

Restitution mechanisms under the UAE Penal law

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This article focuses upon the practical application of Article 230 of the UAE Penal Law No. 3 of 1987 (the “Penal Law”).

This provision provides that a person who is convicted of embezzling or damaging public property shall be sentenced to pay restitution plus a fine equivalent to the proceeds of their crimes. In other words, a person who is convicted of embezzling or damaging public property potentially faces a total of three penalties. The first penalty shall be the principal penalty of imprisonment. The second penalty is restitution of the proceeds of the crime which shall be payable to the victim. The third penalty is a fine equivalent to the proceeds of the crime which is payable to the Public Treasury of the Government of the UAE.

In the Dubai Cassation Court case below, the question arose: who is the “victim” who shall benefit from the court order of restitution in accordance with Article 230?

Summary of facts

The Dubai Public Prosecution (the “Prosecution”) referred the accused to the Criminal Court on the basis that he was alleged to have misappropriated commissions totaling approximately AED 17 million. The accused was a sales manager for a public entity who was responsible for executing sale and lease transactions of land owned by the public entity. The Prosecution argued that the accused committed a crime by requesting kickbacks from clients in order to sell and lease lands owned by his employer. The Prosecution argued that the accused succeeded in misappropriating the commissions through depositing cheques and bank transfers to the bank account of a private company owned by his family. The Prosecution requested that the accused be punished in accordance with Articles 228 and 230 of the Penal Law.

Article 228 of the Penal Law is concerned with public officers who work with preparation, administration or execution of contracting, supply or public works in relation to any UAE public entity. When a public officer obtains for himself or for another person a commission in contradiction with his duties at the public entity, such officer shall be sentenced to temporary imprisonment. A person convicted of obtaining commissions according to Article 228 of the Penal Law has embezzled public property. In that regard, Article 228 relates to Article 230 of the Penal Law in application.

The Dubai Court of First Instance sentenced the accused to three years’ imprisonment and he was ordered to reconstitute the misappropriated monies and also pay the same amount as a fine. This decision was upheld on appeal to the Appeal Court. The accused challenged the judgment on the basis that it was ambiguous as to whether restitution should be paid to the Public Treasury or be paid back to the clients of his ex employer.

The lower court considered matters and ordered the individual to pay the restitution amount to the clients of the public entity rather than to the Public Treasury.

The Prosecution filed an appeal before the Dubai Court of Cassation. The Prosecution argued that the lower court erred in the application of the law as restitution should be paid to the Public Treasury on the basis that the individual was guilty of malfeasance in public office (misuse of public office) and the real “victim” of the committed crime was the public entity (and in turn the Treasury) rather than its clients.

Furthermore, the Prosecution argued that the monies should be paid to the Public Treasury to compensate it for the damages suffered by reason of the individual’s misuse of his public office.

Cassation Court

The Dubai Court of Cassation determined that restitution is a mandatory punishment. The punishment intends to return misused funds to their rightful owner and restore the status quo prior to the crime taking place. To that extent, restitution shall always be paid to the victim of the crime which it deemed to be the UAE Government in this case.

The Cassation Court considered that the clients of the public entity who had paid commissions to this public official who in turn misused his office should not to be considered as victims of the crime. The Court considered that these clients had demonstrated bad faith in that the commissions were intended to enable them to own or lease lands while disregarding the interests of those who had legitimately joined waiting lists with a view to owning or leasing land. The Court went further and considered these clients as bribers who acted as an accessory to the crime. The judgment stated “Doing so [compensating the clients] will urge others dealing with public officials to take the same devious course of action as long as whatever they pay will be returned back to them once their shameful behavior is discovered”. The Court took the view that this was certainly not the intent of the legislator and should not be an approach adopted by the courts.

Therefore, the Cassation Court declared that the Appeal Court misapplied the law and ordered the payment of the amount of restitution to be paid to the Public Treasury.

However, in cases where the victim of the crime is a person or entity other than the government, restitution shall be paid to that victim. The Court used an example of increased taxes or other sums of monies being collected by a public official. Notwithstanding that a public official committed the crime, the Court noted that the “victim” is the person that surrenders more money than what he owes to the public official and restitution should properly be paid to that person.

Conclusion

Public officials are entrusted to act and represent the government that employs them. They have vast powers that are tailored to enable them to perform their functions and carry out important roles. Generally the laws of the UAE, including the Penal Law, strive to protect the integrity and honesty of public offices whilst seeking to enhance the trust of people towards public offices and officials.

This approach is reflected by the above decision of the Cassation Court which widely interprets the articles of the Penal Law to hand down tough sentences and effectively deter public officials from abusing their powers.

This judgment also clarifies the approach of the Court when identifying the appropriate “victim” of such crimes and ensuring that the appropriate person or entity is the beneficiary of a restitution order.

Finally, although this is not addressed in the above judgment, we would like to draw to your attention that sometimes the “victim” in similar cases is an entity comprising of a mixture of public and private ownership like a Public Joint Stock Company as opposed to the above judgment where

the “victim” was an entity wholly owned by the government. When a Public Joint Stock Company is a victim to a crime, the restitution order shall be issued in favor of that Public Joint Stock Company and not in favor of the Public Treasury. The aim of the legislation and the Courts is to preserve the rights of private shareholders in such companies who are deemed to be the “victim” for the purposes of the legislation.