

Does anticipatory breach exist under UAE law?

Khaled Gamaleldeen - Senior Counsel - Litigation

k.gamaleldeen@tamimi.com - Dubai International Financial Centre

Marwa El Mahdy

m.elmahdy@tamimi.com

February 2014

The doctrine of anticipatory breach is found in English common law. It holds that if, before performance is due, a party expresses an intention to break the contract by not performing (or otherwise acts in such a way to lead a reasonable person to the conclusion that the party does not intend to perform), then this is an “anticipatory breach” and entitles the other party to accept the repudiation and seek damages immediately, or wait until performance is due and then seek damages for the failure to perform.

No similar doctrine is known to exist under UAE law, but a recent Dubai Court of Cassation judgment appears to confirm a recent trend by the courts to create a similar doctrine for off-plan real estate disputes. In Dubai Court of Cassation judgment 200/2013 (Real Estate Appeal) the court decided that a buyer may legitimately withhold the performance of his due obligation (to price), if there are serious reasons to lead the purchaser to believe that developer, though presently not in breach, will fail to perform his future obligation (to deliver the unit on time).

Facts of the case:

An individual purchased an off-plan real estate unit from a developer in a real estate project. It was agreed between the parties that the expected date for handing over the unit to the buyer was by 31 March 2010.

In due course the buyer paid 58.5% of the unit’s purchase price in accordance with the payment schedule, but stopped paying the installments when it appeared that the project would not be completed on time. Upon request from the developer, the Land Department sent a notice to the buyer warning the buyer that a failure to pay the instalments would result in the termination of the agreement. The buyer continued to withhold payment, and Land Department proceeded to terminate the sale agreement and allow the developer to deduct 40% of the paid amount (as per Law no. 13 of 2008).

The developer eventually failed to deliver the purchased unit at the due time, and the buyer initiated legal action before the Dubai Court of First Instance seeking a court order against the developer to cancel the agreement and refund the paid amount along with interest.

Court of First Instance and Court of Appeal

Before the Court of First Instance, the developer submitted that the percentage of completed works was 68% and that the delay was a result of force majeure. The Court of First Instance accepted this and dismissed the case.

The buyer then appealed to the Dubai Court of Appeal which appointed an engineering expert. In light of the findings of the expert’s report, the Appeal Court overturned the lower court’s decision and cancelled the agreement, ordering the developer to refund the amount paid by the Buyer with interest.

The developer then challenged the Appeal Court's decision before the Dubai Court of Cassation.

Developer's grounds for appeal:

The developer submitted that the Appeal Court erred in its decision for the following reasons:

- The delay in the handover of the unit was due to force majeure. There was a delay in obtaining the necessary certificates and permits from the relevant authorities to the Developer, and many purchasers (like the buyer) had ceased making payments. These events were beyond the control of the developer.
- The Appeal Court held that the buyer was entitled to withhold the remaining installments despite the developer's submission that the buyer was in breach of the agreement. The Land Department had terminated the sale agreement and allowed the developer to deduct 40% of the paid amount (as per Law no. 13 of 2008), which proved that the buyer had been in breach of contract.

The Court of Cassation:

The Cassation Court dismissed the developer's arguments and held:

- According to Articles 247, 414 and 415 of the UAE Civil Code, in binding contracts the performance of reciprocal obligations is tied to mutual commitments. Either party may withhold performance of an obligation if the other party fails to perform his own reciprocal obligation on time. As such, a buyer may withhold payment of the balance of the purchase price if there is a good reason to suspect that the seller will not perform his obligation to deliver what had been sold.
- Furthermore, if either party of an agreement defaults in performing any of its obligations, the other party may, according to article 272 of the Civil Code, request termination of the contract. Upon termination, the parties are restored to their positions before entering into their agreement and the seller must refund any amounts paid by the buyer.
- Additionally, and in accordance with article 246 of the Civil Code, contracts must be performed in accordance with their content and in a manner consistent with the requirements of good faith.
- In this case, performing the agreement in good faith requires that the Developer refrain from selling units in his project before securing the land on which the project is to be developed and all the necessary approvals for the project and its execution. Delay in obtaining necessary approvals is therefore not considered force majeure since force majeure is caused by an unforeseeable event at the time of the contract that is impossible to avoid.
- Under the terms of the agreement the expected date of completion as per the agreement was the first quarter of 2010 which could be extended for up to a further 12 months with a further possible extension in the event of force majeure. However the percentage of work at the time of the expert's inspection was 75%. The Court of Appeal was therefore correct to find that this was a delay amounting to negligence that entitles the buyer to seek termination of the agreement.
- In light of the above, the Cassation Court upheld the appealed decision and dismissed the appeal.

Practice Note:

The above decision is representative of a recent change in approach by the Dubai Court of Cassation in recent real estate cases. Whilst the Civil Code is clear that one party can refuse to perform if the other party has stopped (Article 247), the new approach appears to allow a party to withhold performance even when the other party still performing, provided there are 'serious reasons' that have led the party to believe that the other party will not perform its future obligations. This is similar too the English common-law doctrine of anticipatory breach.

This new approach must however be followed with the utmost caution

The "serious reasons" that led to the withholding of performance are subject to the discretionary power of the court, and will not be upheld unless the withholding party can prove that the reasons are sufficiently serious. It is still not clear what will be considered "serious reasons", though in Dubai Court of Cassation (in

case 179 of 2012) the court held that failure by a developer to start construction within six months of receiving approval to sell the units off-plan might be sufficient.

What can be said is that if a buyer chooses to withhold payment due to fears about the developer's ability to deliver the unit on time, the buyer must ensure it has clear and compelling evidence to show that the fears are well founded at the time the decision to withhold payment is made. Withholding performance is a serious step to take and will likely lead to the developer terminating the agreement and reselling the unit. If by the time the dispute reaches the court the project has indeed been constructed (even if delayed), it will be difficult for the buyer to maintain a case that there were serious reasons to believe the developer would not perform.