

Sincastle Enterprises Pte Ltd v Sulzer Chemtech Pty Ltd (formerly known as Towertech Pty Ltd) and another
[2011] SGHC 206

Case Number : Suit No 1063 of 2009
Decision Date : 16 September 2011
Tribunal/Court : High Court
Coram : Philip Pillai J
Counsel Name(s) : Wong Tze Roy (Goh JP & Wong) for the plaintiff; Malathi d/o das (Joyce A Tan & Partners) for the first defendant; Lim Joo Toon (Joo Toon & Co) for the second defendant.
Parties : Sincastle Enterprises Pte Ltd — Sulzer Chemtech Pty Ltd (formerly known as Towertech Pty Ltd) and another

Contract – Contractual terms

16 September 2011

Judgment reserved.

Philip Pillai J:

Introduction

1 In the present action, the plaintiff claimed that the first and second defendants were jointly and severally liable for \$191,692.27 in respect of goods and services that the plaintiff had provided to the first defendant under an agreement dated 15 April 2009 (“the Service Agreement”). It is undisputed by all parties involved that the sum of \$191,692.27 was due and owing to the plaintiff (“the agreed sum”).

2 The dispositive issue was whether the first defendant was liable for the agreed sum under the Service Agreement and, if not, whether the second defendant was liable for the agreed sum under an alleged oral collateral contract between the plaintiff and the second defendant. Also connected to this was the second defendant’s counterclaim against the plaintiff for a sum of \$21,084.00 pursuant to two outstanding invoices for services rendered by the former to the latter.

The Parties

3 The plaintiff is Sincastle Enterprises Pte Ltd (“Sincastle”).

4 The first defendant is Sulzer Chemtech Pty Ltd (“Sulzer”), a company incorporated in Australia and formerly named Towertech Pty Ltd.

5 The second defendant is Power-Vac Technology Pte Ltd (“Power-Vac”), a company incorporated in Singapore.

Background

6 Sulzer was engaged to carry out certain building and construction work for an Exxon SPA-X project located at Jurong Island, Singapore. Sulzer contracted with Sincastle to supply manpower and

equipment in this Jurong Island project, in a contract with Towertech Pty Ltd (currently named Sulzer), which was signed by both parties on 15 April 2009 (*i.e.* the Service Agreement).

7 In the Service Agreement, Sincastle set out its unit rates for supply of manpower in specified categories and for diesel. Manpower supply was also stated to be subject to availability and for the period until the end of May 2009. The Service Agreement also provided that Sincastle would charge for diesel supplied to Sulzer on the basis of the supplier's prevailing actual market price (plus GST), with a mark up of 10% (exclusive of GST). Lastly, the terms of payment under the Service Agreement were as follows ("the terms of payment clause"):

TERMS OF PAYMENT

As agreed, all supply of manpower, equipment, consumables or any request of whatsoever, **shall billed to** the following company:

POWER-VAC TECHNOLOGY PTE LTD

No. 48, Toh Guan Road East, #02-105

Singapore 608586

Tel: [xxx], Fax: [xxx]

Person-in-charge: Mr Philip Oh

The invoice copy shall be **submitted to TowerTech for verification purposes and upon approval**, the **invoice shall be submitted to POWER-VAC TECHNOLOGY to expedite the payment to us**.

The terms of payment shall be 30 days from the date of our invoice.

[emphasis added]

8 Before me, parties did not dispute that the agreed sum was due and owing to Sincastle and that Sulzer's had remitted sums exceeding the agreed sum to Power-Vac. Sulzer and Power-Vac had a separate bilateral agreement under which Power-Vac would consolidate all invoices payable by Sulzer to several third party contractors in Singapore and that Sulzer would then remit funds to Power-Vac following which Power-Vac would make payment on these invoices. Power-Vac received a 12% service charge from Sulzer for these services as an "administrative fee". [\[note: 11\]](#) This agreement between Sulzer and Power-Vac was not disclosed to Sincastle nor was it incorporated by reference into the Service Agreement.

9 However, Power-Vac did not remit the agreed sum to Sincastle for the reasons stated below at [\[11\]](#). Both Sulzer and Power-Vac denied any liability to Sincastle for the agreed sum.

