

Filing # 61207203 E-Filed 08/31/2017 02:58:00 PM

IN THE CIRCUIT COURT OF THE
4th JUDICIAL CIRCUIT IN AND FOR
DUVAL COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

CASE NO. _____

APR ENERGY, LLC, a Florida limited liability
company, POWER RENTAL ASSET CO TWO
LLC, a Delaware limited liability company, and
POWER RENTAL OP CO AUSTRALIA LLC,
a Delaware limited liability company,

Plaintiffs,

v.

BAKER & MCKENZIE, an Australian
Partnership,

Defendant.

_____/

Complaint

Plaintiffs APR Energy, LLC (“APR”), Power Rental Asset Co Two LLC (“AssetCo”),
and Power Rental Op Co Australia LLC (“OpCo”) sue Defendant Baker & McKenzie, an
Australian Partnership (“Baker”), and state:

Parties, Jurisdiction and Venue

1. This is an action for damages in excess of Fifteen Thousand Dollars (\$15,000.00)
exclusive of interest, costs, and attorney’s fees.

2. APR is a limited liability company established under the laws of Florida, with its
principal place of business in Jacksonville, Florida.

3. AssetCo is a limited liability company established under the laws of Delaware,
with its principal place of business in Jacksonville, Florida.

4. OpCo is a limited liability company established under the laws of Delaware with its principal place of business in Jacksonville, Florida.

5. Baker is an Australian Partnership with its main business location in New South Wales, Australia. It is a member of Baker & McKenzie International, “a global law firm structured as a Swiss Verein” with member law offices around the world, including Miami, Florida.

6. Baker advises Australian and foreign companies both inside and outside of Australia. It markets itself as a “one-stop-shop” with the capability of engaging 77 offices worldwide to execute “cross-border” transactions.

7. Jurisdiction is proper in that Defendants committed tortious acts within the State of Florida and/or caused injury to persons or property within the State of Florida arising out of acts or omissions by the Defendant outside the state, and, at the time of injury, the Defendant was engaged in solicitation or service activities within this State, giving rise to Plaintiffs’ claims herein.

8. Venue is proper because the conduct and causes of action set forth herein accrued and/or occurred in Duval County and Miami-Dade County, Florida.

FACTS COMMON TO ALL COUNTS

Background

The Underlying Agreements

9. This case arises from the lease of four General Electric model TM 2500 mobile gas turbine generator sets comprising gas turbines and associated auxiliary equipment (“the Turbine Sets”) intended for installation at a temporary power station established by Regional Power Corporation (“Horizon Power”) a statutory Australian body.

10. Through a “Design Build Operate and Maintain Contract” dated January 23, 2013, Horizon Power contracted with Forge Group Power Party Ltd (“Forge”) to design the power station and install the necessary equipment.

11. General Electric International, Inc. (“GEI”), a subsidiary of General Electric Company (“GE”) is a Delaware corporation with its principal place of business in Schenectady, New York.

12. On March 14, 2013, Forge and GEI entered into a Contract for Rental Power Generation Equipment and Supply of Associated Services (“Lease”). The Lease provided for the rental by GEI to Forge of four of GEI’s Turbine Sets identified as TM33, TM35, TM36, and TM37, and for the supply of associated services.

13. On July 2, 2013, ANZ Bank, the principal lender of Forge, recorded a security interest extending Forge’s indebtedness to its principal lender in the Turbine Sets.

14. The GEI turbines were manufactured in Ohio and delivered to GEI’s facility in Houston, Texas for final assembly and packing. Forge took delivery of the first two Turbine Sets in Houston, Texas on or about September 5, 2013, and the second two in Houston, Texas on or about September 27, 2013.

15. The Lease provided that GEI personnel were responsible for preparing and assembling the Turbine Sets for shipping and delivery to Forge (through Forge’s chosen shipping agent).

16. GEI’s delivery to Forge occurred when Forge’s shipping agent, P.T. Rolitrans International (“Rolitrans”), took possession of the Turbine Sets at GEI’s Houston facility.

17. The Lease provided that Forge would be solely responsible for transportation of the Turbine Sets (including carriage and the expense of shipping) from GEI's facility to the power plant in Western Australia.

18. On September 5, 2013, Rolitrans caused the first two Turbine Sets (TM33 and TM35) to be placed on a ship at Galveston, Texas. On September 27, 2013, it caused the remaining Turbine Sets (TM36 and TM37) to be placed on another ship, also at Galveston, Texas. The four Turbine Sets were shipped by Forge to Australia for installation at the Horizon facility.

