Merriwa Nominees Pty Ltd v Romar Positioning Equipment Pte Ltd
[2004] SGHC 176

Case Number : Suit 315/2003, TA 1/2004

Decision Date : 13 August 2004

Tribunal/Court : High Court

Coram : Ching Sann AR

Counsel Name(s) : B Mohan Singh (KK Yap and Partners) for plaintiffs; Victor Leong (Chan Kam Foo and Associates) for defendants

Parties : Merriwa Nominees Pty Ltd — Romar Positioning Equipment Pte Ltd

13 August 2004

Assistant Registrar Ching Sann:

The Plaintiffs and the Defendants were contractual joint venture partners in the provision of trenchless horizontal directional drilling services to Reliance Engineering & Associates Private Limited ('Reliance'), an Indian company. Pursuant to this contract, the parties agreed that the Defendants would pay to the Plaintiffs an amount equal to 50% of all payments received by the Defendants from Reliance, less "reasonable expenses incurred by [the Defendants].

2 When the relationship between the parties soured, the Plaintiffs brought an action against the Defendants seeking an account of the monies due to the Plaintiffs. By a judgment dated 8 January 2004, the Defendants were ordered to render such an account, which was eventually provided on 13 April 2004 through the Defendants head of finance Ms Lim Siew Geok. According to the account rendered, the balance remaining was US$150,647.65, such that the Plaintiffs' share was US$75,323.83.

3 The above account was contested by the Plaintiffs, who raised objections to seven categories of deductions made by the Defendants in compiling the accounts:

Category	Nature	Quantum
1	Cost of feasibility study	US$100,000
2	Various invoiced amounts	US$2,820
3	Indian withholding tax	US$130,667.40
4	Indian withholding tax	US$72,646.53
5	Salary payments	US$85,835.66
6	Expense claims	US$9,234.23
7	Administration expenses	US$285,000

Category 1

4 The Plaintiffs' claim in respect of this category was that the money was not partnership money, but that it belonged solely to the Plaintiffs' James Johnson. Hence, the full sum of US$100,000 ought to be added to the final figure due to the Plaintiffs. The basis for the Plaintiffs' claim was the fact that this payment, made on 31 January 2001, had been made in response to an invoice dated 5 December 2000 in respect of a "Lump Sum Contract Payment for 'Feasibilities Studies Contract'".

5 The Defendants' explanation for this payment was that although Mr Johnson had indeed prepared a feasibility study, he had already been paid about A$4,000 for it sometime in March 2000. Instead, this payment was actually for mobilization expenses, which Reliance had agreed to pay when it was agreed between Reliance and the joint venture that the hourly rate payable to specialists engaged to work on the Reliance project would be reduced from US$75 to US$70. As there would be problems prepaying monies out of India if it was described as an upfront payment, it had been agreed that Mr Johnson's earlier report would be repackaged and sent again to Reliance, as a pretext for the payment of the mobilization expenses.

6 It is apt at this juncture to note that much was made in submissions by Plantiffs' counsel of the fact that the Defendants were in the position of trustees being called to account, and that the duty on them was of the highest standard. While I agreed with this characterization of the duty borne by the Defendants, I was of the view that the explanation offered by the Defendants as to the payment of the US$100,000 could nevertheless be accepted, even if, in doing so, the Defendants had admitted to mischaracterising the nature of the payment in their records. In so deciding, I noted that Mr Johnson had stated in his affidavit of evidence-in-chief, filed for the trial on liability, that Reliance had agreed, in November 2000, to pay the joint venture US$100,000 as mobilization expenses. The coincidence in amount, as well as the closeness in time of these two events, led me to conclude that the Defendants' explanation was to be preferred. In any event, I also found the Plaintiffs' claim that a feasibility report had a price tag of US$100,000, when Mr Johnson had only been paid A$4,000 for an earlier feasibility report, to be rather far-fetched. This was all the more so when Mr Johnson had stated at the trial that about half of the second report consisted of the same material as that comprising the first report he had submitted, and that it had been the Defendants that assembled the second report, without his input or supervision.

7 Hence, I concluded that the sum comprising this category had been properly characterized as partnership money in the accounts, and could not be the subject of a claim by the Plaintiffs.

Category 2

8 The dispute raised by the Plaintiffs in relation to this category arose from the fact that the invoices rendered in support showed payments due of US$2,235,913, while the accounts showed a figure of US$2,233,093. The Defendants' explanation for this shortfall was that there were thirteen invoices for which Reliance adjusted the amount slightly when making payment. As support for this contention, the Defendants tendered a table showing the shortfall in payment by Reliance. Be that as it may, given that the Defendants were trustees rendering an account to the Plaintiffs, I was of the view that this explanation did not suffice to absolve the Defendants of responsibility for accounting for the shortfall. As such, I concluded that the amount of US$2,820, comprising Category 2, was to be added to the final account.

