IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

6 August 2020

CASE No: AIFC-C/SCC/2020/0003

STAR ASIAN MINING COMPANY LLP

Claimant

v

AURORA AG LIMITED

Defendant

JUDGMENT

Justice of the Court:

Justice Tom Montagu-Smith QC

ORDER

1. The Defendant shall by 4pm on 3 September 2020 deliver to the Claimant the final logistical report and final digital data required by Schedule 1, paragraph 4 of the contract between the parties dated 17 July 2018.

2. The Defendant shall deliver the report and data referred to in paragraph 1 of this Order by providing the Claimant with two copies of each in digital format recorded on compact discs.

3. The parties have permission to apply to vary the time for provision of the report and data referred to in paragraph 1. Any such application shall be made by 4pm on 13 August 2020.

JUDGMENT

1. This is a claim for specific performance of the terms of a contract entered into between the parties on 17 July 2018 (**"the Contract"**). By the Contract, the Claimant engaged the Defendant to perform geophysical survey works in East Kazakhstan and to report the results to the Claimant.

2. The Claimant's case is that, although the Defendant has produced daily reports as required by the Contract, it has not provided the final report and data. The Claimant seeks specific performance of the Defendant's obligation to supply the final report and data, together with a declaration that the Defendant has acted unlawfully in failing to provide them. The Defendant's position is that it has already complied with its obligations under the Contract; that the Claimant has not paid what is due; and that the Contract has expired.

3. The Contract provides that disputes shall be subject to the jurisdiction of the Astana International Financial Centre Court. The parties agree that the value of the claim is within the financial limits of the Small Claims Court. The parties have filed written submissions and have asked the Court to decide the claim on the papers without a hearing.

4. The Defendant's obligations under the Contract were set out in Schedule 1, paragraph 4. In translation, that provision reads as follows:

> "4. Deliverables
>
> Daily production reports should be provided by e-mail. The field data should be delivered via email as each survey line is completed. Regular products will include concise notes on daily productivity and related matters, instrument dump files, reformatted text files on all survey lines.
>
> The final logistical report will be completed and supplied in digital PDF format and will include the following information:
>
> - Description of the survey coverage, type and methodology
> - Names of all persons involved in the survey
> - Technical description of the instrumentation
> - Data reduction and processing procedures
> - Contractor background

- Production summary
- Description of the digital data
- Location maps and figures formatted to fit on a standard 8.5 by 11 page size

The final digital data will include:

- Raw time series data (if requested)
- Final cleaned Geosoft format DAT files containing resistivity and chargeability (Mx and decay)
- Final pseudosections of chargeability and resistivity for each line in Geosoft GRD format
- Full grid coordinates
- Transmitter current and number of cycles used in the stacking process
- All QC test results, noise level assessment, and any related comments
- 2D inversion models of chargeability and resistivity for each survey block

The final report and all digital data should be supplied in digital format written to CD (2 copies) and will be delivered within five weeks of demobilization of the field crew."

5. By clause 3 of the Contract, the Claimant was obliged to pay the Defendant the Contract price in 3 instalments:

   a. 40% payable within 15 days of entering into the contract;

   b. 40% payable on completion of all field work;

   c. 20% payable no more than 5 business days after the Defendant issued the final report.

6. The Defendant completed the field work in August 2018. It also provided the Claimant with 14 daily reports of the survey operations. However, the Claimant did not pay any of the sums due. By SCC Claim No. 1 of 2019, the Defendant claimed the sums then due. The Claimant did not respond to the claim. It has never offered any defence, justification or explanation for its failure to pay.

7. By a judgment dated 25 April 2019 (**"the 2019 Judgment"**), the Claimant was ordered to pay the Defendant KZT 44,885,081.15 or the US Dollar equivalent at the time of payment. This comprised the sum of KZT 42,747,658.24, together with a late payment charge of KZT 2,137,382.91.

8. The sum due under the 2019 Judgment has now been paid. Payment was not made voluntarily but was obtained by attaching bank accounts to the credit of the Claimant.

9. It is common ground that the sum awarded and now paid represented the first two instalments due under the Contract. However, the parties differ as to the precise proportion of the Contract sum which has been paid.

10. The 2019 Judgment debt having been paid, the Claimant now seeks specific performance of the Defendant's obligation to provide the final report and final data required by Schedule 1, paragraph 4. The Claimant accepts that, once those documents are provided, it will be obliged to pay the outstanding part of the Contract price.

11. The Defendant resists the claim. In its response to the claim, the Defendant states that it is "*interested in transferring the reporting documents to the Claimant*". However, it states that that is "*no longer possible under a valid agreement*". It is however willing to enter into a further agreement for the transfer of the report to the Claimant. Similarly, by its letter to the Claimant of 5 June 2020, the Defendant said that it was "*ready to transfer [to] you [the] final results of the operations through entry into the Supplementary Agreement and advance payment.*"

12. The Defendant advances three arguments in its defence.

13. First, the Defendant asserts that it has already fulfilled its obligations under the Contract. In support of this, it points out that it has completed the field work required under the Contract and has provided 14 daily reports. That is not in dispute. However, by Schedule 1, paragraph 4 of the Contract, the Defendant was required to supply the Claimant with the final logistical report and the final digital data from the field work within 5 weeks of demobilisation. The Defendant does not claim that it has provided those documents to the Claimant. To the contrary. It has indicated that it is "*interested in*" and "*ready to*" transfer those documents, but only in the event that a further agreement is reached between the parties. The Defendant therefore implicitly concedes that it has not yet provided those documents to the Claimant. I therefore reject the Defendant's first argument.