19. For a two-year term, the Lease provided that Forge would have the right to possess and use the Turbine Sets, at which point, subject to extension, they were to be returned to GEI. The Lease further provided, however, that GEI was to maintain, at all times, the sole right, title and interest in the Turbine Sets.

20. The Lease also gave GEI the right to terminate the Lease should Forge become insolvent or have a receiver or trustee appointed for the benefit of its creditors or seek protection from creditors. In that event, Forge was also required to return the Turbine Sets to GEI.

APR Entities Retain Baker

21. APR is the head of operations for several interrelated companies commonly known as the APR Group.

22. APR provides both temporary and long-term power solutions across the globe. It is a world-wide leader in providing rapidly deployable, large scale power generation facilities to customers in need or in under-served markets.

23. During the summer of 2013, APR began negotiations with GE to acquire GE's temporary power generation and power rental business and certain related assets. In connection

therewith, APR examined various GE power rental projects in five different countries or jurisdictions that it might acquire including the subject Lease.

24. APR concluded that a complex cross-border transaction of this nature required a comprehensive legal analysis. At the time, APR had extensive and ongoing experience with Baker & McKenzie's law offices in various locations worldwide, who provided advice to APR in Florida, and was aware of its international capabilities.

25. As a consequence, on or about September 13, 2013, APR retained Baker to provide due diligence advice for the potential purchase of GEI's interests in the Lease and the Turbine Sets to be located in Australia during the performance of the Lease.

26. Thereafter, and at all times material, Baker provided legal advice directly to Plaintiffs at their principal place of business in Jacksonville, Florida and/or through Plaintiffs' outside counsel in Miami, Florida.

27. On September 24, 2013, Baker advised APR that it had identified only one "red flag" issue "regarding potential stamp duty liability."

28. Thereafter, on September 27, 2013, Baker authored a draft "Legal review report regarding Project Horizon contract" which it forwarded to APR's outside counsel in Florida. In this report, Baker did not alert APR of any other "red flag" issues. Instead, Baker stated: "We would strongly recommend that APR Energy registers its interest in the assets to be acquired as part of the business on the PPS register¹." A second draft report dated October 2, 2013, contained identical language.

¹ The Personal Properties Securities Register is an electronic register that allows security interests in personal property to be registered and searched in accordance with the PPSA and is referred to as the "PPS register" or "PPSR."

29. In connection with the due diligence activities, APR told Baker that GEI's interest in the Lease and GEI's interest in the Turbine Sets would be assigned to one or more newly-created entities that would thereafter be owned or controlled by APR individually or by one or more related members of the APR Group.

30. Thus, Baker was fully aware that it would be providing legal advice not merely to APR, but also to the newly-formed entities, individually and on APR's behalf. Until the precise names of the new companies were known, Baker simply used terms such as "NewCo" in recognition of the proposed arrangement.

31. In the expectation that both the assets and contract would be held by these separate companies created by GE and sold to APR or its related entities, Baker also provided pertinent tax and registration advice in addition to its due diligence responsibilities.

32. At all relevant times, Baker represented itself as having the necessary expertise, experience and knowledge needed to advise Plaintiffs, in Florida, of the intricacies of Australian law upon which representations Plaintiffs reasonably relied on, to their detriment.

APR and GE Reach Agreement

33. On October 22, 2013, in reliance on Baker's due diligence advice, APR recommended to its parent company APR Energy plc that it enter into an agreement with GE to purchase a number of global assets, including the Lease and the Turbine Sets to be located at the Horizon facility.

34. Based on Baker's advice and APR's recommendation, APR Energy plc entered into a Business Transfer Agreement with GE for the acquisition by affiliates of APR and APR Energy plc of GEI's TM2500 power rental business and related assets including the Lease and

Turbine Sets. GE agreed that prior to closing, its subsidiaries, including GEI, would hold all ownership interests in two newly-formed limited liability companies: AssetCo and OpCo.

35. Thereafter, on October 27, 2013, as agreed, GEI assigned the assets and rights comprising this business to AssetCo and OpCo. GEI assigned its ownership of the Turbine Sets to AssetCo and assigned the Lease including the right to receive rental payments to OpCo, with an effective date of October 22, 2013.