Categories 3 and 4

9 The Plaintiffs contested these deductions on several grounds: first, they relied on clause

2.3(c) of the Service Agreement concluded between the parties, which provided that "All payments to [the Plaintiffs] shall be gross without any deduction of taxation." Hence, the Plaintiffs contended that any tax withheld by Reliance in making the payments to the Defendants to hold for the joint venture could not be included when compiling the accounts. The Defendants' reply to this submission was that clause 2.3(c) referred only to any tax paid by the Defendants or the Plaintiffs, and could not be extrapolated to include any tax paid by Reliance. The Defendants also relied on clause 2.3(a), which stated that the parties' shares were to be calculated from all payments "received" by the Defendants.

10 Reading clauses 2.3(a) and (c) together, I agreed with the Defendants' contention that clause 2.3(c) could only relate to any tax payable by the Defendants or the Plaintiffs, but not Reliance. However, this was not the end of the matter. I noted that the deductions comprising these categories were for withholding tax, ie that Reliance had withheld the payments in question in anticipation of the need to pay taxes to the Indian government. Bearing in mind the trust relationship in the present situation, if the Defendants could show that such payments had indeed been made, then the deductions were justified. If, however, the payments had not in fact been made, then the burden was on the Defendants to seek payment of the withheld monies from Reliance, and their failure in this regard could not be passed on to the joint venture.

11 The Defendants purported to rely on a series of documents, introduced through the videolink evidence of Mr Hardeo Chaturvedi, an accountant, as evidence that Reliance had paid the withheld monies to the Indian government. The Plaintiffs contended that these documents were inadmissible for hearsay as Mr Chaturvedi was not the maker of the documents. Allegations were also made of fraud and deceit on the part of the Defendants concerning but not restricted to their allegedly insincere attempts at acquiring the attendance of a competent witness at the taking of account, and of widespread fraud and corruption in India in general. For their part, the Defendants contended that their expert witness, Mr Lai Seng Kwoon, an accountant, had accepted documents which evidenced the payment of the withholding tax.

12 Dealing first with Mr Lai's evidence, I noted that it was not strictly correct to say that Mr Lai had accepted the documents which evidenced payment of the tax by Reliance. Instead, Mr Lai stated in his report that he had "sighted copies of certificates of deduction of tax at source for the taxes withheld and paid by Reliance". He went on to conclude that on the basis of these documents, "the taxes appeared to have been withheld by Reliance". In view of the careful wording of Mr Lai's conclusion, I was of the view that this part of his report was not relevant to the present issue, which was on whether the tax had in fact been paid.

13 Turning now to the evidence of Mr Chaturvedi, without even considering the allegations of fraud made by the Plaintiffs, it was clear that he was not the proper witness to introduce the supporting documents in question. Mr Chaturvedi had not even signed off on the tax "challans" in question, nor had he been approached by the Defendants to testify on the documents until the eleventh hour. Instead, the Defendants had concentrated their efforts on securing the attendance of one Mr Rajesh Chaturvedi and one Mr Narayan, both of Mr Chaturvedi's firm, and indeed it had been Mr Rajesh Chaturvedi whose signature was on the documents the Defendants sought to rely on. Nevertheless, Mr Chaturvedi claimed that he was competent to introduce the documents as he had assisted in their preparation and was familiar with the situation.

14 Mr Chaturvedi's own actions, however, belied his words. It was patently obvious that Mr Chaturvedi was not familiar with his own affidavit of evidence-in-chief, which comprised in the main the supporting documents. He needed the prompting of two unidentified men seated next to him before he could even begin to navigate the document, and the two men at one point even leafed

through the affidavit to point out various pages which Mr Chaturvedi then gave testimony on. When asked to leave the room early on, these unidentified men purported to comply with the direction but in truth only remained off camera. That they continued to interfere with Mr Chaturvedi's testimony was obvious from the oral promptings which they continued to give him, and which were audible over the videolink.

15 The documents purporting to show the payment of tax not being received into evidence, I concluded that the Defendants had failed to show that such the tax withheld by Reliance had in fact been paid to the Indian government. They were hence not justified in reflecting these alleged tax payments in the account, and the sum of US$203,313.93 (being the total of Categories 3 and 4) was added to the final account.

Category 5

16 This category of deductions concerned alleged salary payments, which the Plaintiffs contested as no salary vouchers or other documents had been adduced to support the payments. However, it was clear that the disputed sums were fully accounted for, either in the form of advices of telegraphic transfer from banks, or bank cheque deposit slips. The issue was whether such evidence sufficed for the exercise at hand.

