IN THE COURT OF APPEAL

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

22 June 2023

CASE No: AIFC-C/CA/2023/0017

State Institution "Astana Education Department"

Appellant

v

Buldirshin-2012 LLP

Respondent

JUDGMENT

Justice of the Court:

Justice Sir Stephen Richards

ORDER

The applications for permission to appeal and for suspension, pending an appeal, of the monetary payment ordered by the Court of First Instance are refused.

JUDGMENT

1. By a judgment dated 30 March 2023 in Case No. AIFC-C/CFI/2022/0003 the Court of First Instance of the Astana International Financial Centre ("the CFI") (Justice The Rt. Hon. Sir Jack Beatson FBA) determined a claim by Buldirshin-2012 LLP ("the Private Partner") against the City of Astana's Education Department ("the Public Partner") under a public-private partnership contract ("the PPP Contract") to construct and operate a kindergarten. The Court found largely in favour of the Private Partner and ordered the Public Partner to pay the Private Partner the sum of 1,776,174,926 KZT within 28 days of the handing down of the judgment.

2. This is an application by the Public Partner for permission to appeal against the CFI's decision and for suspension, pending an appeal, of the monetary payment ordered by the CFI.

3. Rule 29.6 of the AIFC Court Rules provides that permission to appeal may be given where the appeal Court considers that (1) the appeal would have a real prospect of success or (2) there is some other compelling reason why the appeal should be heard. By Rule 29.7 success on an appeal depends on establishing that the decision of the lower Court was (1) wrong or (2) unjust because of a serious procedural or other irregularity in the proceedings in the lower Court.

4. An application for permission to appeal made to the appeal Court will normally be determined on paper; and although an oral hearing is requested by the Public Partner, I am satisfied that the application can be fairly determined in this case on the papers without an oral hearing (see Rules 29.16 and 29.17 of the AIFC Court Rules). In addition to the Public Partner's application and supporting documents, the papers before the Court include written submissions on behalf of the Private Partner in opposition to the application, pursuant to Rule 29.13 of the AIFC Court Rules.

5. Reference should be made to the CFI's judgment for the background to the case and for the Court's detailed analysis and conclusions.

6. The application for permission is a diffuse document, with a considerable amount of detail but without a clear statement of the grounds of appeal; and it adopts a narrative form without even the benefit of numbered paragraphs. The document is rightly criticised by the Private Partner for its lack of organisation and of structured argument. In this judgment I deal with various specific points and themes that I have identified in the application, but I have considered the document as a whole in reaching my decision on the application.

7. The application starts with a generalised submission that the CFI's decision "was made without sufficient and objective consideration of all the case materials, which significantly affected the conclusions made by the court when making the decision". It comes back to this at the end of the document, submitting that the CFI "made an incorrect decision, due to insufficient and biased

consideration of the case materials". As explained below, those submissions are not made good by the detail sandwiched between them. They do an injustice to what is a conspicuously fair and careful judgment which sets out clearly the issues in dispute and the submissions of each party on those issues, examines at some length the written and oral evidence relevant to each issue, and reaches appropriate conclusions based on the Court's findings of fact and legal analysis.

8. The application goes on to submit that the Court did not take into account the fact that the Private Partner signed the PPP Contract "on obviously unfavourable conditions for itself" despite having had the opportunity to review the design and estimate documentation, so that it was "his will, his decision and his share of responsibility for the execution of the contract". But it takes the Public Partner nowhere to say that the Private Partner made an informed decision to enter into the contract. The central issues for the Court concerned the obligations of the Public Partner under the terms of that contract (notably the obligation to provide engineering infrastructure in the form of an electricity connection) and whether the Public Partner was in breach of those obligations. The Court made detailed findings against the Public Partner on those issues. The Private Partner cannot sensibly be said to have shared responsibility for the Public Partner's breach of its obligations.

9. The next paragraph of the application states that the claim referred only to the failure to provide one of the infrastructure elements, the connection to the power supply networks, and that there was no dispute over the provision of the land plot for the construction and operation of a PPP facility; and the paragraph ends by stating that the Private Partner "accepted the land plot without comments". It is not clear what point is sought to be made by this. An issue as to the timing of the provision of the land plot was dealt with by the CFI for sound reasons, explained in paragraph 66 of the judgment; and the Court concluded at paragraph 77 that the plot was provided to the Private Partner on 18 April 2018 (after the March 2018 date when, as was common ground, construction in fact started). Although dealing with that issue, however, the Court noted in paragraph 66 that the more important question was whether the Public Partner was in breach of its obligation to provide electrical power infrastructure, a question considered at paragraphs 91ff. of the judgment. As to the question of comments about the lack of electrical infrastructure, that is dealt with by the CFI as part of its consideration of the wider issue concerning electrical infrastructure: the conclusion summarised at paragraph 114 of the judgment, and for which there is a sufficient evidential basis, is that the Private Partner gave the Public Partner written notice of the power supply problems in June 2018 and communicated about the problems more informally with the Public Partner before then.

