

Dubai Courts hold that delay in handover can trigger termination

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Many off plan development projects have faced serious delays as a result of problems arising from the global financial crisis.

The Dubai Courts have dealt with thousands of cases of off plan purchasers suing developers about the delays and either seeking to get their money back or to get compensation for those delays.

But how long of delay must there be before a purchaser has the right to terminate? In Dubai Court 41/2012 Cassation court the court discussed the time at which the right for the purchaser to seek termination is acquired and the materiality of the breach by the developer in not handing over the unit in the agreed date.

Background

The Claimant bought a villa from the Defendant (a developer) on in 2006 for AED 4 million to be paid in installments. It was agreed in the contract that the villa would be delivered in December 2007.

In September 2007, the Defendant asked the Claimant to delay the next installment because the project's delivery date was delayed to June 2008. The Claimant sent a notice to the Defendant stating that if they did not honor the new delivery date, he would terminate the contract and claim reimbursement.

The Defendant did not deliver the villa by June 2008, and the Claimant filed a claim in the Court of First Instance. The Claimant relied on Articles 246(1) of the Civil Code which states:

(1) The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith.

The Court of First Instance ruled in favor of the Claimant, citing that the Defendant failed to deliver the villa on the date that was agreed upon, and ordered the termination of the contract and for the Defendant to pay the Claimant AED 3,477,701 plus 9% interest from the time the claim was filed until the Claimant is fully reimbursed.

The Defendant then appealed the decision in the Court of Appeal. The Court appointed an expert to the case. After receiving the expert's report, the Court of Appeal issued its judgment overturning the Court of First Instance's decision. The Court of Appeal cited the following reasons for its decision:

- The expert's report concluded that the Villa would be completed in 2012
- After the Defendant concluded its disputes with the governmental entities, it completed 70% of the villa, which the Court did not regard as a delay worthy of annulling the contract; and
- The Defendant's failure to handover the villa on the agreed delivery date did not amount to a material breach of the contract

Cassation Ruling

The Claimant appealed the decision to the Court of Cassation. The Court of Cassation overturned the Court of Appeal judgment and issued the same ruling as the Court of First Instance.

The Court stated that grounds that the Court of Appeal relied upon were invalid as the court contradicted itself in its judgment. The Court of Appeal stated in its reasoning that the developer failed to deliver and handover the unit in June 2008, which meant that the developer breached his obligations in the contract. This should not be affected by the fact that the expert concluded that the project would be completed by 2012 in breach of the completion date that the parties agreed upon in the agreement.

The Court found that a default by the developer in the handover of the unit would entitle the purchaser to terminate the contract. In response to the developer's argument that the purchaser did not pay the whole purchase price, the Court stated that the purchaser may withhold payment of the balance of the purchase price even if the payment is due if there is good reason to suspect that the seller will not perform his obligation to deliver the thing sold. The Court relied on Article 247 of the Civil Code which states:

In contracts which are binding on the parties, 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

The Court also stated that a developer's dispute with governmental entities does not excuse the developer from fulfilling its contractual duties. The right of a purchaser to withhold any payment and seek termination of the contract is established on the next day following the handover date. As such, the Court found it to be the Claimant's right to claim reimbursement and annulment of the contract the day after the Defendant failed to deliver the villa in June 2008.

Conclusion

The decision issued by the Court of Cassation has significant implications for developers who fail to deliver projects on an agreed delivery date. Proving that the project will be completed in the future may not be enough to prevent termination, and purchasers may have the right to withhold payments whilst the delay continues. Disputes with local authorities may also not be sufficient to excuse the delay in handover.

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