14. Second, the Defendant argues that the Claimant was and remains in default of its payment obligations under the Contract. The Defendant points out that the Claimant failed voluntarily to pay the first two Contract instalments, amounting to 80% of the Contract price. The Defendant further complains that the sum finally paid by the Claimant was less than the sum which was in fact due, as a result of the fluctuation of exchange rates.

15. The Defendant has not explained why the Claimant's breach of the Contract in failing to pay would give rise to a defence for the Defendant. I am aware that, in certain circumstances, Kazakhstan (non-AIFC) civil law permits a party to a contract to withhold performance of its obligations, for example where the other party is in fundamental breach of its obligations. However, no argument has been directed at that issue and I have not been shown any provisions of Kazakhstan law which might assist the Defendant in this regard.

16. In any event, for the reasons which follow, I reject the Defendant's case that the Claimant still has an outstanding debt under the Contract.

17. There is no doubt that the Claimant has now paid the sum due under the 2019 Judgment – that is not disputed. There is however a difference between the parties as to whether that sum amounts to more or less than 80% of the Contract price and therefore whether it satisfied the Claimant's present payment obligations.

18. In its Claim Form, the Claimant asserts that the amount it has paid is 86.8% of the Contract price. In correspondence, it had put the proportion variously at 80% (letter of 11 May 2020) and 85% (letter of 29 May 2020). The Defendant takes a different view. In a letter to the Claimant dated 5 June 2020, the Defendant accepted that the payment represented 80% of the contract price. However, in its response to this claim, it has provided a schedule which states that the Claimant has paid just 70% of the Contract price.

19. The Defendant's argument is that the Claimant's payment obligation under the Contract was to be calculated by reference to the exchange rate between the US dollar and the Kazakhstan Tenge as at the date of payment. As a result of fluctuations in the value of the Tenge against the Dollar, the judgment sum at the date of payment amounted to only 70% of the Contract price.

20. In my judgment, these arguments are not open to either party. In the earlier claim, the Defendant brought proceedings and obtained judgment for the sum then due. The parties now agree that the first two payment obligations had arisen, but the third had not. In the circumstances, the Defendant's claim was for the first 80% of the Contract price. That claim has been finally determined in the amount of the 2019 Judgment sum. That determination is final and binding between the parties and cannot be challenged in subsequent proceedings. Further, the Defendant's right to payment for the first two instalments was merged into the 2019 Judgment. As a consequence, neither party can now claim that the payment ordered and paid is more or less than the sum due in respect of the first two instalments.

21. Whether or not the applicable law excused the Defendant's performance of its obligations under the Contract while the Claimant was in default of its payment obligations, the outstanding instalments have now been paid by satisfaction of the 2019 Judgment debt. In the circumstances, I reject the Defendant's second argument in support of its defence.

22. The Defendant's third argument is that the Contract expired on 30 October 2018. This appears to be based on clause 11.1 of the Contract, which states, in translation:

> "The Contract comes into force from the date of its signing and is valid until October 30 2018, and in respect of mutual settlements and provision of a report on local content – until full execution."

23. Clause 1.2 of the Contract provides:

> "Duration of works:
> Start: from the date of signing of the contract.
> End: until October 30, 2018."

24. The date of 30 October 2018 therefore appears to be the date by which all works under the Contract were to be completed by the Defendant.

25. The effect of the Defendant's argument is that any obligation it had to provide the final data and report simply expired on 30 August 2018. According to the Defendant, then, the phrase "*is valid until*" indicates that, after the designated date, the Contract was terminated and the parties rights and obligations came to an end. In my view, that cannot be the meaning of the clause.

26. First, the Contract makes clear that at least some obligations could arise after 30 August 2018. For example, by clause 3.1.1, the Claimant was obliged to pay the final 20% instalment 5 business days after receipt of the Defendant's final report. The Defendant's work was to be completed by 30 October 2018. The Contract therefore envisaged that the Claimant's payment obligation could arise after 30 October 2018.

27. Second, clause 11.1 does not say and cannot mean that accrued contractual rights and obligations would be extinguished on 30 October 2018. The Claimant's unpaid debts survived the 30 October 2018 deadline. So too would the Claimant's accrued rights and the Defendant's accrued obligations.

28. Field work was completed on or before 15 August 2018 (see 2019 Judgment, paragraph 13). By 30 October 2018, the obligation on the Defendant to provide the final report and data had already arisen. In my view, clause 11.1 could not be intended to allow the Defendant to escape its obligations to complete the Contract works at will, simply by failing to provide them. That would render the Contract unenforceable against the Defendant.

