

The Effect of Discrepancies in Security Documents on Foreclosure Proceedings

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In this article we illustrate three examples of how discrepancies in security documents relating to real estate may have an impact on foreclosure proceedings with all of the examples relating to the grant of housing loan facilities to retail customers during the course of 2008. Discrepancies in the information within documents submitted as part of enforcement proceedings may have a disastrous effect on the sale of a mortgaged property.

Example One

A leading national bank granted a housing loan facility of AED 2.2 million. A first degree mortgage was registered against the purchased property and secured for the facility amount of AED 2.2 million. The customer had failed to make payments for a significant period and the total outstanding amount had reached near AED 3.6 million, including accrued interest. Consequently, the Bank commenced enforcement proceedings to seek the sale of the mortgaged property through public auction, in accordance with the Dubai Law No. 14 of 2008 Concerning Mortgages in Dubai.

A direct enforcement case was registered, the execution judge in charge of the case file approved an attachment over the mortgaged property for the secured amount, i.e. the amount mentioned within the mortgage contract up to which a mortgagee is generally entitled to recover. At the stage of proceedings when the Court was requested to issue a decision to sell the mortgaged property through public auction, the request was declined without stating any justifying reason.

On investigation it was revealed that the Court's decision was based on a discrepancy in the mortgaged property's information between the title deed, mortgage contract and the facility offer letter. The mortgaged property was defined within the title deed and the facility offer letter issued by the Bank by reference to the unit number. In the mortgage contract it was defined by reference to the plot number with no reference to the unit number at all. A note for readers, it is the mortgage contract that is the main execution instrument in mortgage enforcement cases.

The case is presently subject to appeal and the Bank may be able to rectify the discrepancy between the title deed and the mortgage contract at the Dubai Land Department (DLD). However, the Court has the discretion to not revise its original decision and not permit the sale of the mortgaged property if it believes that the discrepancy of the plot details within the documents submitted by the Bank are too material for its earlier judgment to be altered.

The case shows all banks need to thoroughly check finance and security documents to ensure conformity with the title deed in the course of each transaction and prior to commencement of enforcement proceedings. In the event any discrepancy emerges after a mortgage contract has been registered this should be resolved with the DLD as soon as a bank becomes aware of such discrepancy.

Example Two

A leading international bank granted a housing loan facility of AED 5 million. Again, a first degree

mortgage was registered against the purchased property in favour of the bank secured for the facility amount. The customer defaulted under facility and when the enforcement proceedings commenced the total outstanding amount was in the region of AED 5.8 million, including accrued interest.

A direct enforcement case was registered in 2015 in accordance with Dubai Law No. 14 of 2008, and the execution judge in charge of the case file issued an order to attach the mortgaged property. Interestingly, the attachment was granted for the total outstanding amount despite the secured amount in the mortgage contract being less, i.e. AED 5 million.

In direct enforcement cases, what follows the attachment of a property is an evaluation stage during which the property's value is determined by experts. Conducting the evaluation and obtaining an evaluation certificate is a pre-requisite for listing of the property in public auction. Unfortunately, in the present case, significant issues were faced during the evaluation stage due to a material discrepancy which has severely delayed the issuance of the evaluation certificate. Essentially, both the title deed and the mortgage deed refer to a wrong plot number. Evaluation certificates are typically issued within a month, but in this case, the evaluation certificate has not yet been issued by the DLD to date—a delay of more than 18 months.

It later appeared that the developer had given incorrect property information to the customer, the Bank and the DLD. As such, the circumstances that led to this situation were totally unrelated to the customer. Nonetheless, the incorrect property information given by the developer caused a first degree mortgage to be created over the wrong plot and villa. To avoid this issue, the Bank could have physically checked the property. The developer in question is currently cooperating with the DLD to resolve the matter.

A new title deed may eventually be issued holding the accurate property and mortgage details, followed by the evaluation certificate. Once obtained, the Bank will be able to apply to the court for the sale of the property in public auction. Notwithstanding all these efforts and delays to rectify the discrepancy and obtain the evaluation certificate, the Court retains the absolute discretion to reject the application for the sale of the mortgaged property based on any material discrepancy within the security documents.

Example Three

As a final example, a leading national bank granting a housing loan facility of AED 3 million. A first degree mortgage was registered against the purchased property in favour of the Bank to secure the facility amount. The customer defaulted under the facility and the total outstanding amount was in the region of AED 4.3 million, including accrued interest.

A direct enforcement case was registered in 2016 and the execution judge in charge of the case file issued an order to attach the mortgaged property. The attachment was granted for the total outstanding amount despite it exceeding the secured amount mentioned in the mortgage contract (AED 3 million).

The evaluation process was successfully completed. However, when the Court was requested to issue a decision to sell the mortgaged property through public auction, the request was declined due to a discrepancy between the customer's name on the mortgage deed versus the customer's name in the customer's residency visa, both of which were in Arabic language. One letter was missing within the customer's name mentioned on the mortgage deed which was issued by the DLD.

A request was submitted to the Court to instruct the DLD and General Directorate of Residency and Foreigners Affairs in Dubai to provide the Court with copy of the customer's passport and residence visa which led the Court to determine that this was in fact a discrepancy which was not material to

prevent enforcement from going ahead. As a result, the mortgaged property was sold at public auction and the Bank received the sale proceeds (after the relevant deductions).

Conclusion

Banks, security agents, and security holders need to be very diligent when describing a mortgaged property for the purpose of entering into finance and security documents and obtaining title deeds with the mortgage registered thereon.

Determining whether a discrepancy in the security documents is material or not is at the sole discretion of the concerned judge. Banks should not attempt to determine whether a discrepancy is material or not and should immediately rectify any inaccurate information or mismatches within security documents that they hold.

If the Court decides that a discrepancy is not material, the Court may allow proceedings to continue. However, as the first two example cases show, if the issue is material it can cause significant delays in completing the foreclosure process.

If the Bank is in a situation where a judge has rejected its direct enforcement application due to a discrepancy in the security documents in connection with the mortgaged property information, the Bank should consider filing a civil case immediately as an alternate route to enforcing its claim. Civil case proceedings against the debtor will be much longer than a direct enforcement case against a property. Civil cases also present the inconvenience of the Bank having to establish and provide evidence of a valid underlying debt owed by the customer to the Bank. However, if an application for direct enforcement is rejected, initiating a civil case may be the only viable alternative and can lead to the same outcome: the sale of the property in public auction and the recovery of the related sale proceeds.

Al Tamimi & Company's Banking and Finance team regularly advises on all types of security documents. For further information please contact Ahmed Zaki (a.zaki@tamimi.com) or Karim Shiyab (k.shiyab@tamimi.com).