IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

8 November 2022

CASE No: AIFC-C/CFI/2022/0008

Private Company Minerals Operating Ltd.

Claimant

v

Private Company GEOPS Exploration Kazakhstan Ltd.

Defendant

JUDGMENT AND ORDER

Justice of the Court:

The Rt. Hon. The Lord Faulks KC

ORDER

1. The Defendant, Private Company GEOPS Exploration Kazakhstan Ltd., shall pay the Claimant, Private Company Minerals Operating Ltd., 42,339,332.94 KZT. This Order shall have immediate effect.

JUDGMENT

1. This is a claim for agency fees by the Claimant, Private Company Minerals Operating Ltd., sometimes referred to as Minerals Operating. The Defendant is Private Company GEOPS Exploration Kazakhstan Ltd., sometimes referred to as GEOPS. The Claim arises out of the conclusion of a drilling contract between the Defendant and Kazakh Altyn on the Kvartsitoviye Gorki field and Zholymbet field. The relevant contracts in relation to these two fields were completed on 9 April 2021. These are referred to as the "Kazakh Altyn agreements".

2. The Claimant relies on what is described as an "Agency agreement" dated 29 September 2020 signed by Mr. Alibek Shakirimov on behalf of the Claimant and Mr. Vassil Andreyev on behalf of the Defendant. Both gave evidence before me through interpreters respectively in Russian and Bulgarian. Neither gave much evidence which assisted in the interpretation of the contract, although both were helpful in giving the Court something of the background of the dispute.

3. The Agency agreement was concluded at the same time as the Share Purchase Agreement, whereby Mr. Andreyev acquired 30% of the charter capital of GEOPS and became what had been described by him in his witness statement as the "sole participant of GEOPS". The two agreements, and there were two agreements, reflected the next stage of the relationship that has grown up between the parties as GEOPS wanted to expand their activities in Kazakhstan. It had become very much as a joint venture, but the parties agreed that while going their separate ways, there would be continued cooperation between them as is evidenced by the Agency agreement.

4. The Claimant's case is straightforward. It is said that in accordance with the Agency agreement, it is entitled to 10% of the value of the Kazakh Altyn agreements.

5. Following an interlocutory order of mine in this case, evidence was adduced of the amount actually paid for those Kazakh Altyn agreements which were in total 423,393,329.43 KZT of which the Agency fee would then be 42,339,332.94 KZT. Those figures were provided by the Defendant. They are included in the argument given to the Court before this case and I understand that subject to liability, they are agreed or can be subject to further argument if there is any dispute.

6. The Defendants answered the Claim in a number of ways. Firstly, they said that the Agency agreement would be more properly described as a Framework agreement. In other words, it was an agreement to agree and is in effect unenforceable. I will refer to the relevant terms of the agreement. The agreement which is signed by both the principal parties, Mr. Alibek Shakirimov and Mr. Vassil Andreyev, described respectively as Agent and Principal, is an agreement with various different clauses. Clause 1 is headed "Subject of the agreement". Clause 1 sub-clause 1 follows:

"The Principal entrusts and the Agent undertakes to act as an agent and provide services for the conclusion of a drilling contract with the companies listed below, as well as with other companies in the Republic of Kazakhstan (hereinafter – the "Customer")."

In clause 1.1.1 and 1.1.2, those referenced firstly to the two fields in Kazakh Altyn, to which I have already made reference, and in 1.1.2, the reference is to Bakyrchik Mining enterprise, about which I heard no further, because it appears that it did not in fact materialise as a contract.

7. Clause 1.2 provides as follows:

"The Agent shall take measures to conclude subcontracts with the Principal, provide the Principal with all relevant necessary information and documentation on target tenders, procurements by way of request for commercial offers, through single source, give necessary explanations, organize and prepare direct contacts, meetings and negotiations of the Principal with the Customers; provide other services contributing to conclusion of Service Agreements and other agreements between the Principal and the Customers."

8. Clause 1.3 provides as follows:

"Contracts and other agreements shall be concluded directly between the Principal and the Customer. The Agent shall not have the right to sign any contracts or any other documents on behalf of the Principal, and shall not have the right to close any transactions in any form."

9. Clause 2, which I need not read in full, sets out the obligations of the Agent in familiar terms. Similarly, Clause 3 sets out the obligations of the Principal, also in familiar terms.

