

Dubai Cassation Court's recent approach to Real Estate disputes

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Importantly, the Court also confirmed that a decision by the Land Department to cancel the registration of off plan units in the Interim Register is subject to the Court's review if the parties dispute such a decision.

Facts

The Claimant (the Purchaser company) entered into a Sale and Purchase Agreement ("SPA") of four off plan residential units with a real estate developer (the Second Defendant/ the Developer). Pursuant to the SPA, the expected date of completion was 30 November 2011. Additionally, an escrow account number was included in the SPA as the Second Defendant's account. The Claimant paid AED 4,884,720 (the Claim amount) to the First Defendant, who is the main developer for the project where the units subject of the SPA are located.

The Claimant, after inspecting the site of the project, discovered that:

- The Second Defendant did not fulfil its obligation in respect of the completion percentage;
- The Second Defendant did not obtain a permit to work as a developer;
- The developer for this project was the First Defendant;
- An escrow account was not opened specifically for this project;
- The units were not registered in the Interim Register.
- As a result of these discoveries, the Claimant initiated legal action before the Dubai Court of First Instance on 21 April 2009, seeking a Court order against the Defendants for the Claim Amount and interest at the rate of 12%.

Procedural History:

Before the Court of First Instance, the First Defendant argued the lack of its legal capacity in the case. Additionally, the Land Department addressed the Court, stating that the units subject of the dispute are registered under the Claimant's name.

The Court of First Instance dismissed the case and the Claimant appealed before the Dubai Court of Appeal which, after appointing an expert and after submission of his report, quashed the lower Court's decision and ordered the Second Defendant to pay to the Claimant the Claim Amount plus interest from the date of filing the claim until full completion at a rate of 9%.

Developer's grounds for appeal:

The Second Defendant challenged the Appeal Court's decision before the Dubai Court of Cassation on the following grounds:

1. The case was filed prematurely. This argument was on the grounds that the parties agreed in their SPA that the expected completion date was 30 November 2011 extendible for twelve months, which makes the completion date 30 November 2012, yet the Claimant filed his case in 2009.
2. It was also agreed that the parties relinquish any liability on the side of the Second Defendant in the event of delay in fulfilling its obligation when such delay was the result of a third party's delay in performing a related obligation.
3. It was concluded by the expert appointed by the Land Department in another case related to the same project that the main reason for the delay in completing the work on this project was that the main developer did not avail the necessary infrastructure where the project is located.
4. The delay in completing the project was primarily due to (i) the delay caused by the main developer (First Defendant) in constructing the infrastructure, (ii) the breaches caused by the project's investors including the Claimant in scheduled payments for their purchased units and (iii) the delay caused by the competent authorities in issuing the necessary permits required to resume works in the project.
5. The Claimant did not have the legal capacity to file this case on the grounds that a decision was issued by the Land Department terminating the SPA and cancelling the registration of the units from the Claimant's name. The Land Department had cancelled the units' registration because the Claimant did not make the second instalment, due in December 2008, or subsequent scheduled payments. However, the appealed decision stated that the Land Department's decision has no effect against the Claimant.
6. The appealed judgment relied on the expert's findings that the Second Defendant changed the payment schedule without obtaining the Claimant's consent.

The Court of Cassation

The Cassation court found the Second Defendant's arguments inadmissible and held:

- According to Article 246 of the UAE Civil Code, "a contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith" and "the contract shall not be restricted to an obligation upon the contracting party to do that which is contained in it, but shall also embrace that which is appurtenant to it by virtue of the law, custom and the nature of the transaction". Determining whether the delay in performing a contractual obligation is considered a breach which would give one of the parties the right to terminate an agreement falls within the discretionary power of the Court.
- In light of the foregoing, if it was proven that a developer (i) was not serious in completing the project, (ii) was incapable of completing the project due to its negligence, or (iii) disclosed his wish not to complete the project, the buyer in these cases is entitled to withhold performing his side of the obligation i.e. payment of due instalments, according to Article 247 of the UAE Civil Code, until elimination of the threat of non-completion of the project or negligence.
- The practice adopted by the Court is that negligence or a breach on the side of the main developer does not exempt the sub contractor/developer from performing all his obligations derived from the latter's agreement with the buyer.
- It is also established that a decision issued by the Land Department – upon a request from the developer – to cancel registration of units in the Interim Register is subject to the Court's review if a dispute arose in respect of such decision. If the Court discerned, after examination of the subject of the Land Department's decision, that such decision was faulty, the Court may reverse the decision, which would eliminate the effects of the Land Department's decision and accordingly the developer and the buyer would be restored to the same legal positions as before the issuance of the Land Department's decision.
- In addition to the above, the Court considered the expert report's finding (adopted by the lower Court) that (i) the works on the project started on 17 May 2009 and has only progressed to 2% on 28 February 2010 then the works on the project completely stopped; (ii) the Land Department cancelled the units' registration in the Interim Register and forfeited the instalments paid without taking into consideration the ongoing dispute between the parties before Court; (iii) the Land Department justified the cancellation due to the buyer's breach in payment and did not take into consideration that the buyer withheld payment due to the developer's breach in performing its obligations.
- The Cassation Court therefore upheld the appealed decision and dismissed the appeal.

Practice Note

This decision of the Court of Cassation reinforces its recent series of decisions in respect of contractual reciprocal obligations. It also confirms that a developer must ensure that it fulfils all its contractual obligations prior to resolving to the Land Department to cancel the registration of an off plan unit, since such a decision is subject to the Court's review and does not have *res judicata* status against the buyer and does not protect the seller (developer) in the event of the latter's breach of its obligations.

Additionally, if the Court finds differently to the Land Department, the parties will be restored to the same legal positions as before the Land Department's decision. In practice, there have been examples where developers, in breach of their obligations, resolve to obtain a cancellation from the Land Department and resell the units. The original buyer has taken the matter to Court and the developer has then found itself in a peculiar situation where a Court has issued judgment in favour of the old buyer, even though they have re-sold the units.