



## NINETEENTH ARBITRAL OF APPEAL COURT

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### order

#### June 21, 2016 Case No. A14-2754 / 2014 Voronezh

The operative part of the resolution was announced on June 14, 2016 The full text of the resolution was issued on June 21, 2016

Nineteenth Arbitration Court of Appeal composed of: presiding judge Makhova E.V., judges Korableva G.N., Kolyanchikova L.A.,

when keeping the minutes of the court session by secretaries Sheina K.A., Trunova T.V.,

with the participation:

from JSC firm "SMUR": Litvinova N.N., representative by power of attorney from 15.05.2015,

from LLC "Company ALS and TEK": 1) Demidov I.A., representative by power of attorney from 01/11/2016 (before the break), 2) Poretskov A.V., representative by power of attorney from 01.06.2016, 3 ) Vekozin V.N., representative by power of attorney dated 05/30/2016, from JSC "QUANT-TELECOM": Litvinova N.N., a representative by proxy dated 25.08.2015,

from JSC "RentNet": the representative did not appear, evidence of proper notification is available in the case file,

Having considered in open court the appeals of the joint-stock company of the firm "SMUR", the limited liability company "Company ALS and TEK", the joint-stock company

"QUANT-TELECOM" against the decision of the Arbitration Court of the Voronezh

region of November 24, 2015 in case No. A14-2754 / 2014 (judge Shishkina V.M.) on the claim of the joint-stock company of the firm "SMUR" (OGRN 1023601610878, INN 3662020332) against a limited liability company

"Company ALS and TEK" (OGRN 1026402661108, TIN 6452045336), with

participation of a third party closed joint stock company "RentNet", on the collection of 2,144,158 rubles. 83 kopecks unjust enrichment and a counterclaim of the limited liability company "ALS and TEK Company" (OGRN 1026402661108, TIN 6452045336) against the joint-stock company firm "SMUR" (OGRN 1023601610878, TIN 3662020332), with

participation of a third party joint stock company "QUANT-TELECOM", on the collection of 164 181 227 RUB. 09 kopecks illegally obtained income and 38 765 011 rubles. interest for using other people's funds,

#### FOUND:

Closed joint-stock company firm "SMUR" (hereinafter - CJSC firm "SMUR", the plaintiff) applied to the Arbitration Court of the Voronezh Region with a claim against the limited liability company "Company ALS and TEK" (hereinafter - LLC "Company ALS and TEK", the defendant) to recover

2 144 158 rub. 83 kopecks unjust enrichment (executed under the terminated contract No. 3 / 12-12 of purchase and sale of optical fibers and a share in the right of common shared ownership in a fiber-optic communication line in the Voronezh and Saratov regions, concluded on September 10, 2012) (taking into account repeated changes and clarifications adopted by the court in accordance with Article 49 of the APC RF).

By definition dated 21.01.2015, the court of first instance accepted for joint consideration with the initial claim a counterclaim of LLC "Company ALS and TEK" against OJSC firm "SMUR" to collect 164 181 227 RUB. 09 kopecks illegally obtained income and 38 765 011 rubles. interest for the use of other people's funds for the period from 02/01/2013 to 07/01/2014 (taking into account the repeated changes and clarifications of claims adopted by the court in accordance with Article 49 of the APC RF).

Closed joint-stock company "RentNet" (hereinafter - CJSC "RentNet", third party), closed joint-stock company "QUANT-TELECOM" (hereinafter - CJSC "QUANT") are involved in the case as third parties who do not declare independent claims regarding the subject of the dispute. -TELECOM ", rubbing your face).

Based on paragraph 7 of Art. 3 of the Federal Law of 05.05.2014, No. 99-FZ "On Amendments to Chapter 4 of Part One of the Civil Code of the Russian Federation and on the Recognition of Certain Provisions of the Legislative Acts of the Russian Federation" CJSC Firm SMUR, CJSC RentNet and CJSC "QUANT-TELECOM" changed their corporate names to JSC firm "SMUR", JSC "RentNet" and JSC "QUANT-TELECOM", respectively.

By the decision of the Arbitration Court of the Voronezh Region dated November 24, 2015, the claim of JSC firm "SMUR" was rejected. The counterclaims of LLC "Company ALS and TEK" were also dismissed. Disagreeing with the adopted judicial act, referring to its illegality and groundlessness, JSC firm "SMUR", LLC "Company ALS and TEK" appealed to the Nineteenth Arbitration Court of Appeal with appeals, in which they asked to cancel the court decision and adopt a new judicial act on the case ...

Also referring to the illegality and groundlessness of the court decision of November 24, 2015, KVANT-TELECOM JSC filed an appeal, in which it asks to change the court decision, excluding from its reasoning part all references to the circumstances established in the previously considered case No. A57 -9276/2014. Consideration of appeals was repeatedly postponed to clarify by the persons involved in the case their positions in the dispute and to provide written explanations on the factual circumstances of the case, as well as due to the fact that the parties presented a large amount of documents to the court sessions, which the persons participating in the case were not familiar with in advance ...

