

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SAUDI BASIC INDUSTRIES)
CORPORATION,)
)
Plaintiff/Counterclaim Defendant,)
)
v.) C.A. No. 00C-07-161-JRJ
)
MOBIL YANBU PETROCHEMICAL)
COMPANY, INC. and EXXON)
CHEMICAL ARABIA, INC.,)
)
Defendants/Counterclaim Plaintiffs.)

Date Submitted: June 3, 2003
Date Decided: August 26, 2003

Upon SABIC'S Renewed Motion for Judgment as a Matter of Law, or (in the Alternative) New Trial or Remittur on ExxonMobil's Enhanced Damages -
DENIED

ORDER

AND NOW, TO WIT, this 26th day of August, 2003, upon consideration of the briefs and the record, it appears to the Court that,

1. Pursuant to Superior Court Civil Rule 50(b), SABIC moves for judgment as a matter of law with respect to the \$324 million "enhanced damages" award which followed the jury verdict for ExxonMobil on *ghasb*, the Saudi law tort of usurpation.

In the alternative, SABIC moves for a new trial pursuant to Superior Court Civil Rule 59(b), and/or remittur, claiming that the evidence “wholly fails” to support the jury’s “enhanced” damages award.¹

2. The \$324 million award which SABIC refers to as “enhanced damages” is the difference between the \$92 million award reflecting Exxon’s and Mobil’s *pro rata* shares of the overcharges for the Unipol® PE Technology and the \$416 million gross award, and represents half of the disgorged profits ExxonMobil established SABIC earned through its use of the \$184 million overcharge.²

3. SABIC claims that under Saudi law \$324 million in *ghasb* damages is “entirely precluded because ExxonMobil introduced no evidence whatsoever that the purportedly ‘usurped’ \$92 million was not commingled with other monies belonging to SABIC.”³

4. SABIC alleges that the “disgorged-profits enhanced-damages remedy is only theoretically available, but virtually never used... in Saudi Arabia and, even then, may only be available for *ghasb* claims *and* only under the most unusual or

¹SABIC’s Br. Supp. Renewed Mot. J. Matter Law, Alternative New Trial or Remittur, on ExxonMobil’s Enhanced Damages at 1 [hereinafter SABIC’s Opening Br.].

²SABIC’s Opening Br. at 1.

³*Id.*

egregious of circumstances.”⁴ According to SABIC, “enhancement is entirely precluded under governing Saudi law” in this case.⁵ SABIC claims that unless a particular increase or gain can be “*directly traced*” to the specific funds usurped, a plaintiff cannot recover enhanced damages on a *ghasb* claim. Thus, according to SABIC, even if the plaintiff establishes the elements of *ghasb*, if the monies have been commingled, “enhanced damages” are not allowed. SABIC asserts that this is so because under Saudi law usury is prohibited and damages may not be in any way speculative.⁶

5. SABIC’s arguments ignore the simple truth that the circumstances under which *ghasb* (usurpation) damages are available under Saudi law are not well known, much less defined, because Saudi law is not based on precedent or *stare decisis*.⁷ Contrary to the implication of SABIC’s briefing on this issue, the reality is that one cannot simply consult a statute book or a case reporter to find the elements of, or

⁴SABIC’s Opening Br. at 4 (emphasis in original).

⁵*Id.* at 5.

⁶*Id.* at 5-6.

⁷On this point, all the Saudi law experts who testified agree. *See* Rep. Indep. Expert Herbert S. Wolfson (February 21, 2003) (Doc. No. 518) ¶ 23 (“Islamic law resists the concept of precedent and *stare decisis*, and this doctrinal hostility has been incorporated into the Saudi Arabian legal system.”); Tr. Saudi Law Hr’g Morning Session (March 7, 2003) at 26-29 (Doc. No. 533) (Testimony of Prof. Hallaq); *Id.* at 117-25 (Testimony of Dr. Vogel).

damages available for, the Saudi law tort of *ghasb*. Nor can one point to one definition of, or a given set of circumstances giving rise to, *ghasb*. To illustrate the extreme difficulty of discerning and interpreting Saudi law, the Court notes that none of the Saudi law experts who testified agreed on the proper elements of *ghasb*. It is clear to the Court that, had the Court appointed two or three Saudi law experts, it would have received two or three different opinions. Finally, because Saudi law decisions are not published, even *if* the decisions had precedential value (which all the experts agree they do not), the Court could not look to decisions of Saudi judges to determine the proper elements or define the recoverable damages.