36. On October 28, 2013, in a related transaction, GEI sold and assigned the membership interests in AssetCo and OpCo to APR Holdings Limited (“APR Holdings”), a parent company of APR, such that APR Holdings became both a parent and a creditor of AssetCo and OpCo through an intercompany loan.

37. The Turbine Sets arrived at the Horizon power plant site in Western Australia on October 19, 2013 (TM33 and TM35) and on November 11, 2013 (TM36 and TM37). Shortly thereafter installation and commissioning work began, and rent became payable on January 1, 2014.

The PPSA

An Overview

38. The above described transactions, for which Baker was retained to provide due diligence advice to Plaintiffs in Florida, necessarily required a comprehensive understanding of Australia’s *Personal Property Securities Act* 2009 (Cth) (the “PPSA”) which took effect on January 30, 2012.

39. The PPSA introduced a revolutionary new national regulatory framework in Australia for determining priorities for persons defined as holding security interests in personal property.

40. Significantly, the PPSA gives expansive meaning to the concept of a security interest by encompassing within that term the interests of a lessor who is regularly engaged in the lease of goods.

41. The PPSA does not apply to an interest in a fixture (which under settled Australian law is defined to mean goods that are affixed to land) or, at the time, the lease of goods for a period of one year or less.

42. The Lease is governed by the PPSA because its term exceeds one year and it involves goods (the Turbine Sets) that are not affixed to the land.

Perfecting a Security Interest under the PPSA

43. Under Australian law, once the PPSA governs a particular security interest, the significance of ownership or title in a good as those terms are commonly understood worldwide becomes irrelevant in the case of insolvency if the good is then in the possession of the insolvent entity. Under this Australian law, the lessor is deemed to be the “holder” of a security interest, whose interest is vulnerable so long as the security interest remains unperfected.

44. Perfection occurs when the lessor registers its security interest on the PPSR Register. The lessor’s interest is fully perfected if it is recorded within 20 business days of the date of the lease. Otherwise, under the priority rules established under the PPSA, security interests recorded earlier in time prevail.

45. One exception to this rule of priority is the Purchase Money Security Interest (PMSI), defined in Section 14 of the PPSA. A PMSI affords the lessor a “super priority” that overrides non-PMSI security interests registered earlier in time. To be effective, however, a PMSI security interest must be recorded no later than 15 days after lessee obtains possession of the leased property (Section 62 of PPSA).

46. GEI did not register the Lease on the PPS Register at any time either as an ordinary perfected security interest or as a PMSI.

Vesting Under the PPSA and Corporations Act

47. If the lessor has not perfected its security interest at the time the lessee in possession of a leased good goes into administration (the equivalent of bankruptcy), under Section 267 of the PPSA, the lessor's deemed security interest immediately "vests" in the lessee under the control of its external controllers in insolvency. Any proceeds realized from the property in question are thereafter distributed among secured creditors who have perfected security interests in assets of the lessee, including the vested security interest according to their respective priorities, and the remainder is shared among the general creditors of the lessee.

48. Vesting can also occur as a result of the application of the *Corporations Act 2001* (Cth). Under section 588FL of this Act, unless the security interest is registered within 20 business days of the date of the lease agreement, if registration occurs less than 6 months before the date of the appointment of administrators, vesting will take place the instant before the lessee company goes into administration. Satisfaction of the requirements for PMSI priority will not prevent vesting under 588FL of the *Corporations Act 2001* (Cth).

The Forge Insolvency

49. On February 11, 2014, merely forty-one (41) days after the commencement of the rental term and slightly more than 6 months after ANZ Bank recorded a blanket security interest in the Turbine Sets, voluntary administrators were appointed to Forge pursuant to the *Corporations Act 2001* (Cth).

50. Immediately thereafter, ANZ Bank appointed Mark Mentha and Scott Langdon of KordaMentha Pty Ltd., as Receivers and Managers of Forge (the "Receivers").

51. On February 26, 2014, GEI, with the consent of AssetCo and OpCo, gave notice of termination of the Lease based on Forge's insolvency.

52. On March 18, 2014, Forge was placed into voluntary liquidation by its creditors. AssetCo immediately demanded the return of the Turbine Sets as authorized by the Lease.

53. Notwithstanding the unambiguous terms of the Lease, the Receivers refused to return the Turbine Sets.

54. The Receivers maintained that upon delivery of the Turbine Sets in Houston, Texas, under the PPSA, an unperfected security interest attached to the Turbine Sets, and once Forge declared insolvency, GEI's unperfected security interest vested in Forge immediately prior to the appointment of administrators, thereby effectively terminating GEI's entire interest in the Turbine Sets.