At the hearing of the appeal instance on 06.06.2016 (taking into account the announced break until 14.06.2016), the representative of RentNet JSC did not appear.

Given the existence of evidence of proper notification of the third party about the time and place of the trial, the appeals were considered in the absence of his representative in accordance with Art. 123, 156, 266 of the Arbitration Procedure Code of the Russian Federation, clause 5 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated February 17, 2011 No. 12 "On some issues of application of the Arbitration Procedure Code of the Russian Federation as amended by Federal Law No. 228-FZ dated July 27, 2010" On Amendments to the Arbitration Procedure Code of the Russian Federation".

When considering a case by way of appeal, the arbitration court, based on the evidence available in the case and additionally presented evidence, re-examines the case (part 1 of article 268 of the APC RF).

The representative of the JSC firm "SMUR" announced the waiver of the claim for the recovery from LLC "Company ALS and TEK" 2,144,158 rubles. 83 kopecks unjust enrichment and the termination of proceedings in the case on the claim of the JSC firm "SMUR" against LLC "Company ALS and TEK".

Representatives of LLC "Company ALS and TEK" did not object to the fact that the court of appeal accepted the refusal of JSC "SMUR" from the claim.

In accordance with Part 2 of Art. 49 of the Arbitration Procedure Code of the Russian Federation, the plaintiff has the right, before the adoption of the judicial act, which ends the consideration of the case on the merits in the arbitration court of the first instance or in the arbitration court of the appellate instance, to abandon the claim in whole or in part.

The arbitration court does not accept the plaintiff's refusal of the claim, the reduction of the amount of the claim, recognition by the defendant of the claim, does not approve the amicable agreement of the parties if this contradicts the law or violates the rights of other persons. In these cases, the court considers the case on the merits (part 5 of article 49 of the APC RF).

By virtue of paragraph 4 of Part 1 of Art. 150 APC RF, the arbitration court terminates the proceedings if it finds that the plaintiff abandoned the claim and the refusal was accepted by the arbitration court in accordance with Art. 49 of the APC RF.

The powers of the plaintiff's representative to withdraw from the claim are stipulated by the power of attorney of JSC "SMUR" dated 15.05.2015 (a copy is attached to the application for withdrawal from the claim).

Having considered the application of the JSC firm "SMUR" to terminate the proceedings on the claim of the JSC firm "SMUR" to the LLC "Company ALS and

TEK" for the recovery of 2,144,158 rubles. 83 kopecks unjust enrichment in connection with the refusal of the JSC firm "SMUR" from the stated claims, taking into account that it does not violate the rights and legitimate interests of others and does not contradict the law, filed in accordance with Art. 49 of the APC RF, the court of appeal considers it possible to satisfy it and accept the refusal of JSC firm "SMUR" from the claim.

Due to the fact that the refusal of the plaintiff from the claims is made by the Nineteenth Arbitration Court of Appeal, the decision of the Arbitration Court of the Voronezh Region dated November 24, 2015 is subject to cancellation in terms of the refusal to satisfy the claim of JSC SMUR to recover from LLC ALS and TEK Company »2 144 158 rubles. 83 kopecks unjust enrichment, as well as in terms of the return of JSC to firm "SMUR" from the federal budget 56 911 rubles. 73 kopecks state duty, and the proceedings on the claim of the company "SMUR" to LLC "Company ALS and TEK" on the recovery of 2,144,158 rubles. 83 kopecks unjust enrichment - termination.

Thus, the subject of consideration in the present case is the counterclaims of LLC "Company ALS and TEK" against JSC "SMUR" for the recovery of 164 181 227 RUB. 09 kopecks illegally obtained income and 38 765 011 rubles. interest for the use of other people's funds for the period from 01.02.2013 to 01.07.2014, the satisfaction of which was refused by the appealed court decision.

At the hearing on 06.06.2016 (taking into account the announced break until 14.06.2016), representatives of ALS and TEK Company LLC supported the arguments of the appeal of ALS and TEK Company LLC, taking into account additions and clarifications to the complaint.

The representative of JSC firm "SMUR", which also represents the interests of JSC "QUANT-TELECOM", objected to the satisfaction of the appeal of LLC "Company ALS and TEK" on the grounds set out in the responses and additions to the responses to the complaint, supported the arguments of the appeals of JSC firm "SMUR "And JSC" QUANT-TELECOM "in terms of disagreement with the reasoning part of the court decision.

After examining the case materials, evaluating the arguments of the appeals, taking into account the additions and clarifications to the complaints, reviews and additions to the responses to complaints, written explanations, additions and objections received from the parties, after hearing the explanations of the participants in the process, the judicial board sees no grounds for satisfying the appeals.