17 The Defendants' expert witness, Mr Lai, was of the view that while the issuance of payment vouchers was a routine practice, it was not critical, and that the advices tendered by the Defendants were adequate to support the fact that these payments had been made. This assertion, however, had to be weighed with the fact that it was made patently clear during his cross-examination that Mr Lai had not been informed when he was instructed that he was to comment on the situation of a trustee giving an account to a beneficiary. Once he had been so informed, Mr Lai also accepted that since the present situation was a trustee situation, the rules and duties which applied to the Defendants were very strict, and also accepted that if a claim could not be supported by a receipt, it would be disallowed.

18 I was also mindful of the concession made by Mr Lai at the close of his cross-examination that his report was "irrelevant" where trust monies was concerned. However, given the context in which that admission was made, and the flow and direction which the cross-examination took, I was of the view that this concession related more properly to the issue of the Category 7 deductions, which are considered further below. Where the salary payments were concerned, I considered Mr Lai's testimony during cross-examination, viz. that receipts were needed to justify payments, to be consistent with the report. While the bank advices tendered by the Defendants were not as satisfactory as an acknowledgement of receipt from the alleged payees, they nevertheless showed that the contested payments had in fact been made. Hence, I concluded that it was proper for the Defendants to include the deductions in this category when rendering their account.

Category 6

19 It was conceded by the Defendants' Ms Lim during cross-examination that this deduction had been overstated by US$4,800 when the accounts were rendered, such that the deduction should only have been US$4,434.23. As to this balance, no document was adduced to support this deduction until the hearing itself, when Ms Lim referred to a table of payments and some receipts. The Plaintiffs contended that the table was self-serving and did not support the payments as being reasonably or validly made. The Defendants, for their part, then contended in submissions that this amount of US$4,434.23 had already been accounted for to the Plaintiffs when Mr Johnson was paid US$15,419.54 in July 2001, but did not explain how this was made out.

20 I noted that table which Ms Lim referred to as evidence supporting the expenses comprising the sum of US$4,434.23 was one which the Defendants themselves had created. Of the four expenses listed in that document, receipts were produced for only two items – namely advertising expenses in Singapore, and advertising expenses in Malaysia. It was pointed out in cross-examination, however, that the Malaysian advertising expenses had not been paid by the Defendants, but by a company called Hong Hua Guan Marine & Engineering Sdn Bhd. Ms Lim claimed that this company was the Defendants' Malaysian subsidiary, but there was no evidence proving this, much less the fact that the Defendants had reimbursed this company for the monies paid out. Bearing in mind the strict duties placed on the Defendants in the accounting exercise, I was of the view that only the sum attributable to advertisement in Singapore, which Ms Lim had put at US$363.47, were properly deductible. Hence, I added the figure of US$8,870.76 was added to the final account rendered.

Category 7

21 This category concerned deductions made by the Defendants to the tune of US$15,000 per month, which the Defendants claimed they were contractually entitled under clause 2.3(a) of the Service Agreement as "reasonable expenses". Ms Lim explained that she had arrived at this figure by considering first the Defendants' income as a whole, and then the Defendants' income which was attributable to the Reliance project, to arrive at a proportion. The Defendants' expenses as a whole had then been considered, and the same proportion as derived from the income figures was then applied to the expenses to derive the expenses attributable to the Reliance project. This method of calculation was initially supported by Mr Lai, who stated in his report that the use of revenue as a benchmark to allocate common costs was not unreasonable.

22 However, as had already been mentioned in paragraph 17 above, Mr Lai was not aware, until he was cross-examined at the account-taking, that he was reporting on a trustee situation. Once that was made clear, he conceded that his report was irrelevant to the present exercise. Another factor which had to be taken into account was the fact that Reliance paid for almost all of the joint venture's expenses, such as airfare, lodging and food. From Ms Lim's cross-examination, it appeared that the only expenses which the Defendants incurred for the joint venture were use of furniture, computer and electricity supply, invoices and email. I failed to see how any of these services could in any way costs more than a nominal sum per month, given that the entire project was based in India. I also found other expenses which Ms Lim regarded as chargeable to the Reliance project to be patently ludicrous, such as charging a vehicle usage fee and chauffeur's fees for her trips to the bank to pay in the worker's salaries. Finally, I was mindful of Mr Johnson's testimony that Mr Lim had told him that neither joint venture partner was to be allowed to claim expenses from the joint venture's accounts, such that invoices he submitted on behalf of the Plaintiffs were rejected by Mr Lim.

23 In light of all the above, I was of the view that the Category 7 deductions were not justified, and that the entire amount comprising these deductions had to be added to the final account.

Conclusion

24 In light of the foregoing, I concluded that the true amount to be rendered under the account was US$650,652.34, such that the Plaintiffs' share was US$325,326.17. I also awarded costs and interest to the Plaintiffs.