

IN THE SMALL CLAIMS COURT
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

26 April 2024

CASE No: AIFC-C/SCC/2024/0004

(1) MS. AISULU OMAROVA

(2) MR. ALTAI OMAROV

Claimants

v

(1) NEF QAZAQSTAN LIMITED LIABILITY PARTNERSHIP

(2) TIMUR GAYRIMENKUL GELIŞTİRME YAPI VE YATIRIM A.Ş.
JOINT STOCK COMPANY

Defendants

JUDGMENT

Justice of the Court:

Justice Josephine Higgs KC

JUDGMENT

This Judgment is structured as follows:

- Part 1. Introduction
- Part 2. The Claimants' Claims
- Part 3. Claim for principal debt
- Part 4. Claim for penalties
- Part 5. Claims against the Second Defendant
- Part 6. Costs
- Part 7. Conclusion

PART 1. INTRODUCTION

- 1.1 The Claimants, Ms Omarova Aisulu Izataevna and Mr Omarov Altai Salauatovich, commenced a claim against NEF Qazaqstan LLP (the "**First Defendant**" or the "**Issuer**") and Timur Gayrimenkul Geliştirme Yapi ve Yatırım A.Ş. JSC (the "**Second Defendant**" or the "**Guarantor**") (collectively the "**Defendants**"), by submitting a Claim Form to the AIFC Court which was issued by the Court on 17 January 2024.
- 1.2 In their Claim Form the Claimants claim, in summary, repayment of matured bonds KZX00000118 (the "**Bonds**") issued by the First Defendant and guaranteed by the Second Defendant, interest, penalties and costs.

Procedural history

- 1.3 On 17 January 2024, the Registry served the Claim Form on the Defendants by email and advised the parties that the claim would be determined by the AIFC Small Claims Court in accordance with Part 28 of the AIFC Court Rules.
- 1.4 Pursuant to Rule 28.12 of the AIFC Court Rules, the Defendants were required, within 14 days after being served with the Claim Form, being Wednesday 31 January 2024, to admit the claim, file a defence, or make an application to dispute the jurisdiction of the AIFC Small Claims Court. The Defendants were informed of this deadline by the email from the Registry dated 17 January 2024, and were reminded by a further email from the Registry on 29 January 2024. The Defendants did not take any of those steps by 31 January 2024.
- 1.5 On 9 February 2024, the Claimants made an application to file an Amended Claim Form. The application was said to be made pursuant to Rules 11.38(2) and 11.48 of the AIFC Court Rules (albeit that those Rules do not strictly apply to the AIFC Small Claims Court). The Claimants also filed a Certificate of Service of the Claim Form dated 7 February 2024. The proposed amendments were to reduce the quantum of the claim, in light of payments made by the First Defendant to the Claimants since the Claim Form was issued.
- 1.6 By an order dated 6 March 2024 (the "**Order**"), I allowed the Claimants' application to amend their Claim Form. I further ordered that: the Claimants should serve the Order and Amended Claim Form on the Defendants and file a certificate of service in accordance with Rule 5.26 of the AIFC Court Rules, within 14 days of the date of the Order; and that the Defendants should take the steps set

out in Rule 28.12 of the AIFC Court Rules within 14 days after being served with the Order and the Amended Claim Form.

- 1.7 Paragraph 4 of the Order provided that the Claim would be determined on the papers without a hearing, pursuant to Rule 28.39 of the AIFC Court Rules, unless either the Claimants or the Defendants requested a hearing.
- 1.8 On 20 March 2024, the Claimants duly filed a Certificate of Service pursuant to paragraph 2 of the Order.
- 1.9 On 1 April 2024, the First Defendant filed a Defence. In its Defence, the First Defendant states that a further instalment payment towards the bond principal was remitted by the First Defendant on 29 March 2024, and *“acknowledges its duty to fulfill the monetary obligations outlined in the bond agreements with Claimant 1... for the sum of KZT 20,000,000, and with Claimant 2, Mr Omarov, for the sum of KZT 10,000,000”*. The Defence further states: *“This financial obligation is fully acknowledged by Defendant 1 and will not be contested or waived under any circumstances”*.
- 1.10 No Defence has been filed by or on behalf of the Second Defendant.
- 1.11 By an email to the Registry dated 11 April 2024, in response to a request for information from the Registry dated 11 April 2024:
 - 1.11.1 The Claimants confirmed that they admitted that payments had been made on 29 March 2024 in the amount of KZT11,196,380.69 for the First Claimant and KZT 5,598,190.34 for the Second Defendant, which they stated amounted to 56% of the bond principal.
 - 1.11.2 The Claimants stated that the principal debt which was owed by the Defendants was the amount of KZT 8,803,619.31 for the First Claimant and KZT 4,401,809.66 for the Second Claimant.
 - 1.11.3 The Claimants stated that as at 11 April 2024, penalties have accrued in the amount of KZT 1,409,560.01 for the First Claimant and KZT 704,779.99 for the Second Claimant.