As established by the court and follows from the case materials, on September 4, 2012, between ALS and TEK Company LLC (seller) and SMUR CJSC (buyer), an agreement for the purchase and sale of optical fibers and a share in the right of common share ownership in fiber-optic communication line on the territory of the Voronezh and Saratov regions No. 3 / 12-12, under the terms of which (clause 1.1) the buyer undertook to pay and take ownership, and the seller undertook to transfer the following property into the ownership of the buyer after payment:

- four optical fibers (OF) of the G.652 standard and 4/72 (four seventy-second) shares in the right of common share ownership of the sheath, protective and power elements of an optical cable (OC), couplings, crosses in a fiber-optic communication line Borisoglebsk - Rogachevka in the section from the M2A clutch

of ORTPTs in Tellermanovskiy settlement of the Gribanovsky district of the Voronezh region to the Ml clutch at the automatic telephone exchange of OJSC Rostelecom Borisoglebsk, st. K. Marx, 76 with a total length of 6.8 km. (sub. 1.1.1);  
- four OV of the G.652 standard and 4/64 (four sixty-fourth) shares in the right of common share ownership of the shell, protective and power elements of the OK, couplings, crosses in the Saratov-Ozinki FOCL with a total length of 345.078 km. (sub. 1.1.2);

Individualizing signs of the transferred property, as well as the route of passage of the FOC, the list of sections of the OV, the contractual price of the OV are indicated in the list of the transferred property (Appendix No. 1 to this agreement). The total length of the OC, which includes the transferred OM, is 351.878 km, and the total length of the transferred OM is 1407.512 km. (sub. 1.1.3).

- In accordance with clause 1.3 of the agreement, the transfer of property from the seller to the buyer, first for temporary use, and then into ownership is carried out according to the acts of acceptance and transfer of property signed by the parties.
- Simultaneously with the transfer of the property into the ownership of the buyer, the seller is obliged to transfer to the buyer the technical documentation provided for by the technical requirements for the property (clause 1.6 of the contract).
- Based on clause 2.3.1 of the contract, the buyer undertook to pay for and accept the property on the terms of the contract and in accordance with the annexes to it.
- Clause 2.5 of the agreement states that in the event of a significant violation of the requirements for the quality of optical fibers - the detection of fatal deficiencies, deficiencies that cannot be eliminated without significant costs and time consuming, or are revealed repeatedly, or appear again after their elimination and other similar shortcomings, or if the buyer does not provide all the necessary documentation for optical fibers in accordance with the contract, or if there are such violations of the quality of optical fibers that do not allow them to be used for transmitting telecommunication signals and providing communication services, the buyer has the right to demand replacement of optical fibers that do not meet technical requirements, for similar property, or completely abandon the execution of the contract and demand the return of the funds paid under the contract.
- According to clause 3.5 of the agreement, the total value of the property and the share transferred to the buyer under the agreement is 18,520,211 rubles. 79 kopecks, plus VAT 18% - 3 333 638 rubles. 12 kopecks
- In accordance with clause 3.7 of the agreement, payments and transfer of property for temporary use, and then into ownership, are made in stages in the following order:
  - the first payment in the amount of 25% of the property value, amounting to 4,630,052 rubles. 95 kopecks, besides VAT 18% in the amount
  - RUB 833,409 53 kopecks, the buyer makes no later than 10 days after receiving the invoice issued by the seller. The seller undertakes to issue an invoice within 3 calendar days after the signing of the contract by both parties (clause 3.7.1);
    - after the buyer makes the first payment, the seller, within 10 calendar days, carries out the procedure for the acceptance and transfer of property for temporary use to the buyer 4 optical fibers in FOCL Saratov - Ozinki and FOCL ORTPTS - Borisoglebsk, specified in the statement of transferred property for temporary use (Appendix No. 1 to this to the agreement) and the parties sign the act of acceptance and transfer of property for temporary use (Appendix No. 2 to this agreement) 4 optical fibers in the fiber-optic communication line Saratov - Ozinki and the fiber-optic communication line ORTPTS - Borisoglebsk (sub. 3.7.2);
      - after the seller provides 4 optical fibers and the parties have signed the transfer and acceptance certificate of 4 optical fibers in the Saratov - Ozinki and ORTPTS - Borisoglebsk fiber optic communication lines for temporary use, the buyer within 10 calendar days after signing the specified transfer and acceptance certificate for temporary use makes the payment of the second payment in the amount of 25% of the value of the property, amounting to 4 630 052 rubles. 95

kopecks, plus 18% VAT in the amount of 833 409 rubles. 53 kopecks If the second payment is not made within the specified period, the temporary use of 4 optical fibers in the Saratov-Ozinki FOCL and the ORTPTS-Borisoglebsk FOCL shall be terminated until the second payment is made (Subclause 3.7.3);

- after the buyer makes the second payment, the seller, within 30 calendar days, carries out the procedure for transferring 4 optical fibers into the ownership of the buyer in the Borisoglebsk-Rogachevka FOCL in the section from the M2A clutch ORTPTS settlement Tellermanovskiy, Voronezh region to the M1 ATS clutch

Rostelecom Borisoglebsk, st. K. Marx, 76 and 4 (four) optical fibers in the fiber-optic communication line Saratov - Ozinki on the Ozinki-Ershov section, indicated in the statement of transferred property into ownership according to stage I (Appendix No. 3 to this agreement) and the parties sign the act of transfer and acceptance of property in property under stage I (Appendix No. 4 to this Agreement) 4 optical fibers in the Borisoglebsk-Rogachevka FOCL in the section from the M2A coupling of the ORTPTS settlement Tellermanovskiy, the Gribanovsky district of the Voronezh region to the M1 coupling of the automatic telephone exchange of OJSC