55. Once Baker learned of Forge's insolvency, it continued to provide legal representation to APR, AssetCo and OpCo, in Florida, without advising Plaintiffs of its own role leading to the unanticipated vesting of title and ownership in the Lease and the Turbine Sets in Forge of GEI's unperfected security interest in the Turbine Sets.

56. Baker did not recommend that Plaintiffs invoke the arbitration clause of the Lease (Section 30), which provided for arbitration in London under the London Court of International Arbitration Rules. Section 30 required the arbitrators to "give full force and effect to the intent of the Parties as expressed in [the] contract," and to apply the governing law [Western Australia] only "if a solution is not found in [the] contract."

57. Instead, Baker, ostensibly on Plaintiffs' behalf, entered into negotiations with Forge, the Receivers, and GEI, which culminated in an Interim Arrangement Deed on July 22, 2014.

58. Under the terms of the Interim Arrangement Deed, which was executed in Florida and Australia, AssetCo and OpCo agreed to dismiss all US proceedings against Forge and the Receivers, accept the jurisdiction of the Australian courts, and post a security bond through a Letter of Credit in the amount of US \$44 million (the “LOC”). In exchange, Forge and the Receivers agreed to release the Turbine Sets, thus enabling OpCo, after a lengthy and costly delay, to re-lease them directly to the state-owned entity in Western Australia.

59. Thereafter Forge, through the Receivers, commenced a judicial action in Australia to determine whether Forge or the APR entities possessed title to the Turbine Sets. In the Australian proceedings Baker contended that the Turbine Sets were “fixtures” and thus not subject to the PPSA, even though Baker was fully aware that the Turbine Sets were not fixtures under Australian law.

The LOC

60. On July 31, 2014, Bank of America, N.A. (“Bank of America”), acting through its branch in San Francisco, issued the LOC for an aggregate amount of US \$44 million, to Forge.

61. AssetCo was the applicant and account party under the LOC.

62. Pursuant to the LOC, the proceeds of the LOC were available to Forge, through the Receivers, upon the presentation of a draft, or drafts, drawn upon Bank of America and accompanied by a written statement, signed by an authorized “officer” of Forge (in this case, “a receiver and manager appointed to Beneficiary”).

63. On February 11, 2016, in the Equity Division of the Supreme Court of New South Wales (the court of first instance), the Court ruled that the Lease is a PPSA lease, and that Forge’s right, title or interest in the Turbine Sets was superior to that of AssetCo or OpCo.

64. On February 6, 2017, the Court of Appeal of the Supreme Court of New South Wales dismissed the appeal (thereby affirming the decision of the Supreme Court).

65. On June 15, 2017, the High Court of Australia denied special leave on the basis that an appeal would enjoy no further prospect of success.

66. On June 27, 2017, the LOC was drawn by Forge for the entire amount of the bond.

67. All conditions precedent to the bringing of this action have occurred, been performed, or been waived.

Count I – Legal Malpractice

68. Plaintiffs restate and re-allege each of the foregoing allegations as if fully set forth herein.

69. Plaintiffs retained Baker to provide due diligence legal advice consistent with reasonable professional standards.

70. Accordingly, Baker owed Plaintiffs the duty to exercise the degree of care, skill and competence that reasonable competent attorneys would exercise under similar circumstances.

71. Baker breached its duties to the Plaintiffs in many ways, including, but not limited to, the following acts or omissions:

- a. failing to advise that GEI did not register its security interest in the Turbine Sets within 20 days of entering into the Lease;
- b. failing to advise that GEI did not register its security interest in the Turbine Sets at any time;
- c. failing to advise that ANZ Bank recorded a security interest in July of 2013 in the Turbine Sets;