Jurisdiction of the AIFC Small Claims Court

- 1.12 In the Claim Form, it is stated the AIFC Court has jurisdiction over the Claimants' claims against the Defendants based on the prospectus for the Bonds prepared by the Issuer (the **“Prospectus”**), which is exhibited at Exhibit 4 to the Claim Form.
- 1.13 The Prospectus in Clause 2.1 on page 28 provides as follows:

“The Bonds and any non-contractual obligations, arising out of, or in connection with, the Bonds shall be governed by, and construed in accordance with the laws of the AIFC. The Issuer has agreed herein the conditions in favor of the Bondholders that any claim, dispute or discrepancy of any nature arising out of, or in connection with the Bonds (including claims, disputes or discrepancies regarding the existence, termination thereof, or any non-contractual obligations arising out of, or in connection with the Bonds) shall be brought to, and finally resolved by the Court of the AIFC in

accordance with the rules thereof, currently in effect, such rules shall be deemed incorporated herein”.

1.14 The Prospectus on pages 40-55 contains the “Schedule 3 Guarantee Agreement” dated 28 October 2022 between the Guarantor and the Issuer in favour of the bondholders (the “**Guarantee**”).

1.15 The Guarantee on page 54 in Art. 19 “Jurisdiction” includes the following jurisdictional clause:

“Each party irrevocably agrees that, subject as provided below, the courts within Astana International Financial Centre shall have exclusive jurisdiction over any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this guarantee or its subject matter or formation. Nothing in this clause shall limit the right of the Bondholder to take proceedings against the Guarantor in any other court of competent jurisdiction, nor shall the taking of proceedings in any one or more jurisdictions preclude the taking of proceedings in any other jurisdictions, whether concurrently or not, to the extent permitted by the law of such other jurisdiction”.

1.16 The Claimants allege that, as a result of these provisions, the AIFC Court has jurisdiction over their claims against the First Defendant and the Second Defendant arising out of the default on the Bonds. The AIFC Court’s jurisdiction is not disputed in the Defence, and neither of the Defendants has made an application contesting the jurisdiction.

1.17 The Court is satisfied that the AIFC Small Claims Court has jurisdiction over the Claimants’ claims, for the reasons set out above.

1.18 None of the parties has requested a hearing. Accordingly, pursuant to Rule 28.39 of the AIFC Court Rules and paragraph 4 of the Order, I have considered this Claim on the papers and determine it as follows.

PART 2. THE CLAIMANTS’ CLAIMS

2.1 The Claimants allege the following facts in their Amended Claim Form. None of these facts is disputed by the First Defendant in its Defence.

2.2 The First Claimant invested KZT 20,000,000 and acquired 20,000 Bonds; the Second Claimant invested KZT 10,000,000 and acquired 10,000 Bonds. These investments are recorded in the Securities Movement Report exhibited at Exhibit 5 of the Claim Form.

2.3 The maturity date for the Bonds was 23 November 2023 with an interest rate of 20 % per annum payable on a semi-annual basis.

2.4 The first interest payments in the amounts of KZT 2,000,000 (for the First Claimant) and KZT 1,000,000 (for the Second Claimant) respectively were scheduled to be paid within 7 calendar days from 24 May 2023 and were paid on 30 May 2023.