10. Clause 4 is important. The heading of Clause 4 is "Agency fee". It provides at Clause 4.1 as follows:

"For the provision of agency services with the conclusion of each subcontract by the Principal with the Customer, the Principal shall pay the Agent remuneration in the amount of 10 (ten) % of the prime rate of the total value of the Agreement, inclusive of VAT."

Clause 4.2:

"Relations with each individual Customer attracted by the Agent will be formalized by a separate agreement specifying the remuneration for the provision of agency services."

Clause 4.3:

"The prime rate may be changed through negotiations and agreement between the Agent and the Principal depending on the economic feasibility of the potential project."

Clause 4.4:

"Remuneration shall be paid to the Agent within 10 (ten) working days after receipt of payment from the Customer under the concluded contract."

11. It seems to me that on the proper construction of the agreement that although it is not as clear as it might be, that it is properly described as an Agency agreement, not as a Framework agreement. It was clearly envisaged that there would be a continuing relationship between the parties, one acting as a Principal and one acting as an Agent. In respect to the two named concerns, these were identified, it was clearly intended that there would be a contract entered into with Kazakh Altyn and they were named the customer, whereas other customers might or might not materialise, depending on how the relationship developed. Any such future contracts would, it seems to me, on the proper construction of Clause 4, have to be formalised by separate Agency agreements with the remuneration rate to be agreed between the parties.

12. There is common ground about this, there had been a separate specific agreement in what has been described as the Loton project, where a figure for agency of less than 10% was agreed. So, this was in accordance with the spirit and terms of the Agency agreement, although it did not feature specifically in that agreement.

13. "What was the purpose of putting in 10% of the prime rate in the agreement?" – that was the question which featured in the submissions on behalf of both the parties. The Defendants argue that it was put into the agreement on the basis that their figure was to be not less than 10% or it was a starting point or that it was in some way simply put in there as a record of what might be the rate. I do not find any of these arguments convincing. Why put 10% of the prime rate in the contract at all, if in effect, the parties were agreeing that in due course there would be an agreement about percentage rates? If the agency figure was to be agreed by reference in some way more or less to 10%, why not say so? So, it seems to me that 10% was part of the agreement in so far as the contract had been specifically identified, or the customers had been specifically identified, in the agreement. That leaves open the possibility that a different rate might have been negotiated with other customers had they materialised.

14. In his evidence, Mr. Shakirimov acknowledged that there had in fact been much talk of a drilling contract at Kazakh Altyn fields before the Agency agreement and the Shareholder agreement had in fact been concluded, hence their inclusion in the Agency agreement. Mr. Andreyev told me that the GEOPS relationship with Kazakh Altyn long predated the Agency agreement. He said that in all relevant meetings leading to the conclusion of the Kazakh Altyn agreements, it was always GEOPS representatives who were present, not those of Minerals Operating.

15. I also heard evidence from two witnesses with roles to play in Kazakh Altyn. I heard from Mr. Myrzakasimov, an employee of Kazakh Altyn. He is the Chief Geologist. His evidence was that Minerals Operating had initiated the negotiations between GEOPS and Kazakh Altyn. Minerals Operating, he said, provided the necessary information and documentation, and organised negotiations between GEOPS, Mr. Andreyev, and Kazakh Altyn. All these took place, he said, after the Agency agreement had been concluded, at the beginning of 2021 up to the time that the agreement had finally been entered into in relation to those operations with Kazakh Altyn.

16. Mr. Kaissar Yerkebulan Kaissaruly was also an employee at the relevant time of Kazakh Altyn. He is described as a Senior Geologist. He told me that he had meetings with GEOPS representatives and referred, in particular, to a meeting in December 2021 when he and others from Kazakh Altyn met

GEOPS representatives, but he pointed out that there was no one from Minerals Operating present. Although he accepted that back in May 2020 there had been meetings at which Mr. Shakirimov had been present.

17. It seems to me that whatever the degree of such contact, there had plainly been contact between Kazakh Altyn and both GEOPS and Minerals Operating. The evidence of the two geologists, taken as a whole, suggests that the Claimants were at all material times acting in accordance with the Agency agreement albeit that there would have been considerable contact between GEOPS who were actually going to do the drilling operations.