Rostelecom Borisoglebsk, st. K. Marx, 76 and 4 optical fibers in FOCL Saratov - Ozinki in the Ozinki - Ershov section (sub. 3.7.4);

- the third payment in the amount of 50% of the property value, amounting to 9 260 105 rubles. 90 kopecks, besides VAT 18% in the amount

RUB 1,666,819 06 kopecks paid by the buyer within one calendar year from the date of signing the contract, after making the first and second payments (clause 3.7.5);

- after the buyer makes the third payment, the seller, within 30 calendar days, makes the procedure for transferring and receiving 4 optical fibers into the ownership of the buyer in the Saratov-Ozinki FOCL on the Ershov-Saratov section, indicated in the statement of property transferred to the ownership of the II stage (Appendix No. 5 to this the agreement) and the parties sign the act of acceptance and transfer of property into ownership according to stage II (Appendix No. 6 to this agreement) of 4 optical fibers in the fiber-optic communication line Saratov - Ozinki on the Ershov - Saratov section. If the third payment is not made within the specified period, the temporary use of 4 optical fibers in the FOCL on the Ershov - Saratov section is terminated until the third payment is made (Subclause 3.7.6).

In clause 4.4 of the agreement, the parties agreed that in case of violation of the terms of payment for the property through the fault of the buyer for more than 90 calendar days, the seller has the right to unilaterally and out of court to refuse to execute this agreement or to claim the unpaid amounts in court.

Pursuant to the terms of the said agreement, JSC "SMUR" transferred under payment orders No. 932 dated 04.10.2012 in the amount of 4,000,000 rubles, No. 944 dated 05.10.2012 in the amount of 1,463,462 rubles. 48 kopecks to the account of LLC "Company ALS and TEK" monetary funds in the total amount of 5,463,462 rubles. 48 kopecks, indicating in the purpose of payment of these payment orders: "The first payment for dog. No. 3 / 12-12 of 04.09.2012 ".

10.10.2012 between CJSC firm "SMUR" and LLC "Company ALS and TEK" signed an act of acceptance and transfer of property for temporary use, according to which the seller transferred and the buyer accepted for temporary use the property, consisting of 4 optical fibers in the fiber-optic communication line Borisoglebsk - Rogachevka in the section from the M2A clutch of the ORTPTs in Tellermanovsky settlement of the Gribanovsky district of the Voronezh region to the M1 clutch at the automatic telephone exchange of OJSC

Rostelecom Borisoglebsk, st. K. Marx, 76 and from 4 optical fibers in a fiber-optic communication line Saratov - Ozinki.

Payment orders No. 782 dated November 26, 2012 for the amount of 1,000,000 rubles, No. 900 dated December 7, 2012 for the amount of 200,000 rubles, No. 936 dated

12.12.2012 for the amount of 1,000,000 rubles, No. 91 dated 28.12.2012 for the amount

RUB 3,263,462 48 kopecks CJSC firm "SMUR" made the payment of the second payment in accordance with sub. 3.7.4 p. 3.7 of contract No. 3 / 12-12 dated 04.09.2012 in the amount of 5 463 462 rubles. 48 kopecks

According to the act of acceptance and transfer of property into ownership according to stage 1 of November 21, 2012, the seller transferred, and the buyer took ownership of the property, consisting of optical fibers and a share in the right of common shared ownership in the Saratov-Ozinki fiber-optic communication line of the Saratov region to section Ozinki-Ershov.

At the same time, clause 2 of this act of acceptance and transfer indicates that after signing this act, the buyer has the right to own, dispose and use 4 optical fibers in the Borisoglebsk - Rogachevka fiber-optic communication line in the section from the M2A clutch of ORTPTS in p. Tellermanovskiy, Gribanovsky District, Voronezh Region, to the M1 coupling at the automatic telephone exchange of OJSC Rostelecom Borisoglebsk, st. K. Marx, 76 and 4 optical fibers in a fiber-optic communication line Saratov - Ozinki.



On November 23, 2012, CJSC Firm SMUR (lessor) and CJSC KVANT-TELECOM (lessee) entered into a lease agreement for a share in the common share ownership of fiber-optic communication lines No. 23-A4732 / 12, according to the terms of which (clause 2.1) the lessor undertook to transfer to the lessee within 10 days from the date of signing the lease the following property (leased objects):

- four OV of the G.652 standard and 4/72 shares in the right of common share ownership of the sheath, protective and power elements of the optical cable, couplings, crosses in the fiber-optic communication line Borisoglebsk

- Rogachevka in the section from the M2A clutch of ORTPTs in Tellermanovsky settlement of the Gribanovsky district of the Voronezh region to the M1 clutch at the automatic telephone exchange of OJSC

Rostelecom Borisoglebsk, st. K. Marx, 76 with a total length of 6.8 km. (sub. 2.1.1);

- four OV of the G.652 standard and 4/64 shares in the right of common share ownership of the shell, protective and power elements of the OK, couplings, crosses in the Saratov-Ozinki FOCL with a total length of 345.078 km. (sub. 2.1.2).