2.5 The second interest payments and principal debt were due to be paid by 1 December 2023.

- 2.6 The Issuer did not pay the second interest payments or the principal debt at that time. It subsequently paid the second interest payment on 30 January 2024 and (as explained below), later repaid part of the principal debt.
- 2.7 On 30 November 2023, the Issuer sent a notice to the bondholders (exhibited at Exhibit 3 to the Claim Form) stating that it was experiencing financial difficulties but was taking measures to fulfill its obligations to the bondholders. The notice stated: *“In light of the above, we ask you to take into account that the Company will fulfill all its obligations to Bondholders in 15 (fifteen) working days, but by no later than December 21, 2023 (inclusive).”* Paragraph 6 of the notice also recorded that the Issuer was obliged to pay a penalty to the bondholders pursuant to paragraph 4.3 of the Prospectus.
- 2.8 However, the Issuer did not repay the principal debt by December 21, 2023 and had not done so as at the date on which the original Claim Form was filed.
- 2.9 On 8 January 2024 the Claimants sent a Notice of Default and Guarantee Trigger Event. This is exhibited at Exhibit 6 to the Claim Form.
- 2.10 The Claimants allege they are entitled to the payment of the principal debt and penalties, and that the Guarantor and the Issuer are jointly liable for this payment. As explained below, there is no dispute regarding the Issuer’s liability for repayment of the principal debt, but the Claimants’ claim for penalties is contentious.
- 2.11 The Claimants allege that the dispute is governed by AIFC law, since both the Prospectus and Guarantee provide that AIFC is the applicable law. The First Defendant, in paragraph 5 of its Defence, accepts that the law applicable to the Bonds is AIFC Law.

PART 3. CLAIM FOR PRINCIPAL DEBT

- 3.1 There is no dispute that the First Defendant became liable to repay the principal debt to the Claimants. As recorded in paragraph 1.9 above, in its Defence, the First Defendant acknowledges its duty to repay the principal sums invested and states that this obligation will not be contested.
- 3.2 As regards the payments made on 29 March 2024, in its Defence, the First Defendant does not specify the sums paid, but states that it has discharged 52.94% of the bond principal.
- 3.3 In their email of 11 April 2024, the Claimants have provided the exact figures paid by the First Defendant on 29 March 2024 and state that 56% of the bond principal has been paid. The First Defendant has not responded to that email, and I therefore proceed on the basis that the figures set out in the Claimants’ email of 11 April 2024 are undisputed and are correct.
- 3.4 Accordingly, based on the allegations made in, and the documents exhibited to, the Claim Form, the First Defendant’s admission in its Defence, and the further information provided by the Claimants by email on 11 April 2024, I find that the First Defendant owes the First Claimant the sum of KZT 8,803,619.31 and owes the Second Claimant the sum of KZT 4,401,809.66.

PART 4. CLAIM FOR PENALITIES

- 4.1 The Claimants claim that they are also entitled to payment of penalties.
- 4.2 The Claimants note that the AIFC Contract Regulations No. 3 of 2017 (the “**Contract Regulations**”) established both freedom of contract (Rule 8.1 of the Contract Regulations) and its binding character (Rule 10 of the Contract Regulations). They assert that the Prospectus and the Guarantee as contracts provide an outline of the parties’ rights and obligations.
- 4.3 In support of their claim for penalties, the Claimants refer to paragraph 4.3 on page 32 of the Prospectus, which they contend provides that the First Defendant is obliged to pay the penalties sought. This provides as follows:

“The Issuer shall pay a penalty to the Bondholders for each day, that follows “Interest payment expiry date” shown in paragraph 3.2, on which any amount payable under the Bonds remains due and unpaid (the “Unpaid Amount”), at the rate equal to the Coupon Rate. The amount of penalty payable per any Unpaid Amount in respect of any Bonds shall be equal to the product of the Coupon Rate, the Unpaid Amount and the number of calendar days on which any such Unpaid Amount remains due and unpaid divided by amount of actual days within the period of 12 months when Bonds are in circulation, rounding the resultant figure to the nearest cent, half of any such cent being rounded upwards.”

