



IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

10 March 2022, addendum added on 25 April 2022

CASE No: AIFC-C/SCC/2021/015

BASTAU BUILD GROUP LLP

Claimant

v

SHEGEBAYEV ERKIN TEMIRTASOVICH

Defendant

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JUDGMENT

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Justice of the Court:

Justice Charles Banner QC

### FIRST ORDER

1. **The application for interim relief is dismissed.**
2. **The claim shall be dismissed unless within 14 days of this Order the Claimant amends its Details of Claim to seek a remedy that is within the jurisdiction of the AIFC Court.**
3. **If the claimant submits amended Details of Claim the Defendant shall have 14 days to provide his response which shall be in the manner provided for by rule 28.12 of the AIFC Court Rules.**

### FIRST JUDGMENT

#### Background

1. This claim arises out of a construction contract, entitled Construction Agreement No. 9 (“**the Agreement**”) and dated 15<sup>th</sup> July 2013 and subsequently varied by Supplementary Agreement No. 1 dated 15<sup>th</sup> August 2013 (“**the 2013 Supplementary Agreement**”). Under the Agreement as varied, the Claimant contracted to build a residential building for the Defendant on Land Plot 269, Telman Residential Area, Nur-Sultan (“**the Property**”). Title to the Property had been registered in the Defendant’s name on 23<sup>rd</sup> November 2012.
2. The price payable by the Defendant to the Claimant under the Agreement as varied was 113,661,260 Tenge. The Defendant made an advance payment of 22,732,252 Tenge prior to commencement of the works.
3. It is common ground between the Claimant and the Defendant that:
  - 1) The works provided for by the Agreement were duly completed; and
  - 2) the Defendant has not paid the remaining amount of 90,929,000 Tenge and that he remains obliged to pay the Claimant this sum.
4. Article 651 of the Civil Code of the Republic of Kazakhstan is entitled “Construction Contract”. At paragraph (4) it provides:

“The owner of the construction in progress until its delivery to the customer and payment for work is the contractor.”
5. On 28<sup>th</sup> August 2020, the Claimant and the Defendant entered into a mediation agreement (“**the Mediation Agreement**”), pursuant to which the Defendant purported to transfer all rights in the Property to the Claimant in full and final settlement of his debt.
6. Prior to this, however, the Claimant’s former wife, Ms Asiya Damirovna Mukhanbetova had obtained an order dated 28<sup>th</sup> July 2020 from the Yessil District Court of Nur-Sultan City to the effect that the ownership in the Property was to be divided equally between her and the Defendant.
7. Ms Mukhanbetova subsequently applied for the cancellation of the Mediation Agreement. This application was granted by the Almaty District Court of Nur-Sultan city in a decision dated 14<sup>th</sup> September 2021. The Claimant says it was not given a proper opportunity to participate in those proceedings.

8. By agreement dated 1<sup>st</sup> December 2021 the Claimant and the Defendant entered into a Supplementary Agreement (“**the 2021 Supplementary Agreement**”) which, amongst other things, recorded their agreement that:
- 1) The Defendant debt to the Claimant for the completed works under the Agreement is 90,929,000 Tenge;
  - 2) A penalty for late payment, amounting to 37,868,818 Tenge, was also due;
  - 3) The Defendant would pay these sums to the Claimant no later than 10<sup>th</sup> December 2021;
  - 4) Any dispute under the Agreement, the 2013 Supplementary Agreement or the 2021 Supplementary Agreement is subject to the exclusive jurisdiction of the AIFC Court.
  - 5) The applicable law is the substantive law of the Republic of Kazakhstan.
9. It is common ground that the Defendant did not make these payments by 10<sup>th</sup> December 2021 or at all.

#### **The proceedings before the AIFC Court**

10. On 29<sup>th</sup> December 2021 the Claimant commenced proceedings in the AIFC Court against the Defendant. Ms Mukhanbetova, who was not a party to the 2021 Supplementary Agreement, was not named as a Defendant, although paragraph 2 of the Details of Claim stated that she *“could be involved in this case as a third party”*.
11. The remedy sought by the Claimant in the Claim Form is not the sums recorded by the 2021 Supplementary Agreement as due to be paid by the Defendant by 10<sup>th</sup> December 2021. Instead the Claimant asks the Court:
- “To recognize for “Bastau Build Group” LLP the right of ownership (law of property) to the object of unfinished construction – at the address Nur-Sultan city, Almaty district, Telman residential area, plot 269 (current name is Ivan Panfilov street, house 6/10”*.
12. The Claimant also asks the Court to grant the following interim relief *“immediately after receiving this claim”*:
- *“the imposition of a ban and suspension of the actions of private court bailiff of the executive district of the city of Nur-Sultan Kaimuldinov Arman Kaliollaevich related to the levy of execution on property, namely: on a land plot with an area of 0,1525 hectares (cadastral number 21:318:088:1010) with unfinished construction property located at the city of Nur-Sultan, Almaty district, in the Telman residential area, plot number 269 (current name is Ivan Panfilov street, house 6/10), committed in enforcement proceedings No' 865 / 20-71-3431 from October 22, 2020 to recover from Shegebaev Erkin Temirtasovich in favor of Mukhanbetova Asiya Damirovna in the amount of 265,607,514 tenge;*
  - *suspension of trading through the electronic trading platform for the sale of seized property on the territory of the Republic of Kazakhstan held by the Republican Chamber of Private Bailiffs of the Republic of Kazakhstan for the sale of property, namely: a land plot with on area of 0'1525 hectares (cadastral number 21:318:088:1010) with unfinished construction located at the city of Nur-Sultan, Almaty district, in the Telman residential area, plot number 269 (current name is Ivan Panfilov street, house 6/10);*

