

Dubai Court Finds Failure to Build Infrastructure Entitles Purchaser to Terminate

Khaled Gamaleldeen - Senior Counsel - Litigation

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

Rami Abdel Latif

r.abdellatif@tamimi.com - Dubai, UAE

Zane Anani

z.anani@tamimi.com - Dubai, UAE

February 2017

Al Tamimi represented the successful claimant before the Dubai Courts.

Background

The Purchaser bought two units for a combined price of AED 16,433,400, of which he paid AED 4,900,350. As is often the case, the units were part of a project that was marketed as an all-inclusive residential development, with landscaping and facilities.

Handover was to be in January 2010 but the Developer was unable to deliver the units at that date and the Purchaser then proceeded to court.

At the time the claim was filed the Land Department was able to confirm that the units were registered in the Purchaser's name on the Interim Property Register and that the project was 91.11% complete.

The Developer argued that the claim should be dismissed because the Units were complete, and filed two certificates of completion for the units from the Ports, Customs and Free Zone Corporation establishing proof of completion and two no objection certificates for the connection of water and electricity utilities.

Court of First Instance

The Court of First Instance dismissed the claim on the basis that an expert appointed by the court had determined that the units were complete and the purchaser failed to pay the remaining installments on time.

Court of Appeal

The Purchaser appealed. The Court of Appeal commissioned a further expert report which found that the units were part of a project launched as an all-inclusive residential development. The infrastructure was not complete and this meant the units could not be used for the intended purpose. The Purchaser had bought the units based on how the project was marketed and had been led to believe the infrastructure and amenities would be included in their purchase.

On this basis the Court of Appeal quashed the decision of the Court of First Instance, and declared the contract between the Purchaser and the Developer terminated. The Developer was ordered to pay back the Purchaser's investment with interest. The Developer appealed.

Court of Cassation

The Developer argued that it had completed the project according to the plans which were approved by the relevant authorities. The Developer submitted the certificate of completion of infrastructure for the project and the construction progress report. The Developer argued that these works (representing 20% of the project) were not part of the contract and were currently in progress. They were minor works that did not justify termination. The Developer also argued that it was the Purchaser who was in breach, having paid only 25% of the price of the two units.

The Court of Cassation dismissed the Developer's arguments and held that:

- It is well established that according to Article 246(1) of the Civil Code, contracts must be performed in accordance with their terms and in a manner consistent with the requirements of good faith. Contracts are not limited to an obligation upon the contracting party to do that which is expressly stated in the contract but shall embrace that which is appurtenant to it by virtue of the law, custom and the nature of the transaction (Article 246(2)). These are assessed by the trial court within its discretion as the fact-finder. To that end the trial court determines whether there was any delay by the developer in performance of the contract, and whether the delay is of such a nature as to warrant its termination. The court's discretion must be exercised soundly and with reference to the evidence.
- In an off-plan sale, the developer must complete the project and achieve timely delivery of the sold units to the purchaser, even if the sale contract makes no provision for completion and delivery. The seller cannot endlessly delay the completion of the project and delivery of the sold units.
- Either party may withhold performance of an obligation if the other party fails to perform his own reciprocal obligation on time. This means that the purchaser may withhold payment of the balance of the purchase price even if the payment is due, until there is no longer any reason to suspect that the seller will not perform his own reciprocal obligation (unless for some reason the purchaser has waived his right to withhold payment after the seller's inability to perform was established).
- In this case, the purchase was concluded nearly eight years ago, but the Developer had not produced any evidence of any impediments that caused delay in execution of the contract. Furthermore, the incomplete amenities meant that the Purchaser could not use the units for their intended purpose. The Court of Appeal was therefore correct to find that the Purchaser could terminate the contract and recover sums paid. The Court of Appeal's findings are sound and based on sufficient and reliable evidence and are not inconsistent with the law. Based on the foregoing, the appeal is dismissed.

Summary

This is an important judgment because:

- it confirms earlier judgments which have held that a party can withhold performance (such as payment instalments) in circumstances where the other party is not actually in breach but it is clear that the other party will not be able to perform (such as developer who has two months to complete the project but has yet to start development); and
- it widens the grounds for termination to include situations where although the unit has been completed, the contract can still be terminated because the associated infrastructure has been delayed so that the unit cannot be used for its intended purpose at the time it is delivered.

Whilst each case turns on its merits, the judgment helpfully indicates that one of the factors the court will consider is how the project was marketed. It must be established that the project was marketed in a way that leads a purchaser to believe that the amenities are part of their purchase. In this case, the Court of Appeal assessed the status of the project at the time the case was filed and compared it to how the project was marketed when it was launched. The Court of Appeal concluded that the purchaser bought the units based on how the project was marketed and were led to believe the infrastructure and amenities would be included in their purchase. The Court of Cassation endorsed this approach.