By virtue of clause 2.2 of the lease agreement, the lessee undertook to accept the leased objects for use and timely pay the lease to the lessor in the manner and on the conditions provided for in this agreement.

According to clause 5.1 of the lease agreement, the rent is 147,000 rubles. per month, including VAT 18%, the rent is paid monthly, no later than the 20th day of each settlement month, according to the invoice issued by the lessor no later than the 10th day of each day of the month.

The validity period of the lease agreement starts from 23.11.2012 and ends on 22.11.2015 (clause 2.3 of the lease agreement).

In accordance with clause 4.1 of the agreement, the acceptance and transfer of the leased object is carried out according to the acceptance certificate of the leased object.

According to the acceptance certificate dated November 26, 2012, CJSC "SMUR" (the lessor) transferred the above leased objects to CJSC "QUANT-TELECOM" (the lessee).

02/04/2013 LLC "Company ALS and TEK" sent a letter No. 124 to CJSC firm "SMUR", in which it notified the latter about the termination of the contract No. 3 / 12-12 dated 04.09.2012 due to repeated violation by the buyer of contractual obligations.

In response to the said notification (letter out. 278 dated 02/11/2013), CJSC firm "SMUR" indicated that LLC "Company ALS and TEK" had no legal grounds to terminate the contract unilaterally.

At the same time, CJSC firm "SMUR" suspended the fulfillment of its obligations to pay the third payment in the amount of 50% percent of the value of the property, provided for in clause 3.7.5 of contract No. 3 / 12-12 dated 04.09.2012, referring to the ALS and TEK "significant violations of the terms of the said agreement.

In particular, CJSC firm "SMUR" refers to the fact that in the course of emergency and restoration work it was found that the identifying signs of the property actually transferred into ownership do not correspond to the identifying signs of the property, which are indicated in the statement of transferred property and in the act of acceptance and transfer of 10.10.2012. In addition, according to CJSC firm "SMUR", LLC "Company ALS and TEK" did not return to the buyer a copy of the certificate of acceptance and transfer of property into ownership, signed by its side, according to stage I of November 21, 2012, and thus by avoiding the transfer of documents to ZAO firm "SMUR" confirming its rights to the property transferred into ownership, and also substantially violated cl. 7.1.6, 7.1.7 of the agreement, by selling the property owned by CJSC RentNet, while misinforming the buyer and claiming at the conclusion of this agreement that this property belongs to the seller by right of ownership.

Also CJSC firm "SMUR" sent claims No. 388 of February 25, 2013, No. 1515 of 10/17/2013, No. 418 of February 10, 2014 to LLC "Company ALS and TEK" with demands to eliminate the violations. In the notification ref. No. 226 of 27.01.2014, CJSC firm "SMUR" announced the cancellation of contract No. 3 / 12-12 of 04.09.2012 and demanded from LLC "Company ALS and TEK" to return to the buyer the money paid for the transferred property agreement, in the amount of 10 926 924 rubles. 96 kopecks.

In turn, LLC "Company ALS and TEK", pointing out repeated and gross violations by CJSC firm "SMUR" of the terms of contract No. 3 / 12-12 of 04.09.2012, by letter ref. No. 841 of May 23, 2014 asked CJSC firm "SMUR" to consider the agreement terminated.

The issue of termination between the parties to agreement No. 3 / 12-12 of 04.09.2012 is considered by the Arbitration Court of the Voronezh Region in case No. A14-8464 / 2015, as well as the issue of recognizing the agreement as void - in case No. A14-13744 / 2015.

Referring to the fact that CJSC firm "SMUR", due to failure to fulfill the obligation to pay the third payment under contract No. 3 / 12-12 dated 04.09.2012, did not receive ownership of the transferred property and lost the right to use this property, but continues to use the data property and without any legal basis leased it to a third party - KVANT-TELECOM CJSC, that is, it illegally extracted income from the property that did not belong to it, ALS and TEK Company LLC applied to the Arbitration Court of the Voronezh Region with a counterclaim (with taking into account clarifications).

Making a decision on the case, the court of first instance came to the correct conclusion about the refusal to satisfy the counterclaims of LLC "Company ALS and TEK".

According to Art. 8 of the Civil Code of the Russian Federation, civil rights and obligations arise from the grounds provided for by law and other legal acts, as well as from the actions of citizens and legal entities, which, although not provided for by law or such acts, but by virtue of general principles and the meaning of civil legislation give rise to civil rights and obligations, including due to unjust enrichment.

In accordance with Art. 1102 of the Civil Code of the Russian Federation, a

person who, without the grounds established by law, other legal acts or a transaction, acquired or saved property (acquirer) at the expense of another person (victim), is obliged to return to the latter the unjustifiably acquired or saved property (unjust enrichment), except for the cases provided for in article 1109 of this Code.