- the imposition of bans and the suspension of any registration actions in the Non-Commercial Joint stock company “State Corporation” Government for Citizens with the property: land plot with an area of 0.1525 hectares (cadastral number 21:318:088:1010) with unfinished construction property located at the address of Nur-Sultan, Almaty district, in the Telman residential area, plot number 269 (current name is Ivan Panfilov street, house 6/10).”
13. On 15<sup>th</sup> February 2022, the Defendant filed a document entitled “Statement on Recognition of the Claim”. This is not an Admission filed in accordance with Part 10 of the AIFC Court Rules or a Small Claim Defence filed under rule 28.12, but for present purposes the Court treats it as the Defendant’s position in relation to the claim.
  14. In this statement, the Defendant accepts that he has not paid the moneys due to the Claimant, and concludes *“I consider the claim of Bastau Build Group LLP justified and hereby recognize it in full.”*
  15. The sums due by the Defendant to the Claimant are equivalent to between 150,000 and 300,000 US Dollars. Accordingly, the claim falls under rule 28.2 of the AIFC Court Rules, which provides that the AIFC Small Claims Court (“**the SCC**”) will hear claims in this value range if *“all parties elect in writing that it be heard by the SCC”*. The Claimant and Defendant have so elected and therefore the claim falls to be determined by the SCC. Neither party has requested a hearing.

#### **Determination**

16. If the remedy sought in the Claim Form had been an order requiring the Defendant to pay the sums recognised by the 2021 Supplementary Agreement as due to be paid by 10<sup>th</sup> December 2021, the Defendant’s acknowledgement that the claim was justified would have been the end of the matter and the Court would have simply allowed the claim in the terms sought.
17. However, that is not the position.
18. It is plain that the application for interim relief instead seeks the Court to take steps which go very considerably beyond the jurisdiction conferred on it in relation to this matter by the 2021 Supplementary Agreement, both in terms of the nature of the relief sought and in terms of the persons against whom it is sought. That application is dismissed.
19. As for the final remedy sought, as the claim is currently framed that too invites the Court to exceed the jurisdiction conferred on it by the 2021 Supplementary Agreement, since the order sought would affect the rights of Ms Mukhanbetova, who is not a party to the 2021 Supplementary Agreement nor a party to these proceedings.
20. In the circumstances, the Court invites the Claimant to amend its Details of Claim so that the remedy sought is one which is within the jurisdiction of the Court. If it does not do so within 14 days, the Claim shall be dismissed without the need for any further order. If amended Details of Claim are filed, the Defendant shall have 14 days thereafter to respond. That response should be in accordance with rule 28.12 of the AIFC Court Rules. The Court will consider any amended Details of Claim and the Defendant’s response on the papers.

**ADDENDUM ORDER**

1. **The claim as amended is allowed.**
2. **The Defendant shall pay the Claimant the sum of 128,787,862 Tenge within 28 days of this Addendum Order.**

**ADDENDUM JUDGMENT**

1. Following the Court's earlier judgment in this matter ("**the First Judgment**") and accompanying order, the Claimant submitted an Amended Claim From on 24 March 2022, in which it now seeks the sum of 128,787,862 Tenge from the Defendant pursuant to the Supplementary Agreement (comprised of the two amounts referred to at paragraph 8(1)-(2) of the First Judgment).
2. On 4<sup>th</sup> April 2022 the Defendant wrote to the Court indicating that he accepted that the claim as amended was "*justified*" and that "*I... recognize it in full*".
3. The Claim as amended seeks a remedy that is within the Court's jurisdiction. It is not contested. The Court therefore allows it and requires the Defendant to pay the amount claimed within 28 days.

By the AIFC Small Claims Court,

Charles Banner QC,  
Justice, AIFC Small Claims Court

Representation:

The Claimant was represented by Mr. Vali Musalayev, BASTAU BUILD GROUP LLP

The Defendant was represented by Mr. Erkin Shegebayev.