6. When faced with the daunting task of determining the elements of *ghasb* and the damages available for this tort, the Court, weighing the credibility of each Saudi law expert, exercised, as best it could under the circumstances, *ijtihad*, to reach the “right” result.⁸

7. In the Court’s view, Jury Instruction 6.4 (Damages for Usurpation) is the product of the Court’s exercise of *ijtihad*, is not contrary to Saudi law as interpreted

⁸See Tr. Saudi Law Hr’g Morning Session (March 7, 2003) at 20 (Prof. Hallaq stated, “every time a Muslim judge does this [*ijtihad*], it is basically his best way, his best effort to find what is the right thing to do”; Volume Three Expert Rep. & Witness Dep. Cited in Renewed Mot. J. Matter of Law & Mot. New Trial at T-16, Dep. Tr. of Herbert S. Wolfson (March 6, 2003) (Mr. Wolfson stated that a Saudi judge performing *ijtihad* tries to do the “right thing”).

by the Hanbali School, and is consistent with Dr. Hallaq's and Dr. Wolfson's testimony and the unique facts of this case.⁹ Notably, SABIC's expert, Dr. Vogel, the only Saudi law expert who disagreed with the recoverability of damages for usurpation, acknowledged during cross examination at the Saudi law hearing that a bad-faith breach of contract could "easily lead" a Saudi judge "to augment the quantum of damages awarded" without mention of a tracing requirement.¹⁰

8. The Court, after reviewing the Saudi law experts' reports and listening to all the testimony of the Saudi law experts, determined that, contrary to Dr. Vogel's opinion and SABIC's arguments, Saudi law does not impose a requirement on plaintiff, under the facts proven by ExxonMobil at trial, to "trace" the damages.¹¹

9. For the reasons articulated in ExxonMobil's answering brief,¹² Dr.

⁹See e.g., Volume One Expert Rep. & Witness Dep. Cited in Renewed Mot. J. Matter of Law & Mot. New Trial at T-7, ¶ 17, Expert Rep. Wael B. Hallaq (Sept. 12, 2002); Rep. Indep. Expert Herbert S. Wolfson (Feb. 21, 2003) ¶ 89.

¹⁰See Tr. Saudi Law Hr'g Morning Session at 152-53.

¹¹Prof. Hallaq and Mr. Wolfson both opined, (and more credibly, in the Court's view, then Dr. Vogel,) on the availability of *Ghasb* damages. Contrary to Dr. Vogel's opinion, both opined that such damages are available without regard to whether the plaintiff can specifically trace funds to particular profits. See Volume One Expert Rep. & Witness Dep. Cited in Renewed Mot. J. Matter of Law & Mot. New Trial at T-7, ¶ 17 (Expert Rep. Wael B. Hallaq (Sept. 12, 2002); Rep. Indep. Expert Herbert S. Wolfson ¶89.

¹²ExxonMobil Br. Opp'n at 10-14.

Vogel's post trial affidavit does not change the Court's view on the propriety of the *ghasb* damages instruction.

10. SABIC argues that Jury Instruction 6.4 led the jury to believe that “an enhanced damage award follows *automatically* and *as a matter of course* if the elements of *ghasb* are established.”¹³

11. As noted above, the Court is satisfied that Jury Instruction 6.4 is not violative of Saudi law and is appropriate under the particular facts of this case. In fact, Jury Instruction 6.4 expressly left an award of usurpation damages to the jury's discretion:

If you find a favor of Exxon or Mobil on the claims for usurpation, then you may award damages above the amount, if any, you awarded for breach of contract based upon any profits you may determine SABIC derived by using in its operation the money, if any, that was usurped from YANPET or KEMYA. Damages for usurpation may not include any interest.