18. Mr. Shakirimov also told me that, in effect, Minerals Operating had themselves been offering to do drilling works back in May 2020. But with the intended expansion of GEOPS in September 2020, a deal was effectively done which resulted in Minerals Operating selling their 30% share as I indicated. At the same time, the Agency agreement was concluded. He also told me of the involvement of Minerals Operating leading up to the signing of the Kazakh Altyn agreements. He explained that while GEOPS had the necessary equipment and expertise for drilling, Minerals Operating had the contacts and opportunities to find customers for GEOPS. He said he had made various calls, including conference calls and WhatsApp communications after the Agency agreement had been concluded, in which he himself communicated with Kazakh Altyn. He was not sure quite how many. Two or three were suggested.

19. What is clear is that the relationship between the Claimant and the Defendant broke down. It was even suggested that threats were made at some stage on behalf of Minerals Operating and that following the breakdown, Minerals Operating acted in breach of their Agency agreement by offering themselves to provide drilling services contrary to the interests of the Principal, GEOPS.

20. There was some dispute between the parties as to whether and when precisely the Agency agreement formally came to an end. On one view, by failing to pay in accordance with the agreement, GEOPS had in effect repudiated the Agency agreement and Minerals Operating had no further obligations arising from that agreement. The duration of the Agency agreement was initially supposed to be until the end of December 2025. But both parties have plainly acted in such way that is inconsistent with the continuation of the Agency agreement. And I consider they have no continuing obligations to each other.

21. The only question that remains is whether the Claimant has established the right to 10% of the contract price in relation to those Kazakh Altyn agreements. In response to the allegations by the Defendant that the Claimant acted in breach of the Agency agreement by competing on the underground drilling work, the Claimant says in relation to the “LinkedIn” post in December 2021, this was eight months after the non-performance by the Defendant of its obligation to pay. As I have indicated, if the Defendant was in breach of its own obligation by non-payment, I do not consider that the posting of this notice can possible be regarded as a breach of the Agency agreement.

22. There was debate about whether drilling contracts generally or more specifically in this case include geological exploration and/or geological services. The Defendant argued that by the letter dated 21 of January 2021 the Claimant was offering to provide geological exploration by putting a price that was

effectively reducing the value of the contract to the Defendant, was acting not as an Agent, but in competition with the Principal.

23. This approach and the alleged threats by the Claimant, as to which that that was no admissible evidence, caused the Defendant to purport to terminate the Agency agreement by letter of 15 March 2021. It is said that this amounts to behaviour which releases the Defendant from any obligation to pay commission under the Agency agreement. The Claimant's response is firstly to deny any threats, and I am unable to find on the evidence that there were any. Secondly, to explain that once they were at one stage offering to assist in geological exploration, there was never in fact any agreement in relation to the price of geological services. In those circumstances the Claimant did not in fact become involved in the provision of such services.

24. In my judgment, nothing about the Claimants merely offering to provide the services amounts to a breach of the agreement. I do not consider it necessary to consider whether geological services would or should normally be regarded as a part of a drilling contract, because the offer did not eventuate, and it had no causative effect.

25. It follows from this that I reject the Defence and Counterclaim and return to the central question as to whether there was a concluded agreement in relation to the Kazakh Altyn fields. The Agency agreement does in my judgment amount to a concluded agreement. Both parties signed and it reflected the next stage in the companies' relationship.

26. I daresay that the Defendants consider that 10% is too much to pay for what the Claimant provided, and the point was made that the Claimant has done well financially out of the Shareholders agreement. This was elicited in evidence but that seems to me to be rather beside the point in determining what was the effect of the agreement. The fact was that the parties made a bargain. It is not unusual in agency claims for a principal to consider that an agent has been overpaid for their contribution to concluding a contract. But it must not be forgotten that sometimes agents do labour hard on behalf of the principal but may not be able to conclude agreements at all, in which case they fail to achieve entitlement to any commission.

27. It follows from my construction of the agreement and in the light of all the evidence that in my view, the Claimant is entitled to agency fees in accordance with the Agency agreement. The figure is 10%, and I indicated the figure is agreed between the parties subject to the finding that I have just made, that the Claimant is entitled to that commission. In those circumstances, I give Judgment for the Claimant in the sum claimed.

By Order of the Court,

The Rt. Hon. The Lord Faulks KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Ravil Kassilgov, Partner, Tukulov & Kassilgov Litigation LLP, Almaty, Republic of Kazakhstan.

The Defendant was represented by Ms. Gulnur Nurkeyeva, Partner, Grata International Law Firm, Beijing, People's Republic of China.