- d. failing to provide any advice regarding the legal consequences of GEI's failure to register its security interest in the Turbines within 20 days of entering into the Lease or at any time thereafter;
- e. failing to provide any advice regarding the legal consequences of GEI's failure to register a PMSI security interest within 15 days of the delivery of possession of the Turbine Sets to Forge;
- f. failing to provide any advice regarding the legal consequences of ANZ Bank having recorded a security interest in the Turbine Sets;
- g. failing to provide any advice regarding the legal distinction between registering a security interest in the ordinary course versus registering as a PMSI;
- h. failing to provide any advice regarding Forge obtaining possession of the Turbine Sets;
- i. failing to advise that the Plaintiffs would forfeit ownership of the Turbine Sets if Forge became insolvent during the course of the Lease;
- j. failing to advise Plaintiffs to take all reasonable steps to prevent Forge from obtaining or maintaining possession of the Turbine Sets;
- k. failing to advise Plaintiffs that they should take all reasonable actions to prevent the shipment of the Turbine Sets to Australia;
- l. failing to advise that under the PPSA, delivery to Forge occurred when Forge's shipping agent took possession of the Turbine Sets from GEI;
- m. failing to advise of the extraordinary and unreasonable risk associated with entering into the Business Transfer Agreement and related agreements in light of GEI's failure to register and ANZ's actions;
- n. repeatedly providing misleading, incomplete, and counterproductive advice recommending that Plaintiffs register their security interest under the PPSA when it knew or should have known that taking such action would be futile;
- o. failing to provide appropriate due diligence advice consistent with reasonable professional standards;
- p. providing improper legal advice once it learned of Forge's insolvency; and
- q. failing to advise that Plaintiffs should have pursued LCIA arbitration versus litigation in Australia.

72. As a direct and proximate result of Baker's negligence, Plaintiffs suffered damages including payment of the US \$44 million bond and associated costs, loss of rental profits, attorney's fees incurred and paid in order to protect their interests, damage to reputation, and diminution of company value.

WHEREFORE, Plaintiffs demand judgment against Defendant for damages including compensatory damages, costs, pre-judgment and post-judgment interest, and granting such relief as the Court deems appropriate.

Count II – Breach of Fiduciary Duty

73. Plaintiffs restate and re-allege each of the foregoing allegations as if fully set forth herein.

74. Plaintiffs retained Baker to provide due diligence advice consistent with reasonable professional standards.

75. As the law firm representing Plaintiffs, Baker stood in a special relationship of trust confidence and responsibility.

76. Plaintiffs placed their utmost confidence in Baker, and Baker owed Plaintiffs the heightened duty of care and loyalty of a fiduciary.

77. Baker breached its duty of loyalty and care to Plaintiffs in many ways including, but not limited to, the following acts or omissions:

- a. misleading and/or concealing from Plaintiffs its multiple failures to exercise the degree of care, skill and competence that reasonable competent attorneys would exercise under similar circumstances;
- b. failing to advise of significant and impermissible conflicts of interest in Baker's continued representation of Plaintiffs once it learned of Forge's insolvency;
- c. providing improper advice regarding strategy to protect its own interests at the expense of the client; and

- d. concealing matters that were relevant, material, and necessary to Plaintiffs' legal position and strategy.

78. As a direct and proximate result of Baker's breaches of its fiduciary duty as Plaintiffs' counsel, Plaintiffs suffered damages including payment of the US \$44 million bond and associated costs, loss of rental profits, attorney's fees incurred and paid in order to protect their interests, damage to reputation, and diminution of company value.

WHEREFORE, Plaintiffs demand judgment against Defendant for damages including compensatory damages, costs, pre-judgment and post-judgment interest, and granting such relief as the Court deems appropriate.

Count III – Disgorgement of Attorney's Fees and Costs

79. Plaintiffs restate and re-allege each of the foregoing allegations as if fully set forth herein.

80. This is an action for disgorgement and recoupment of attorney's fees unjustifiably charged and unlawfully received.

81. Baker failed to perform legal services in accordance with reasonable professional standards, and failed to earn the fees Baker charged Plaintiffs that were paid.

82. Baker should not be permitted to retain its ill-gotten gains.

83. The payments made by Plaintiffs should be disgorged and refunded by Baker.

WHEREFORE, Plaintiffs demand judgment against Defendant for damages including compensatory damages, disgorgement of fees, costs, pre-judgment and post-judgment interest, and granting such relief as the Court deems appropriate.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on all issues so triable as a matter of right.

DATED this 31 day of August, 2017.

/s/William L. Petros

WILLIAM L. PETROS, ESQ.

Florida Bar No. 378690

BRETT J. NOVICK, ESQ.

Florida Bar No. 107536

Attorneys for Plaintiffs

WILLIAM PETROS LAW

4090 Laguna Street, Second Floor

Coral Gables, Florida 33146

Tel: (305) 446-3699

Fax: (305) 446-2799

Primary email: wlpetros@petroslaw.com

bnovick@petroslaw.com

Secondary email: pmontalvo@petroslaw.com