10. The application then devotes a lengthy passage to the electricity infrastructure issue, including the attempts by the Private Partner to solve the problem, the solution ultimately reached by Supplementary Agreements No.1 and No.2, the effects of delay and the question of responsibility for the delay. The application also returns to the issue in a later passage, after dealing with a separate topic concerning financial closure (considered below). The electricity infrastructure issue forms a major part of the CFI's judgment, at paragraphs 91-136, where the Court deals with the facts, the rival submissions and the Court's conclusions. In the first of its passages concerning that issue, the application for permission to appeal quotes from or summarises the content of various paragraphs of the CFI's judgment (referring in particular to paragraphs 97-98, 105 and 109) and refers to some of the oral testimony and documentary material that was before the Court. This leads into the assertion that the Court "insufficiently analysed the available documents and facts regarding the

provision of infrastructure – electricity (temporary and permanent) and the actions of the Public and Private Partner, which ultimately influenced the determination of the guilt of the parties in the execution of the PPP contract". When the application comes back to the issue in the later passage, reference is made to further paragraphs of the CFI's judgment (paragraphs 110-111 and 125-130 in particular) and criticism is again directed towards the sufficiency of the Court's analysis of the evidence, including the assertion that "some documents are subjected to a thorough analysis, and documents on the same issues of the same period are ignored". But these submissions as to insufficiency of analysis and of failure to take into account relevant evidence are unsustainable. The CFI's findings of fact are based on a careful analysis of the documentary and oral evidence. They were properly open to the Court on the evidence and they provide a sound basis for the conclusions reached. The application does not refer to any documents capable of undermining the Court's findings. The pages of the application dealing with this issue amount in reality to an attempt to re-argue the matter but they do not establish a cogent case that the Court's analysis was deficient or that its conclusions were wrong.

11. Between the two passages of the application relating to the electricity infrastructure issue is a lengthy passage on the broad subject of financial closure, starting with the contention that the CFI "has not analysed and separated the concepts of 'Effective Date of the Contract' and the concept of 'Financial Closure' accurately enough and in accordance with the contract", and going on to make a miscellany of assertions about the Private Partner's lack of financing for the project and its failure to fulfil its obligations under the contract. It is very difficult to see where all of this goes. As stated at paragraph 79 of the CFI's judgment, one of the Public Partner's arguments was that the obligation to provide the land plot only arose after financial closure, which was delayed because the Private Partner did not provide written notification that it had the right to access the financing necessary for the construction of the kindergarten. But the Court knocked out that argument at the first step, holding at paragraphs 80-82 that on the proper construction of clause 7 of the contract all necessary measures to provide the plot had to be taken within a period of 60 days from the date on which the contract came into force, rather than only after financial closure. The application does not appear to challenge that finding, which is in any event clearly correct. Although the Court went on to consider the question of written notification by the Private Party that it had the financing necessary for the project, the Court held at paragraph 88 that in view of its conclusion on the meaning of clause 7 it was not necessary to decide when written notification occurred. For the sake of completeness, however, the Court asked itself what the position would have been had it been necessary to decide the question; and in paragraph 89 it said that the evidence was not entirely clear but there was sufficient evidence to enable the Court to make one of three inferences, each one of which was adverse to the Public Party's case on the point. In those circumstances nothing ultimately turns on the Court's observations on this issue, and the criticisms directed by the Public Partner towards those observations are misplaced. In any event, however, the observations have a sufficient basis in the evidence and are not shown to be arguably wrong.

12. The application refers penultimately to Article 46(1-1) of the Law on Public-Private Partnerships, upon which the Public Partner placed some reliance before the CFI. The Public Partner's submissions based on that provision were rejected by the Court for reasons given at paragraphs 131-132 of its judgment. Whilst referring to the provision, the application does not appear to challenge the CFI's

conclusion in relation to it and does not engage with the reasons for that conclusion. If a challenge is intended, it does not get off the ground.

13. The final issue addressed in the application concerns the timing of payments of Compensation for Investment Costs ("CIC"), a question considered at paragraphs 133-135 of the CFI's judgment. The Court held that payments of CIC had fallen due in 2018 and 2019 under the terms of the original contract (and at a time when the contractual construction period was to end in December 2018) and that the Private Partner's entitlement to such payments had not been changed by the terms of Supplementary Agreement No.1 (which extended the contractual construction period to October 2020 but only changed the amounts of CIC for 2020 and 2021) or by Supplementary Agreement No.2 (which increased the CIC for 2021 to reflect the construction of the transformer substation). It rejected the Public Partner's contention, based on Article 9(4) of the Law on Public-Private Partnerships, that payments were to be postponed to 2024 and 2025. The application renews the contention but does not reveal any error in the Court's reasoning. The application relies *inter alia* on a Budget Commission decision dated 4 December 2020 approving a payment schedule that postponed the payments for 2018-2019 to 2024-2025; but it is obvious that a third party executive decision of that kind cannot affect the correct analysis under the contract between the parties.

14. I note that, according to the written submissions on behalf of the Private Partner, the version of the Law on Public-Private Partnerships in force even at the extended date for the end of the construction period, October 2020, did not contain the requirements in Article 46(1-1) and Article 9(4), which were adopted only by amendments dated 2 January 2021. If correct, that would be a further reason for dismissing the Public Partner's reliance on those provisions. It does not, however, feature in the CFI's judgment and was not necessary for the Court's conclusions. I therefore place no reliance on the point for the purposes of my present decision.

15. In conclusion, for the reasons summarised above, an appeal would have no real prospect of success. There is no other compelling reason why an appeal should be heard. The application for permission to appeal is therefore refused.

16. It follows that the Public Partner's application for suspension, pending an appeal, of the CFI's order for payment of the sum of 1,776,174,926 KZT must also be refused.

By the Court,

The Rt Hon. Sir Stephen Richards

Justice, AIFC Court

Representation:

The Appellant was represented by Mr. Kasymhan Sengaziev, Head of the State Institution “Astana Education Department”.

The Respondent was represented by Mr. Almas Satylganov, Project Manager, Buldirshin-2012 LLP.