



IN THE COURT OF APPEAL
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

5 June 2023

CASE No: AIFC-C/CA/2022/0026

Private Company GEOPS Exploration Kazakhstan Ltd.

Appellant/Defendant

v.

Private Company Minerals Operating Ltd.

Respondent/Claimant

JUDGMENT

Justice of the Court:

Justice Sir Stephen Richards

ORDER

The application for permission to appeal is refused.

JUDGMENT

1. By a decision dated 8 November 2022 in Case No. AIFC-C/CFI/2022/0008 the Court of First Instance of the AIFC (Justice The Rt Hon Lord Faulks KC) ordered the Defendant, Private Company GEOPS Exploration Kazakhstan Ltd. (“GEOPS”), to pay to the Claimant, Private Company Minerals Operating Ltd. (“Minerals Operating”), the sum of 42,339,332.94 KZT with immediate effect. This Court now has before it an application by GEOPS for permission to appeal against that decision. The application is supported by two bundles of material (documents and witness statements) that were before the lower Court. Minerals Operating has filed written submissions in opposition to the application, pursuant to rule 29.13 of the AIFC Court Rules. Although GEOPS has requested an oral hearing, I am satisfied that the application can be fairly determined on the papers (see rules 29.16 and 29.17 of the AIFC Court Rules).
2. 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.
3. Reference should be made to the judgment of the Court of First Instance for the detailed context within which the grounds of appeal are advanced. In briefest outline, the Court found that an agreement dated 29 September 2020 between the parties was an agency agreement under which Minerals Operating agreed to assist GEOPS with the conclusion of drilling contracts with companies including Kazakh Altyn, for a remuneration of 10% of the value of each contract concluded; GEOPS entered into a contract with Kazakh Altyn on 9 April 2021; Minerals Operating was entitled to its agency fee of 10% of the value of that contract; but in breach of the agreement GEOPS had failed to pay that fee.
4. The first ground of appeal challenges the Court’s finding that an agency fee of 10% was payable in respect of the contract concluded with Kazakh Altyn, and in particular it challenges the reasoning in paragraph 13 of the Court’s judgment. It is submitted that the agreement had the nature of a framework agreement and that the 10% rate should be considered not as a fixed rate but as the starting point for negotiations between the parties in relation to projects with each individual customer, whether named in the agreement (as in the case of Kazakh Altyn) or unnamed. As part of the argument it is said that the Court failed properly to evaluate the evidence, including the testimony of GEOPS’s witnesses relevant to the commercial practices and intention of the parties. The Court rightly observed (at paragraph 11 of the judgment) that the agreement was not as clear as it might be, but I am satisfied that there was no error in the Court’s approach to the issue of construction or in the conclusion reached on that issue. There is no real prospect of establishing the contrary on an appeal.


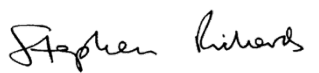
5. The second ground of appeal, or series of grounds, concerns the Court’s reasoning at paragraphs 20, 21, 24 and 25 of the judgment as to the ending of the agreement and of any continuing obligations under it. It is submitted in particular that the Court failed to consider GEOPS’s case that the agreement had terminated on 8 March 2021, prior to the conclusion of the contract between GEOPS and Kazakh Altyn, so that the obligation to pay an agency fee to Minerals Operating in respect of that contract did not arise. Reading the judgment as a whole, however, I think it clear that the Court considered and rejected for sound reasons GEOPS’s case that the agreement had terminated on 8 March 2021.

6. The date of 8 March 2021 derives from a letter dated 5 March 2021 from GEOPS to Minerals Operating, following earlier correspondence about collaboration with regard to forthcoming projects. In substance two issues were raised. One concerned an argument by GEOPS that, as it was put in paragraph 22 of the Court’s judgment, “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”. The other was an allegation that Minerals Operating had threatened to commit violent acts against GEOPS’s infrastructure and facilities and to harm its business activities in general. The letter ended with a request “to provide us with your written response to our call to cooperate not later than Monday, 8 March. Any other way of your response that is not in an official written form will not be considered by our side, and as such will be treated as your ultimate rejection of our proposal for cooperation and finally will open us doors to officially continue our business activities on our own”. No response was received.

7. Even taken as its highest, it would be difficult to read that letter as an effective termination of the existing agency agreement between the parties. But in any event the Court dismissed both issues of concern raised in the letter (the judgment refers to a “letter of 15 March 2021”, but this is plainly a typographical error for the letter of 5 March 2021). As to the alleged threats, the Court was “unable to find on the evidence that there were any” (paragraph 23 of the judgment), a finding that is not specifically challenged and would not be open to successful challenge. As to the offer relating to geological exploration, the Court accepted Minerals Operating’s evidence that although it was at one stage offering to assist in geological exploration, there was never any agreement in relation to the price of geological services and in those circumstances it did not in fact become involved in the provision of such services: the Court held that “nothing about the Claimants merely offering to provide the services amounts to a breach of the agreement” and it was not necessary to consider a further issue, as to whether geological services would or should normally be regarded as part of a drilling contract, “because the offer did not eventuate, and it had no causative effect” (paragraph 24 of the judgment). The Court can therefore be seen to have rejected GEOPS’s case that Minerals Operating had been in breach of its duties under the agency agreement, such as to justify termination of that agreement with effect from 8 March 2021. There was no other basis on which it might be said that the agency agreement was terminated prior to the conclusion of the contract between GEOPS and Kazakh Altyn, so as to deny Minerals Operating’s entitlement to the agency fee in respect of that contract. An appeal against this aspect of the Court’s judgment would in my view have no real prospect of success.

8. The Court did hold that the agency agreement broke down subsequently: “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 [B]oth parties have plainly acted in such a way that is inconsistent with the continuation of the Agency agreement. And I consider they have no continuing obligations to each other” (paragraph 20 of the judgment). GEOPS does not dispute the findings that the agreement had ended and that the parties had no continuing obligations to each other, but complains about the lack of a finding as to the date of termination and the uncertainty that this creates. Had it been necessary to make such an express finding, the Court would plainly have favoured the date when GEOPS breached its obligation to pay the agency fee in respect of the Kazakh Altyn contract: see the passage just quoted, and the observations in paragraph 21 of the judgment to the effect that a “LinkedIn” post by Minerals Operating in December 2021 which was said to show competition on underground drilling work “was eight months after the non-performance by the Defendant of its own obligation by non-payment” and “if the Defendant was in breach of its own obligation by non-payment, I do not consider that the posting of this notice can possibly be regarded as a breach of the Agency agreement”. It was not necessary, however, for the Court to go further than it did. It was clear that the central question was Minerals Operating’s entitlement to an agency fee in respect of the contract with Kazakh Altyn and that there were in the circumstances no other concluded contracts to which the agency agreement was said to apply. Indeed, GEOPS’s counterclaim sought a finding of termination of the agreement but did not suggest that the date of termination had any wider practical significance if its case as to termination with effect from 8 March 2021 was rejected. Again, there is in my view no real prospect of a successful appeal in respect of the Court’s handling of this issue.
9. Accordingly, I take the view that an appeal would have no real prospect of success on any of the issues raised; nor is there some other compelling reason why an appeal should be heard. Permission to appeal is therefore refused.

By the Court,



The Rt Hon. Sir Stephen Richards,
Justice, AIFC Court



Representation:

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

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