It follows from the content of this rule of law that for an obligation to arise as a result of unjust enrichment, two circumstances must be present simultaneously: the enrichment of one person at the expense of another and the acquisition or saving of property without the grounds provided for by law, legal act or transaction.

A person who has filed a claim for compensation for unjust enrichment is obliged to prove the fact that the defendant used the property belonging to the plaintiff, the period of such use, the absence of grounds for such use established by law or a transaction, the amount of unjust enrichment (clause 8 of the Information Letter of the Supreme Arbitration Court of the Russian Federation dated January 11, 2000 No. 49 "Review of the practice of considering disputes related to the application of the rules on unjust enrichment").

Within the meaning of Art. 1102, 1105 of the Civil Code of the Russian Federation, Part 1 of Art. 65 of the Arbitration Procedure Code of the Russian Federation, a person who has applied for compensation for unjust enrichment is obliged to prove the fact of unjust enrichment of the defendant at the expense of the plaintiff.

In this case, the legal relationship of the parties arose from the contract

No. 3 / 12-12 of 04.09.2012, which by its legal nature is a purchase and sale agreement with terms of payment by installments and a phased transfer of property.

In accordance with paragraph 1 of Art. 454 of the Civil Code of the Russian Federation, under a sale and purchase agreement, one party (the seller) undertakes to transfer the thing (goods) to the ownership of the other party (the buyer), and the buyer undertakes to accept this product and pay a certain amount of money (price) for it.

Based on paragraph 1 of Art. 456 of the Civil Code of the Russian Federation, the seller is obliged to transfer to the buyer the goods stipulated by the sales contract.

According to paragraph 1 of Art. 457 of the Civil Code of the Russian Federation, the term for the seller to fulfill the obligation to transfer the goods to the buyer is determined by the purchase and sale agreement, and if the agreement does not allow determining this period, in accordance with the rules provided for by Art. 314 of the Civil Code of the Russian Federation.

In paragraph 1 of Art. 485 of the Civil Code of the Russian Federation established that the buyer is obliged to pay for the goods at the price stipulated by the contract of sale.

The buyer is obliged to pay for the goods immediately before or after the seller transfers the goods to him, unless otherwise provided by this Code, other law,

other legal acts or the contract of sale and does not follow from the essence of the obligation (clause 1 of Article 486 of the Civil Code of the Russian Federation).

By virtue of Art. 309, 310 Civil Code obligations must be performed properly in accordance with the terms of the obligation and the requirements of the law, unilateral refusal to fulfill the obligation is not allowed.

Under the terms of contract No. 3 / 12-12 of 04.09.2012, JSC SMUR undertook to pay for and take ownership of optical fibers and shares in the right of common shared ownership in a fiber-optic communication line in the Voronezh and Saratov regions with a total value of 18 RUB 520 211 79 kopecks, and LLC "Company" ALS and TEK "(the seller) undertook to transfer the ownership of the buyer after payment to the property named in the contract.

Clause 3.7 of the said agreement stipulates that payments and transfer of property for temporary use, and then into ownership, are made in stages.

So, according to clause 3.7.1 of contract No. 3 / 12-12 dated 04.09.2012, the first payment in the amount of 25% of the value of the property, amounting to 4 630 052 rubles. 95 kopecks, the buyer makes within a period not later than 10 days after receiving the invoice issued by the seller.

After the seller provides 4 optical fibers and the parties have signed the transfer and acceptance certificate of 4 optical fibers in the Saratov-Ozinki and ORTPTs-Borisoglebsk fiber optic communication lines for temporary use, the buyer within 10 calendar days after signing the specified transfer and acceptance certificate for temporary use makes payment of the second payment in the amount of 25% of the value of the property, amounting to 4 630 052 rubles. 95 kopecks (clause 3.7.3 of contract No. 3 / 12-12 dated 04.09.2012).

In accordance with clause 3.7.5 of contract No. 3 / 12-12 dated 04.09.2012, the third payment in the amount of 50% of the value of the property, amounting to

RUB 9 260 105 90 kopecks, paid by the buyer within one calendar year from the date of signing the contract after the first and second payments.

The fact of payment by JSC firm "SMUR" of the first and second payments under contract No. 3 / 12-12 dated 04.09.2012 in the total amount of 10,926,924 rubles. 96 kopecks, including VAT 18%, is confirmed by the case materials, and is not disputed by the persons involved in the case.

After payment of the second payment, LLC "Company ALS and TEK" transferred the JSC firm "SMUR" to the ownership of the property, consisting of optical fibers and a share in the right of common shared ownership in a fiber-optic communication line Saratov -Ozinki of the Saratov region on the Ozinki-Ershov section.

In clause 2 of this act of acceptance and transfer, it is indicated that after signing this act, the buyer has the right to own, dispose and use 4 optical fibers in the fiber-optic communication line Borisoglebsk - Rogachevka in the section from the M2A clutch of the ORTPTS in the village Tellermanovskiy Gribanovskiy district of the Voronezh region to the clutch M1 at the automatic telephone

exchange of OJSC "Rostelecom" Borisoglebsk, st. K. Marx, 76 and from 4 optical fibers in a fiber-optic communication line Saratov - Ozinki.

