

# Abu Dhabi Judgment on Delay Damages Highlights Importance of When Contract is Terminated

by Hassan El Tahir - h.eltahir@tamimi.com - Abu Dhabi  
Ahmad Ghoneim (FCIArb) - a.ghoneim@tamimi.com - Abu Dhabi

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The FIDIC 1999 (Red Book) at clause 8.7 provides that in the event completion is delayed the contractor shall pay the employer delay damages equal to a pre-agreed amount specified in the contract as a compensation for the delay (the 'Delay Damages').

However, the question is: will the employer be entitled to the said Delay Damages if the employer terminated the contract with the contractor? If the answer is no, is there any alternative way under the UAE law to assist the employer to claim compensation for the losses resulted from the contractor's delay?

In a case in which Al Tamimi & Company represented the contractor, the Abu Dhabi Court of Cassation held, in Appeal Case 424 & 483 of 2015, that if the employer terminates the contractor before the completion of the works, the employer is not entitled to sue for the Delay Damages stated in the contract. However, the Cassation Court highlighted that the employer, in such circumstances, is entitled to prove and claim for any damage that may have resulted from the contractor's delay (i.e. claim damages in tort).

## **The facts of the case**

In May 2008 the parties entered into a construction contract based on the FIDIC 1999 (Red Book) to build a mall and a hotel. The project value was around AED 418 million, although it was subsequently amended to AED 355 million. The value of the work done by the contractor, including the additional works, was around AED 258 million. The project was delayed due for several reasons and the employer terminated the contract.

Following the employer's termination, the contractor filed a case before the Abu Dhabi Court of First Instance to claim unpaid fees. On the other hand, the employer filed a counterclaim, whereby the latter reserved his right to claim compensation from the contractor due to the damage resulting from the contractor's delay in the project. The employer argued that the contractor's case was premature. The Court appointed engineering experts to settle the final account between the contractor and the employer.

The experts concluded that the contractor was due payments of around AED 70 million. The experts further stated that the employer was entitled to Delay Damages under the contract of an amount of AED 41 million, and thus the net payment due to the contractor was around AED 29 million.

The Court of First Instance decided not to accept the contractor's case, holding with the employer that the claim was premature and dismissed the counterclaim made by the employer.

## **Court of Appeal**

The contractor approached Al Tamimi & Co to file an appeal before the Abu Dhabi Appeal Court.

The employer also filed an appeal for his counterclaim, claiming compensation from the contractor for damages resulting from the contractor's delay in completing the project.

The Appeal Court appointed a different panel of engineering experts to settle the final account between the contractor and the employer.

The experts reached the conclusion that the contractor was due payments of around AED 27 million. However, one of the experts gave a dissenting opinion, concluding that the delay damages should not be deducted from the contractor and thus he recommended that the contractor be to AED 72 million.

Nevertheless, the Court of Appeal upheld the judgment issued by the Court of First Instance that the claim was premature.

### **Court of Cassation**

The contractor filed an appeal before the Court of Cassation, arguing again that the case was not premature. Although the Appeal judgment rejected the employer's counterclaim, the employer did not challenge the judgment before the Cassation Court.

### **As regards the employer's claim for delay damages**

the contractor argued that if the original obligation (i.e. the obligation to execute the project) is terminated, then the other obligations set out in the said contract, including the Delay Damages clause, are also terminated and cannot be applied anymore. Accordingly, the legal basis for claiming compensation, if any, can only be based on tortious liability. Therefore, the employer is not entitled to apply the Delay Damages clause, having terminated the contract before the completion of the project's works.

The Court of Cassation accepted the contractor's appeal, and decided to return the case to the Appeal Court to review the dispute. The Appeal Court decided to return the case to the Court of First Instance, since the latter had decided before that the case was premature and so had not reviewed the merits. The contractor objected to this, and the Court of Cassation upheld the objection. In doing so, the Court of Cassation decided, among other things, that the employer is not entitled to apply the Delay Damages clause having terminated the contract before the completion of the project's works. The Cassation Court further highlighted that the employer was only entitled in such circumstances to claim compensation from the contractor based on the actual damages resulting from the contractor's delay based on tortious liability. The Court then concluded that, since the employer's claim had been rejected by the Court of First Instance and the Court of Appeal with no challenge being made by the employee to these judgments, the employer was no longer entitled to claim compensation for the delay (whether based in contract or tort).

### **The importance of the judgment**

This Court of Cassation judgment confirmed, among other things, that clauses regarding Delay Damages cannot be invoked after the employer has terminated the contract if the termination took place before the completion of the project. In such circumstances, the employer's claim for compensation for the contractor's delay will only be based on tortious liability, whereby the employer will be obliged to prove the following:

- The contractor was solely responsible for the project's delay.
- The causal link between the delay and the damages suffered.
- The quantum of damage resulted from the project's delay.

It is therefore recommended that employers seek expert legal advice before terminating a contract to determine whether the termination will negatively affect any future claim for damages.