

UAE Judgment- The scope and nature of an action to determine facts

Ahmed Mounir El Sha'er - Senior Counsel - Litigation

- Sharjah

Sara Omer Ali - Associate - Litigation

- Sharjah

Introduction

In this article, we review and discuss an Abu Dhabi Court of Cassation judgment (1001-2021), which concerned an action to appoint an expert, to determine facts, which provides very helpful guidance on the scope and nature of such an action, including where a debtor commences such an action.

Background

Under UAE civil procedure, it is open to a creditor, who wishes to establish the precise amount of the debt owed by a debtor, to file a case – called “an action to determine facts” – before the UAE courts requesting the appointment of an expert to investigate and opine on the amount of the debt in question. There is no requirement to file a substantive case in parallel to an action to determine facts.

Once the expert completes his investigation and submits his or her expert report, the creditor may amend the requests for relief in the statement of claim to include the actual debt amount as quantified by the expert. The creditor must pay the difference in court fees (i.e. the difference between a substantive case and an action to determine facts). Then the court will then issue a judgment on the merits of the case. It is important to note that there is a minimum court fee for an action to determine the facts as there is no amount being claimed at this stage, however, a creditor can claim the debt amount (as determined by the expert) by amending the statement of claim. The court fees will be determined in accordance with the claim amount.

In the present case, the claimant debtor had mortgaged two properties to a leading bank in the UAE in exchange for certain facilities. When the claimant defaulted on its mortgage repayments, the bank commenced foreclosure proceedings on the properties.

The claimant debtor filed an action with the Abu Dhabi Court of First Instance (“CFI”) to determine the facts to establish the actual debt amount. The expert opined that the debtor owed the amount of approximately AED 300 million to the bank. The debtor then amended the statement of claim, requesting the court to confirm the debt amount, and paid the additional court fees payable.

The CFI, the court of appeal and the court of cassation all accepted the findings of the expert and confirmed the debt amount.

Meanwhile, the Bank was successful in selling the properties for a total value of approximately AED 700 million in the foreclosure proceedings. The debtor then filed a new case before the CFI in which it claimed the difference between the amount recovered from the sale of two properties and the amount of the debt as established in the action to determine facts. The debtor argued that the debt amount had been established, confirmed by the judgment issued by the court and therefore the amount of the debt was *res*

judicata.

An action to determine facts is not a substantive matter

The court of first instance and court of appeal both found in favour of the debtor and awarded it the balance of the sale proceeds, which amounted to approximately AED 400 million. However, the cassation court overturned the court of appeal judgment. It observed:

“It is settled that the court’s mandate, in an action to determine facts, ends once an expert is appointed and he files a report and the parties have had an opportunity to pass comment thereon. The court will leave the parties to litigate the merits of the claim in the course of any substantive proceedings the parties in interest may file. This is because the decision in the action to determine facts does not determine the controversy and does not touch the merits, as noted earlier. In other words, the judge seized of such action has no authority to address the substantive challenges the parties may raise against the expert report and must leave this to the trial court, which exercises review authority.”

Comments

The judgment of the Abu Dhabi Court of Cassation clarifies that:

- An action to determine facts is concluded once the court appointed expert submits his or her report and the parties to the dispute submit their comments thereon.
- The court of first instance to whom an action to determine facts has been issued cannot issue a judgment against any party, considering that it has not considered the substantive issues in dispute.
- The decision of the court in these types of cases does not have *res judicata* effect. The parties to the dispute have the right to dispute the expert report issued in the action to determine facts before the substantive court.
- Should the claimant amend its statement of claim following the submission of the expert report and pay the difference of court fees then the matter case will become a substantive case. The court will then be able to look into the merits of the case and issue a decision on the same.
- However, where a debtor initiates an action to determine facts, and after the submission of the expert report, it later amends its claim requesting the court to confirm the debt owed by him, the case will continue to be an action to determine facts and will have no *res judicata*

Conclusion

It is well established that the court’s mandate, in an action to determine facts, ends once an expert is appointed and he files a report and the parties have had an opportunity to pass comment thereon. The court will leave the parties to litigate the merits of the claim in the course of any substantive proceedings the parties in interest may file. This is because the decision in the action to determine facts does not determine the controversy and does not touch the merits, as noted earlier. In other words, the judge seized of such action has no authority to address the substantive challenges the parties may raise against the expert report and must leave this to the trial court, which exercises review authority.