According to paragraph 2 of Art. 218 of the Civil Code of the Russian Federation, the right of ownership to property that the owner has can be acquired by another person on the basis of a sale and purchase agreement, exchange, donation or other transaction on the alienation of this property.

The owner has the rights to own, use and dispose of his property. The owner has the right, at his discretion, to perform any actions with respect to the property belonging to him that do not contradict the law and other legal acts and do not violate the rights and interests of other persons protected by law, including alienate his property into the ownership of others, transfer them, while remaining the owner, rights possession, use and disposal of property, pledge property and burden it in other ways, dispose of it in a different way (clauses 1, 2, article 208 of the Civil Code of the Russian Federation).

The right to lease property belongs to its owner. Landlords can also be persons authorized by law or the owner to lease out property (Article 608 of the Civil Code of the Russian Federation).

Thus, based on the cumulative analysis of the provisions of Art. 208, 218, 608 of the Civil Code of the Russian Federation and the terms of agreement No. 3 / 12-12 dated 04.09.2012, JSC firm

"SMUR" after paying the second payment and signing the act of acceptance and transfer of property dated November 21, 2012, it was entitled to lease it to a third party - JSC "QUANT-TELECOM".

Links of LLC "Company ALS and TEK" to clause 9.2 of agreement No. 3 / 12-12 dated 04.09.2012, according to which none of the parties can transfer their rights and obligations under this agreement to any third party without written consent the other hand is not accepted by the court by virtue of the following.

In accordance with Art. 431 of the Civil Code of the Russian Federation, when interpreting the terms of the contract, the court takes into account the literal meaning of the words and expressions contained in it. The literal meaning of the terms of the contract in case of its ambiguity is established by comparison with other terms and the meaning of the contract as a whole.

Based on the literal interpretation of the provisions of clause 9.2 of the treaty

No. 3 / 12-12 of 04.09.2012, it follows that the parties established a ban on the transfer of their rights and obligations under this agreement to any third party without the written consent of the other party.

At the same time, from the terms of the lease agreement for a share in the right of common shared ownership of FOCL No. 23-A4732 / 12, concluded on November 23, 2012 between JSC "SMUR" and JSC "QUANT-TELECOM",

it follows that the lessor has transferred to the lessee any rights and obligations under the agreement No. 3 / 12-12 dated 04.09.2012.

In addition, as correctly noted by the regional court, the materials of this case do not contain sufficient evidence of the actual execution of the JSC firm "SMUR" and JSC "QUANT-TELECOM" of the lease agreement and the

extraction of income under it. There are no primary documents confirming the amount of income.

On the contrary, representatives of JSC firm "SMUR" and JSC "QUANT-TELECOM" during the trial of the case explained that in view of the disconnection of LLC "Company ALS and TEK" on 06.02.2013, the fiber-optic communication line transferred under the act of transfer of property for temporary use from 10.10.2012, JSC firm "SMUR" did not receive and could not receive any enrichment (income) from the use of FOCL.

The evidence to the contrary was not presented to the court by LLC "Company ALS and TEK".

Circumstance of disconnection 06/02/2013 FOCL representatives of LLC "Company ALS and TEK" did not deny in the court session of the appeal instance dated June 14, 2016.

Links of LLC "Company ALS and TEK" to terminate the contract by canceling contract No. 3 / 12-12 dated 04.09.2012 by letter ref. No. 124 of 02/04/2013 is also insolvent, since, taking into account the requirements of the law and the provisions of paragraphs. 5, 4.4 of the agreement, the seller in any case did not have the right to unilaterally withdraw from the agreement as of 04.02.2013.

Part 1 of Art. 71 of the Arbitration Procedure Code of the Russian Federation stipulates that the arbitration court evaluates evidence according to its inner conviction, based on a comprehensive, complete, objective and direct study of the evidence available in the case.

Considering in the aggregate the above circumstances, assessing the evidence presented in the case materials in accordance with Art. 71 of the APC RF, the court of first instance came to the correct conclusion about the refusal to satisfy the counterclaims of LLC "Company

"ALS and TEK".

The arguments of the appeal of LLC Company ALS and TEK, taking into account additions and clarifications to the complaint, are reduced to disagreement with the circumstances established by the court and their assessment, however, another assessment by the applicant of these circumstances cannot serve as a basis for canceling the adopted judicial act.

The arguments of the appeals of JSC firm "SMUR" and JSC "QUANT-TELECOM" on the groundlessness of the conclusions of the court of first instance on the prejudicial significance of the judicial act in case No. A57-9276 / 2014 are also subject to rejection as based on an incorrect interpretation of the rules of procedural law.

In addition, the regional arbitration court relied on the findings of the court in case No. A57-9276 / 2014 when considering the claims of JSC firm "SMUR", which the plaintiff refused during the consideration of this case in the court of appeal.

