

The Longest-Running Construction Case in UAE Legal History has Finally Ended

March 2016

Al Tamimi & Company successfully defended the First Jointed Defendant, a major international engineering and construction company. The dispute was in connection with the construction of a sewage system in Abu Dhabi, which was completed in 1983 ('the Project'). In the years following its completion, substantial defects were discovered in the sewage system. The case was very complex with lengthy facts, and this article will only briefly discuss the main aspects.

In 1993 the Plaintiff, a government body in the Emirate of Abu Dhabi, in its capacity as the Project employer, initiated legal proceedings in the Abu Dhabi Court of First Instance against the First Defendant, an international engineering consultancy firm (that acted as the Project's consultant and engineer), and the Second Defendant, an insurance company. The Plaintiff claimed damages in the amount of approximately US\$100,000,000 for the losses it sustained due to the allegedly defective design and supervision of the construction of the Project by the First Defendant (plus interest, loss of profit and all costs incurred by the Plaintiff).

In June 1996, the First and Second Defendants brought a subsidiary action against the First Jointed Defendant (the main contractor in the construction of the Project) in the same case claiming damages equal to the amount that the First and Second Defendants would be ordered to pay to the Plaintiff should the Plaintiff succeed in its claim. Later the First and Second Defendants also brought subsidiary actions against three other contractors. In March 2001, the Court of First Instance joined the First Jointed Defendant and the other contractors as co-defendants in the case following an interlocutory application that was submitted by the Plaintiff requesting that the First Jointed Defendant and the other contractors be made jointly and severally liable with the First and Second Defendants for the entire amount of the damages. As a result, the First Jointed Defendant was faced with a situation in which it was required to defend two claims in parallel in the same case, one by the First and Second Defendants, and one by the Plaintiff.

An international engineering expert was appointed by the court ('the Court Expert') in 2001 to provide expert evidence in this case. The Court Expert submitted his report in November 2005 and all of the parties raised various objections with respect to the contents and findings in the Court Expert's report. The Court Expert later submitted his final supplementary report in 2011, in which he concluded that the First Defendant should be liable for some of the losses sustained by the Plaintiff since the First Defendant was responsible for the design of the sewage pipes and the supervision of the Project works in its capacity as the consultant and engineer with the requisite expertise. The Court Expert also concluded that the First Jointed Defendant should be partly liable as it was, among other things, responsible for the construction of the Project.

Ever since the claim was brought by the First and Second Defendants against the First Jointed Defendant in June 1996, the First Jointed Defendant argued that the claim against it should not be heard and should be dismissed on the basis that the claim was time-barred under Article 883 of the UAE Civil Code. Article 883 provides that "no claim for compensation shall be heard after the expiration of three years from the collapse or the discovery of the defect". The First Jointed Defendant argued that the Plaintiff and the First and Second Defendants discovered the last defects in the Project in 1991 but the subsidiary action against the First Jointed Defendant in connection with the defect did not commence until 1996, i.e. after the expiration of the 3-year limitation period imposed by Article 883. The First Jointed Defendant adopted also

the same legal defence when it was joined to the case as a co-defendant in 2001 at the Plaintiff's request.

In March 2013, the Court of First Instance issued its judgment in case No. 304/1993 with respect to the Plaintiff's claim and the First and Second Defendant's subsidiary actions. It dismissed both claims against the First Jointed Defendant on the basis that the the First Jointed Defendant was not joined in the case as a co-defendant until after three years had passed from the discovery of the defect in the Project and, therefore, the claim and the subsidiary action against the First Jointed Defendant was statute barred pursuant to Article 883 of the UAE Civil Code. In addition, the Court of First Instance ruled against the First Defendant and Second Defendant and awarded part of the claimed damages in favour of the Plaintiff. The judgment was then appealed to the Court of Appeal.

On 17 March 2015, the Court of Appeal issued its decision and upheld the First Jointed Defendant's legal defense, affirmed the Court of First Instance's ruling and rejected the appeals of the Plaintiff and the First and Second Defendants respectively.

Subsequently, the Plaintiff and the First and Second Defendants each appealed the Court of Appeal's judgment to the UAE Federal Supreme Court (the Court of Cassation) in Appeals No. 319/2015 and 320/2015.

Finally, on 9 December 2015, the Court of Cassation issued its judgment in favour of the First Jointed Defendant and rejected both of the foregoing appeals. The following is an extract from the Court of Cassation's judgment setting out its reasoning:

"...the collapse in the works of both agreements occurred during the warranty period and the First Appellant did not file its sub-claim during the three years prescription period (time-limitation), therefore, it shall not be heard. The appealed judgment contained a feasible reply substantiated by the facts established in the papers, especially the submitted expert's report which contained a sufficient investigation of all disputed technical elements, the terms and amounts of the agreements, the damage resulting from the poor execution of the works, the amounts payable therefore and the responsible party. The judgment was based on valid evidence in relation to the plea raised by both the defendant parties. The reasoning of both the defendants' appeals relate to the discretion of the Court of Merits [i.e. Court of First Instance] to understand the facts of the claim, assess evidences and documents, and assess the expert's mission as well as the authority of the court to conclude elements of the contractual obligation to determine whether they are available or not, and to determine whether compensation for damage, if any, is due or not. All these arguments raised by the appellants in the second appeal relate to the judgment issued by the court of first instance, which is not a proper reason for appealing."

Overall, there are a few points arising from this case that are worth highlighting:

- The time-bar principle in construction disputes should be considered at the beginning of the dispute and, when relevant, should be raised as a leading defence. With regards to construction-related disputes, the most important (but not the only) time-bar rules are found in Articles 880 and 883 of the UAE Civil Code. For a more detailed review of the foregoing time-bar rules, please refer to the article 'Time Bars in Articles 880 and 883 of the UAE Civil Code (Regarding Construction Disputes)', by J. Kudsi, Law Update Issue 269, May 2014, available on the Al Tamimi & Company website.
- It is for the Court of Merits (i.e. the Court of First Instance) to understand the facts of the dispute, assess the evidence and documents and assess the Court Experts' reports. The Court of Merits has the authority to ascertain the elements of the contractual obligation to determine whether they are available or not, and to determine whether compensation for damage, if any, is due or not.
- The main reason for the long delay in this case was due to the First and Second Defendants bringing subsidiary actions against many parties and the Plaintiff joining additional parties as co-defendants to the case at different times. There were a total of eight parties involved in this case. Moreover, there was a delay in finalizing the international Court Expert's reports. The Court Expert, who was not based in the UAE, attended numerous meetings with the parties of the case and their legal and technical advisors,

and interviewed many witnesses, and the reports produced by the Court Expert were subject to many discussions and debates.

- It is important that parties to a construction dispute instruct their own technical advisor to assist them because the court will appoint its own technical expert and will usually rely on his report when issuing the judgment. A party is better placed to assess and successfully object to the findings of the Court-appointed expert if it has its own expert on hand to offer expert advice.