29. As I have said above, no explanation has been provided as to how the Claimant's failure to pay could have the effect that the Defendant's obligations under the Contract were suspended. Similarly, no explanation has been provided as to how any such suspension could then cause the obligation to be extinguished as from 30 October 2018 as a result of the operation of clause 11.1. In my view, it did not and clause 11.1 was not intended to have that effect.

30. I note also that clause 9 of the Contract appears to provide a complete contractual code for the termination of the Contract. In those circumstances, it is doubtful that clause 11.1 was intended to discharge the contract on 30 October 2018.

31. Clause 9.1 provides that:

> "The Contract can be terminated by agreement of the parties or in accordance with clause 9.2 of the Contract."

32. Clause 9.2 permitted the Defendant to cancel the Contract where payment was delayed by more than two months. However, by clause 9.3, such cancellation required the service of a written notice. While it is clearly arguable that the Defendant would have been entitled to invoke those provisions and terminate, the Defendant does not claim that it did so. Instead, on 6 May 2020, the Defendant wrote to the Claimant asking it, amongst other things, to pay the final 20% instalment of the Contract price. Rather than seeking to terminate the Contract, the Defendant was therefore seeking to rely on and enforce its terms.

33. In light of the history, the Defendant may well be concerned that the Claimant has no intention of paying the further sum which will fall due on delivery of the report and data. It might also have been arguable that such concerns justified the Defendant in terminating the Contract under the general law. However, the Defendant has not asserted or evidenced any attempt to do so.

34. In the circumstances, my view is that the Defendant is now obliged under the Contract to provide the final report and data to the Claimant. I make no finding as to whether it was entitled to withhold performance prior to recovering payment from the Claimant. However, in my view, now that the 2019 Judgment has been paid, the Defendant is obliged to perform the balance of the Contract. That obligation was subject to any right the Defendant may have had to terminate under clause 9 of the Contract or under the general law. At that stage, the Defendant was faced with a choice. It was entitled either to terminate the Contract or to perform it and claim the final payment instalment. It has not terminated the Contract. Instead, it has claimed the instalment, albeit prematurely. In the circumstances, it is obliged to perform.

35. I note that the Claimant also relies on clause 1.6 of the Contract in support of the claim. This provides that:

> "Ownership of all documents, materials, information received / acquired as a result of performance of Works by the Contractor belongs to the Customer."

36. According to the Claimant, then, it is already entitled to such of the final data as already exists in the Defendant's possession. The Defendant has not responded to this point. In light of clause 1.6, it is difficult to see how the Defendant could resist the claim insofar as it relates to that part of the data.

37. The Defendant has not raised any other objection to an order for specific performance. It is not said, for example, that preparation of the report and data would be unduly burdensome as a result of the passage of time. Instead, the Defendant has indicated that it is willing and able to produce the documents. Nor has the Defendant argued, for example, that the Claimant has no legitimate interest in the Defendant performing the balance of the contract.

38. In its Claim Form, the Claimant has made clear that it intends to pay the outstanding instalment once the report is delivered. The Claim Form is supported by a statement of truth. Given the history, there may be grounds to doubt whether the Claimant in fact intends to pay. However, I am sure that the Claimant and its officers have been made aware of the consequences of making false statements to this Court. In those circumstances, I am prepared to accept and rely on that statement in deciding what Order to make.

39. In the circumstances, ordering the Defendant to provide the final data and report is the best way to do justice between the parties and enforce the bargain that they made. I will therefore make an Order requiring the Defendant to produce the final report and data.

40. Neither party has suggested a timeframe within which the report and data should be produced. The Contract required that the report and data be provided within 5 weeks of demobilisation. Given the passage of time since the field work was completed, I will make an Order requiring production of the report and data within 28 days of this Judgment. I will however give the parties permission to apply within 7 days to vary that time, should they contend for a different period.

41. I do not propose to make any declaration as to the lawfulness of the Defendant's actions. The terms of the declaration sought are vague and I do not believe that they would serve any useful purpose, given the Order for specific performance that I make.

42. The final 20% instalment will be due within 5 business days after delivery of the report and data. The Tenge value of that instalment will fall to be calculated by reference to the US Dollar exchange rate as at the date of payment. Subject to identifying the date of payment, the precise amount due should be capable of straightforward calculation.

43. I expect that the final instalment will be paid, without the need for the Defendant to resort to further proceedings before this Court for its enforcement. As I have said, in making the Order, I have relied on the Claimant's statement that it intends to pay the final instalment when it falls due.

44. I also note that, while legal costs are not generally recoverable in the Small Claims Court, costs may be awarded against a party who has behaved unreasonably. I would anticipate that, should the Defendant need to bring further proceedings to claim the final instalment, that claim will be

accompanied by a request that the Court make an order for costs. The Claimant will no doubt by now be aware of the speed with which this Court is willing and able to act to assist parties in the enforcement of their contracts. There will be no material benefit to the Claimant from withholding the final instalment and significant potential detriment in doing so.

By the Court,

Representation:

The Claimant was represented by Mr. Yessimzhan Yegemberdiyev, Counsel, Regatta Consult.

The Defendant was represented by Ms. Assiya Azimkali, Counsel, Aurora AG Ltd.