- 4.4 The Claimants set out the methodology for the calculation of penalties in paragraph 22 of their Amended Claim Form, and the amounts due by way of penalty as at the date of filing the Amended Claim Form in paragraph 23. The Claimants state in their email dated 11 April 2024 that the penalties which had accrued by 11 April 2024 are as follows:

4.4.1 KZT 1,409,560.01 for the First Claimant; and

4.4.2 KZT 704,779.99 for the Second Claimant.

The First Defendant’s Defence to the claim for penalties

- 4.5 In its Defence, the First Defendant states that it does not contest the method of calculation of the penalty, but it disputes the availability of penalties as a remedy under AIFC law.
- 4.6 The First Defendant states, in paragraph 7 of its Defence, that the Prospectus constitutes the primary contract between the Issuer and the Bondholder. The First Defendant asserts that the Prospectus is subject to the requirements of the Contract Regulations.
- 4.7 The contractual status of the Prospectus, and the applicability of the Contract Regulations is therefore common ground as between the First Defendant and the Claimants.
- 4.8 The First Defendant further asserts, in paragraphs 8 and 9 of its Defence, that the Contract Regulation and the Regulations on Damages and Remedies (No. 17 of 2019) do not include any

reference to “penalties”. The First Defendant therefore considers that AIFC laws do not encompass penalties as a form of remedy. (I discuss this point in paragraph 4.16 below).

- 4.9 As I understand paragraphs 10 to 11 of the Defence, the First Defendant does not contend that the principle of unenforceability of penalties under English law is applicable and that the penalty should not be enforced on this basis.
- 4.10 Rather the First Defendant contends, in paragraph 12 of its Defence, that pursuant to subparagraph 1(3) of Article 4 of the Constitutional Law, the provisions of the legislation of the Republic of Kazakhstan regarding penalties may be applied by this Court. The First Defendant asks this Court to reduce the penalty amount under the Law of the Republic of Kazakhstan, specifically Article 297 of the Civil Code.
- 4.11 The First Defendant refers at paragraph 17 of its Defence to *Freedom Finance JSC v Egor Romanyuk* (Judgment of the AIFC Court of First Instance dated 1 February 2023) in which the AIFC Court reduced the penalty under Article 297 of the Civil Code.
- 4.12 The First Defendant contends that the penalty sought by the Claimants in this case is disproportionate and excessive. As I understand paragraphs 21 and 22 of its Defence, the basis for this contention is that the penalty rate is equivalent to the coupon rate.

The Claimants’ response

- 4.13 The Claimants object to the reduction of the penalty rate based on Article 297 of the Civil Code of the Republic of Kazakhstan which they say is inapplicable. They assert that the penalty is not excessive as it represents the type of liability for late performance of a monetary obligation by the Issuer that has been specifically provided for in the Prospectus. The Claimants further say that the 20% penalty is fully comparable to the interest rate for failure to pay amount under paragraph 17(2) of AIFC Regulations on Damages and Remedies. They assert that the rate of 20% is the average bank short-term lending rate for the currency of payment (KZT) at the place for payment (Republic of Kazakhstan), noting that these rates vary from 18-33% based on the National Bank data.

Conclusion

- 4.14 Having considered the First Defendant’s Defence, and the Claimants’ response in their email of 11 April 2024, together with the case of *Freedom Finance JSC v Egor Romanyuk* (particularly paragraphs 5.2 to 5.27 and 6.13 thereof), I consider that it is not appropriate to reduce the penalty pursuant to Article 297 of the Civil Code.
- 4.15 I accept the Claimants’ submissions in their email of 11 April 2024 that the penalty is not excessive. Although it is described in Clause 4.3 of the Prospectus as a “penalty” the effect of Clause 4.3 is that the Issuer is simply required to continue to pay interest to the bondholders at the coupon rate on any sums which remain unpaid at the maturity date. Further, the rate of 20% is broadly comparable to the interest rate which would apply under paragraph 17(2) of the AIFC Regulations on Damages and Remedies. There was no delay by the Claimants in submitting their claim to the AIFC Court, or in the conduct of this claim, which has caused the penalties payable to accrue unduly and which would justify a reduction on that basis. I also note that the Notice sent by the First

Defendant to the bondholders on 30 November 2023 (referred to in paragraph 2.7 above) referred explicitly to the First Defendant's obligation to pay a penalty under paragraph 4.3 of the Prospectus, implying the First Defendant acknowledged and accepted that obligation. For all these reasons I do not consider that it is appropriate to reduce the penalty based on Article 297 of the Civil Code.