Links of LLC "Company" ALS and TEK "to the need for the court of appeal to accept the refusal of JSC firm" SMUR "to LLC

"The company" ALS and TEK "for all the requirements previously stated during the consideration of the case in the court of first instance (on the

recognition of contract No. 3 / 12-

12 of 04.09.2012 in the part void, the application of the consequences of the invalidity of the transaction, the collection of interest on the amount of unjust enrichment, the recognition of contract No. 3 / 12-12 of 04.09.2012 as not concluded, etc.) are not accepted by the judicial board.

As follows from the materials of the case, the plaintiff changed the subject of the claim and finally asked the court to recover money from the defendant (executed under the terminated contract No. 3 / 12-12 of the purchase and sale of optical fibers and a share in the right of common share ownership in a fiber-optic communication line on the territory of the Voronezh and Saratov regions, concluded on 10.09.2012) in the amount of 2 144 158 rubles. 83 kopecks unjust enrichment (case sheet 60-67 t. 4). It was this requirement that was resolved by the court of first instance. There is no written statement of JSC firm "SMUR" about the waiver of claims in the case file. The representative of JSC firm "SMUR" in the court of appeal also denied the circumstances that JSC firm "SMUR" declared in the regional court to refuse the claim, insisted on changing the subject of the claim.

As explained by the Constitutional Court of the Russian Federation in the Definition of May 21, 2015 No. 1119-O, by virtue of the principle of dispositiveness inherent in civil proceedings, only the plaintiff determines whether or not to defend his violated or contested right (part 1 of Article 4 of the APC RF), which a claim and, in this connection, to present to the court (clauses 4 and 5 of part 2 of article 125 of the APC RF), to whom to bring a claim (clause 3 of part 2 of article 125 of the APC RF) and to what extent demand protection from the court (part 5 of article 170 of the APC RF). Accordingly, the court is obliged to resolve the case based on the claim brought by the plaintiff. Since when changing the subject or basis of the claim in accordance with Part 1 of Art. 49 of the Arbitration Procedure Code of the Russian Federation, the plaintiff changes his claim, insofar as it is the amended claim that should be considered declared and subject to consideration by the court.

The arguments of the applicants of the appellate complaints in essence do not refute the conclusions of the court of first instance, but express only disagreement with them, which cannot be the basis for canceling or changing the adopted judicial act.

The court of first instance thoroughly examined the evidence presented by the persons participating in the case, gave them a correct legal assessment and made a decision regarding the refusal to satisfy the counterclaim, which meets the requirements of substantive and procedural law. Violations of the norms of procedural legislation, which are by virtue of Part 4 of Art. 270 of the Arbitration Procedure Code of the Russian Federation, an unconditional basis for the cancellation of the adopted judicial acts was not admitted.

In accordance with paragraphs. 3 p. 1 art. 333.40 of the Tax Code of the Russian Federation in case of termination of proceedings in the case by an arbitration court, the paid state duty is subject to return to the applicant from the federal budget in whole or in part.

When applying to the arbitration court of first instance with a statement of claim JSC firm "SMUR" on payment order No. 808 of 12.03.2014 paid a state fee in the

amount of 90 632 rubles. 73 kopecks, which is fully subject to refund from the federal budget.

By virtue of the provisions of Art. 110 of the Arbitration Procedure Code of the Russian Federation, the costs for consideration of appeals are borne by JSC firm "SMUR", LLC "Company

ALS and TEK, JSC QUANT-TELECOM 3,000 rubles each. for everyone.

Guided by Art. 49, 102-112, 150, 266-269, 271 APC RF, court

DECIDED:

Accept from the joint-stock company of the firm "SMUR" a waiver of the claim to recover from the limited liability company "Company ALS and TEK" 2,144,158 rubles. 83 kopecks unjust enrichment in the case

No. A14-2754 / 2014.

The decision of the Arbitration Court of the Voronezh Region of November 24, 2015 in case No. A14-2754 / 2014 regarding the refusal to satisfy the claim of the joint-stock company of the firm "SMUR" to recover from the limited liability company "Company ALS and TEK" RUB 2,144,158. 83 kopecks unjust enrichment, as well as in terms of the return to the joint-stock company to the firm "SMUR" from the federal budget 56,911 rubles. 73 kopecks to cancel the state duty. Proceedings in case No. A14-2754 / 2014 on the claim of the joint-stock company of the firm "SMUR" against the limited liability company "Company ALS and TEK" for the recovery of 2,144,158 rubles. 83 kopecks stop unjust enrichment.

In the rest, the decision of the Arbitration Court of the Voronezh Region of November 24, 2015 in case No. A14-2754 / 2014 shall be left unchanged, the appeals - without satisfaction.

To return to the joint-stock company the firm "SMUR" (OGRN 1023601610878, INN 3662020332) from the federal budget 90 632 rubles. 73 kopecks state duty.

The decision comes into legal force from the date of its adoption and can be appealed on cassation to the Arbitration Court of the Central District within two months through the court of first instance in accordance with Part 1 of Art. 275 APC RF.

Presiding E.The. Makhovaya

Judges G.N. Korableva

L.A. Kolyanchikova