12. SABIC also argues that the Court should have instructed the jury on the six factors that Mr. Wolfson suggested “might possibly” enter into a Saudi judge's perception of the equities” in this case.¹⁴ SABIC argues that each of these factors

¹³SABIC'S Opening Br. at 10. *See also*, ExxonMobil Br. Opp'n at 14.

¹⁴SABIC's Opening Br. at 12-13. These factors include:

1. the court's perceptions as to the relative culpability of each party,

“conclusively favor SABIC” but the Court should award a judgment as a matter of law. Alternatively, SABIC argues that the Court should have instructed the jury as to each of these factors and because it did not SABIC is entitled to a new trial.¹⁵ It is important to place the six factors articulated by Mr. Wolfson in the proper context. It is clear from the context in which Mr. Wolfson offered this testimony that he was not stating that these factors were Saudi law, that the factors were exclusive or that consideration of these factors was required. To the contrary, these factors, according to Mr. Wolfson are non-exclusive considerations that “*might possibly enter into a Saudi judge’s perception of the equities*” in this case.¹⁶ Mr. Wolfson clearly opined that “[a] Saudi Arabian judge enjoys considerable discretion to rule in a manner

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2. the lapse of time between the start of the alleged wrongful conduct and ExxonMobil’s decision to file suit;
 3. a desire to find the middle ground between competing litigants;
 4. the sheer size of ExxonMobil’s claim in terms of the absolute number of dollars at stake (and the attendant perception that awarding compensation above the principal amount might be “too much”),
 5. a desire to balance ExxonMobil’s right to recover any wrongfully taken principal amounts with the possibility of undue hardship to SABIC, and/or
 6. a concern that ExxonMobil’s decision to invoke the Islamic law tort of *ghasb* may have been motivated by a desire to sidestep the unavailability of interest or lost profits in Saudi Arabia and, thus, should not be rewarded.

Supp. Rep. Indep. Expert Herbert S. Wolfson (March 6, 2003) (Doc. No. 517) ¶36.

¹⁵SABIC’s Opening Br. at 12-13.

¹⁶Supp. Rep. Indep. Expert Herbert S. Wolfson (March 6, 2003) ¶36 (emphasis added).

leading to what he perceives as a fair and just result.”¹⁷ He further testified that the basis for this list of factors was discussions he had with a Saudi lawyer during his trip to Riyadh. The Court did not find during the Saudi law hearing, nor does it find now, that Mr. Wolfson’s list of factors reflects established Saudi law, much less a studied analysis of Saudi law based upon the authoritative texts. In the Court’s view, this testimony was offered to provide the Court with some considerations that it could take under advisement in exercising its considerable discretion to rule in a manner that resulted in a fair and just decision. The Court noted during the Saudi law hearing that Professor Hallaq and Dr. Vogel did not identify any such list of factors and there was no evidence to suggest that such a list of factors had ever been embraced by the Hanbali School. Nowhere in Dr. Vogel’s pretrial affidavits or in his post-trial affidavits does he provide the Court with authority in the Hanbali texts or otherwise to support a jury instruction on these six factors. While the Court certainly appreciated Mr. Wolfson’s attempt to offer some guidance to the Court on what types of considerations it could take into account in determining what damages would be recoverable for the tort of *ghasb*, and while the Court certainly considered Mr. Wolfson’s list of factors in the context they were presented to the Court, the Court

¹⁷*Id.*

believed then, as it does now, that it would be error to instruct the jury on these factors. The Court did not want to supply to the jury an incomplete list of factors or suggest factors that, under Saudi law, are not “factors” embraced by the Hanbali School. Moreover, the Court did not believe that the jury would be able to meaningfully engage in an analysis of each of the factors without creating tremendous confusion and uncertainty. This situation is a good example of the difficulty in applying Saudi law in a *jury* trial. A Saudi judge exercises tremendous discretion and is not bound by precedent. A Saudi judge is free to consider whatever evidence he feels is worth considering and disposing of any evidence he does not consider worthwhile. In other words, under the Saudi legal system, Delaware Rule of Evidence 403 has no place. Here, the Court exercised its discretion in determining not only what the Saudi law is, but how it should be explained to the jury. Obviously, many of the concepts of Saudi Arabian law are not easily understandable to a U.S. judge, much less a lay person in the United States. The Court in this case attempted to set forth the elements of the tort and convey to the jury in a clear, understandable manner the circumstances under which *ghasb* damages would be awardable. The Court could not present to the jury every conceivable circumstance under which *ghasb* damages could be awarded, nor could it tell the jury, based on information