4.16 I also note that the AIFC Regulations on Damages and Remedies provide at paragraph 21 "Agreed payment for non-performance" that if the contract provides that a party who does not perform is to pay a specified amount to the aggrieved party for non-performance, the aggrieved party is entitled to that amount irrespective of the party's actual loss but that, pursuant to paragraph 21(2), the specified amount may be reduced to a reasonable amount if it is manifestly disproportionate to the loss envisaged as capable of resulting from the non-performance and to the other circumstances. Although the First Defendant does not rely on paragraph 21(2), I am further satisfied that the amount claimed is not manifestly disproportionate and that it is not appropriate to reduce the penalty based on this provision.

4.17 Accordingly, I find that the First Defendant owes the following amounts pursuant to Clause 4.3 of the Prospectus as at 11 April 2024:

4.17.1 KZT 1,409,560.01 to the First Claimant; and

4.17.2 KZT 704,779.99 to the Second Claimant.

4.18 I calculate that the further amounts which have accrued from 11 April 2024 to the date of this Judgment are as follows:

4.18.1 KZT 72,358.51 to the First Claimant; and

4.18.2 KZT 36,179.26 to the Second Claimant.

4.19 The total amounts due from the First Defendant, by way of payment of the principal debt and penalties, as at the date of this Judgment are therefore as follows:

4.19.1 KZT 10,285,537.83 to the First Claimant; and

4.19.2 KZT 5,142,768.91 to the Second Claimant.

PART 5. CLAIMS AGAINST THE SECOND DEFENDANT

5.1 The Claimants contend that, having established the Issuer's liability, the Claimants may jointly demand performance from the Guarantor. They refer to Article 5.1 "Execution and Delivery of Guarantee" and contend that Guarantee Trigger Events have occurred. They further allege that the Guarantor has admitted its obligations to the Claimants in a statement dated 12 December 2023, which is exhibited at Exhibit 7 to the Claim Form.

5.2 The Second Defendant has not filed a Defence. The Defence filed by the First Defendant does not dispute the Claimants' assertions that the Second Defendant is also liable.

- 5.3 Based on the allegations made in the Claim Form, and the documents exhibited to the Claim Form, I am satisfied and I find that the Guarantor is jointly and severally liable for the non-fulfilment of the Issuer's obligations.
- 5.4 I therefore find that the total amounts owed by the Second Defendant as at the date of this Judgment are as follows:
- 5.4.1 KZT 10,285,537.83 to the First Claimant; and
- 5.4.2 KZT 5,142,768.91 to the Second Claimant.

PART 6. COSTS

- 6.1 In their Claim Form, the Claimants also seek costs / attorney's fees. Rule 26.9 of the AIFC Court Rules provides that the Small Claims Court may not order a party to pay a sum to another party in respect of costs, fees and expenses except for such part of any Court fees as the Small Claims Court considers appropriate, or such further costs as the Small Claims Court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably.
- 6.2 I do not currently consider that a costs order is appropriate in this case, and I do not have any information as to the amount of costs incurred by the Claimants.
- 6.3 However, the Claimants are permitted, if so advised, to file a written statement of costs setting out the amounts claimed and brief grounds on which costs are sought within 28 days of the date of this Judgment. The Defendants are permitted, if so advised, to file any response within 28 days thereafter. I will then determine the Claimants' claim for costs on the papers.

PART 7. CONCLUSION

- 7.1 For the reasons set out above, THE COURT ORDERS THE FIRST DEFENDANT AND SECOND DEFENDANT TO PAY THE SUM OF KZT 10,285,537.83 TO THE FIRST CLAIMANT AND THE SUM OF KZT 5,142,768.91 TO THE SECOND CLAIMANT WITHIN 28 DAYS FROM TODAY'S DATE.

By Order of the Court,

Josephine Higgs KC,
Justice, AIFC Small Claims Court



Representation:

The Claimants were represented by Mr. Bakhyt Tukulov, Partner, Tukulov Kassilgov Shaikenov Disputes LLP, Almaty, Republic of Kazakhstan.

The First Defendant was represented by Mr. Nurlybek Sultan Nusipzhanov, ILF A&A Limited Liability Partnership, Almaty, Republic of Kazakhstan.

The Second Defendant was not represented.