10 It was Sulzer's position at trial that having made payment to Power-Vac in excess of the agreed sum, it had no further obligation to pay Sincastle. Sincastle's position, on the other hand, was that the terms of payment clause was no more than a payment mechanism under which Power-Vac was a "centralised point of payment for administrative purposes". Accordingly, Sincastle argued that notwithstanding Sulzer's payments to Power-Vac, the former remained liable to it for the agreed sum.

11 As for Power-Vac, it conceded that it had received the relevant invoices for the agreed sum from Sincastle and that it had received sums in excess of those due to Sincastle from Sulzer. It acknowledged that it was holding and willing to account for up to \$66,711.80 for the Sincastle invoices. As for the remaining \$124, 980.47 remitted by Sulzer, it was not paid to Sincastle as Power-Vac had used this sum for payment of third parties and in satisfaction of unrelated payments owed by Sulzer to Power-Vac.

12 The factual context behind this Service Agreement reveals that Sulzer was contracted to carry out building and construction work for the Jurong Island project in Singapore. Sulzer outsourced its manpower, equipment and consumable needs for the Jurong Island project to third party contractors, including Sincastle. The evidence in court revealed that the terms of payment clause had been required and the text was in fact provided by Sulzer.

13 The payment mechanism inserted in the Service Agreement by Sulzer was as follows:

(a) Sincastle was to submit its invoices to Sulzer for verification; and

(b) Only upon Sulzer's verification was Sincastle to bill Power-Vac.

14 The separate bilateral agreement, between Sulzer and Power-Vac, provided as between them as follows:

(a) Power-Vac was required by Sulzer to consolidate all the Sulzer verified invoices (including non-Sincastle invoices) and send them to Sulzer in Australia; and

(b) Sulzer would then arrange for funds to be remitted to Power Vac which would then pay on these verified and outstanding (including Sincastle) invoices.

Sulzer's liability for the agreed sum

15 The question of Sulzer's liability for the agreed sum turns entirely on the construction of the Service Agreement between Sincastle and Sulzer. At this point, it apposite to note that Power-Vac was not a party to the Service Agreement. Furthermore, the agreement between Sulzer and Power-Vac was not disclosed to Sincastle nor incorporated by reference in the Service Agreement. Though Sincastle's invoices for diesel supplies were addressed to Power-Vac as required by the Service Agreement, they expressly identified the Sulzer employee in charge, the Service Agreement quotation number as well as enclosed copies of the diesel suppliers' invoices which were addressed to Sincastle. As for manpower supplies, Sincastle's invoices were similarly worded and in fact enclosed copies of time sheets verified and signed off by Sulzer's project manager on the Jurong Island site. Accordingly, the consistent reference to Sulzer's employees in the invoices which were addressed to Power-Vac as required by Sulzer, re-iterated the bilateral nature of obligations between Sincastle and Sulzer as contracting parties.

16 Further, the terms of payment clause expressly provides that the bills are to be submitted to Power-Vac "to expedite the payment to us" (viz. Sincastle). As a matter of construction, it is one thing to expedite payment and another to substitute the payment obligation to a non-party to the

Service Agreement. It is clear from the Service Agreement read in its entirety that the contracting parties and obligations thereunder were directly and exclusively between Sincastle and Sulzer.

17 It is also clear that Sulzer required a billing process of consolidation and payment to be made through Power-Vac. This payment agent and process was required by Sulzer which outsourced its required manpower and supplies services. From the terms of payment clause, it is clear that Sulzer was approving, verifying and making all the payments for Sincastle's invoices, using Power-Vac only as a convenient intermediary to ensure timely payment to Sincastle. On this point, the following passage from Andrew Phang Boon Leong's, *Cheshire, Fifoot and Furmston's, Law of Contract Second Singapore and Malaysian Edition* (Butterworths Asia, 1998) at p 19 is apposite:

3 The effect of a payment to the agent

It may happen that either the principal or the third party settles with the agent, who, however, by reason of bankruptcy or fraud, fails to pass the money on to the creditor. The question then arises whether the payer is liable to pay over again. There are two separate cases.

First, the principal, having instructed his agent to buy goods, pays the purchase price to the agent, who fails to pay the seller.

Secondly, the principal instructs his agent to sell goods; the agent sells to a buyer and receives payment from him, but does not pay the principal.

[T]he general rule is that the principal remains liable to the seller [*Irvine v Watson* (1879) 5 QBD 102].

