprive the shareholder of the benefit of limited liability. In the words of Lord

Neuberger:

> "If the sole, or majority, shareholder in a company formed the view that the company would be better off (or its 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" (at [45]).

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