available to it, that it is “rare” for juries to award damages for *ghasb*. In the Court’s view, neither instruction would have been appropriate. The factors Mr. Wolfson suggested are factors that a judge *could* analyze. The factors invite considerations that an American jury would not be permitted to consider, such as “a desire to find the middle ground between competing litigants,” in other words, a compromise verdict or a consideration of the consequences of the jury’s verdict. Factor 5 may have prompted the jury to balance ExxonMobil’s right to recover any wrongfully taken principal amounts against the *possibility* of undue hardship to SABIC. Such an instruction would invite inappropriate considerations by the jury having no place in deliberations and encourage the jury to engage in endless speculation about the “possible” undue hardship that SABIC might experience if ordered to pay damages. In addition, the Court was concerned that Factor 2 impermissibly injected into the case the issue of statute of limitations which the Court had ruled pretrial was contrary to Saudi law. To suggest to the jury that ExxonMobil’s delay in asserting its rights under the contract could be considered by it when deciding whether or not to award damages for usurpation flies in the face of the Saudi substantive law which provides that property rights are eternal and cannot be extinguished by the passage of time. SABIC calls the usurpation damages “extraordinary relief.” It makes this claim based

on Dr. Vogel's testimony alone. There are no authoritative texts cited to the Court by any expert that convince the Court that the jury's award of usurpation damages under these particular circumstances was inappropriate or violative of Saudi law. Moreover, simply because SABIC's expert is unable to name a case in which a Saudi judge awarded damages for usurpation is of little import to this Court considering that Saudi law does not recognize *stare decisis* and Saudi law opinions are not published. To say that usurpation damages are "highly unusual" presumes that there are Saudi law cases where judges refuse to award damages for usurpation even when the elements have been clearly established. No such case law was provided to the Court, nor could it be, given the nuances of the Saudi law system. Moreover, whether a form of damages is "unprecedented" is also irrelevant if such damages are available according to the authoritative Hanbali texts which are the primary works consulted by Saudi judges to determine the law applicable to the type of dispute raised in this case.¹⁸ Thus, whether a usurpation damages award is unprecedented is utterly meaningless given the obligation of any judge employing Saudi law to exercise *ijithad* in a particular case and under a legal system which resists the concept of

¹⁸See Volume One Expert Rep. & Witness Dep. Cited in Renewed Mot. J. Matter of Law & Mot. New Trial at T-2, ¶ 8, (Aff. Frank E. Vogel (Sept. 16, 2002); Saudi Law Hr'g Morning Session at 30-31 (Prof. Hallaq's testimony).

precedent and *stare decisis*. By way of analogy, under U.S. law, punitive damages are rarely awarded, yet we do not instruct the jury about the frequency or lack of frequency of such awards.

13. SABIC's argument that damages for *ghasb* are rarely awarded in the Saudi legal system and are virtually unprecedented is unsubstantiated, unverifiable and irrelevant in the Court's view. The Court finds that there is a legally sufficient evidentiary basis for a reasonable jury to find that ExxonMobil established by a preponderance of the evidence the elements of *ghasb*. The Court instructed the jury that if ExxonMobil proved the elements of *ghasb*, the jury "may" award damages in addition to any amount awarded for breach of contract "based upon any profits you may determine SABIC derived by using in its operation" the usurped money. The Court specifically instructed the jury, consistent with Saudi law, that any damages awarded for usurpation "may not include any interest." The jury verdict is not against the great weight of the evidence and the Court finds no error in the jury instructions relating to the award of damages for *ghasb*. Consequently, the Court denies SABIC's Renewed Motion for Judgment as a Matter of Law and will not grant remittur or a new trial.

IT IS SO ORDERED.

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Jan R. Jurden, Judge