18 Accordingly, applying these simple principles, Sulzer remains liable to Sincastle where Sincastle remained unpaid on verified outstanding invoices, notwithstanding any bilateral disputes it might have with Power-Vac under its separate bilateral contract. The terms of payment clause in the Service Agreement when construed in the light of the full factual context of the arrangement between Sincastle and Sulzer does not have the legal effect of exculpating Sulzer from its direct contractual obligation to pay Sincastle on Sulzer's verified invoices. Sulzer's decision to route its payment through Power-Vac, which it later turns out Power-Vac had otherwise applied, cannot operate to discharge Sulzer's payment obligation to Sincastle. Accordingly, Sulzer remains liable to Sincastle for the agreed sum.

19 In closing, I note that it is surprising that Sulzer did not make Power-Vac a third party to Sincastle's action against it, pursuant to its independent payment agreement with Power-Vac and Power-Vac's admission of liability for \$66, 711.80 of the agreed sum (above at [\[11\]](#)). Perhaps extraneous factors not before the Court might adequately explain why and how Sulzer and Power-Vac have conducted their respective defence and counter-claim.

Sincastle's claim against Power-Vac

20 As Sincastle's claim against Power-Vac on a purported oral collateral contract was mounted in the alternative, in the light of my finding in its favour against Sulzer (above at [\[18\]](#)), I need not consider this prayer further.

Power-Vac's counterclaim against Sincastle

21 Power-Vac counterclaimed against Sincastle for certain goods and services provided to

Sincastle. A total sum of \$21,084.00 was claimed pursuant to the following invoices billed to Sincastle:

- (a) Invoice No. Pv049/09 dated 03/08/2009 for \$14, 084.00 for the provision of skilled welders for welding works at No. 10 Benoi Road ("welding works"); and
- (b) Invoice No. PV048/09 dated 03/08/2009 for \$7000.00 for the transport and consumables provided at the Exxon-Mobil SPA-X project ("transport and consumables").

22 In relation to Power-Vac's welding works claim, by way of an open letter from Sincastle's solicitors to Power-Vac's solicitors dated 24 June 2011, Sincastle conceded liability to Power-Vac's claim for \$14,084.00

23 In relation to Power-Vac's transport and consumables claim, Sincastle claimed that it had not made any request for transport or consumables for the ExxonMobil SPA-X Project and that in any event, no such service had been supplied by Power-Vac. As no evidence was produced by the counterclaimant of actual transport provided under the invoice tendered, or of equipment supplied under the supporting invoice adduced by Power-Vac, this claim must fail. Further, no attendance records of workers using the alleged transport provided or the transport entering the project site was adduced. Power-Vac was relying on a bare quotation and bare invoice in support of its claim for \$7000.00. In fact, in its closing submissions Power Vac stated, "[t]here is *no* documentary evidence to support the version given by either of the witnesses". [\[note: 21\]](#) As the burden fell squarely on Power-Vac and it has not produced satisfactory evidence to establish the same, the transport and consumables claim is dismissed.

Conclusion

24 By reason of my findings above, I make the following orders:

- (a) Sulzer to pay the agreed sum of \$191,692.27 to Sincastle with interest accrued at 5.33% per annum from the date it fell due.
- (b) Sincastle to pay Power-Vac \$14, 084.00 with interest accrued at 5.33% per annum from the date it fell due.
- (c) Sincastle's claim against Power-Vac is dismissed.
- (d) Power-Vac's claim for \$7000.00 is dismissed.
- (e) Cost orders:

- (i) In relation to Sincastle's claim against Sulzer, Sulzer to bear costs to be taxed on the District court scale.
- (ii) In relation to Sincastle's claim against Power-Vac, parties are to bear their own costs.
- (iii) In relation to Power-Vac's claim for \$14, 084.00, while Sincastle conceded liability prior to the commencement of trial, any costs incurred prior to 24 June 2011 will be borne by Sincastle.
- (iv) In relation to Power-Vac's claim against Sincastle for \$7000, Power-Vac to bear costs to be taxed on the District court scale.

[\[note: 1\]](#) Second Defendant's defence (Power-Vac), 13/01/2010 at [5].

[\[note: 2\]](#) Second Defendant's closing submissions (Power-Vac) dated 1 July 2011 at [33].

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