

Judgment: the Court's discretion when terminating binding contracts

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Introduction

In the last few years, the Dubai courts have witnessed many cases filed by investors/purchasers of real estate against developers requesting the courts to terminate their contract. This article considers the merits of some of the arguments raised by the purchaser and the developer in a recent judgment where a developer failed to deliver an apartment by the contractual hand-over date (at the time of judgment, the hand-over date was approximately 3 years in delay) and legislation (that has been spurred by the economic crisis) that sets out circumstances when a purchaser or developer can terminate a contractual relationship.

Background

The Developer (the Defendant) and the Claimant entered into a contract in February 2006 for the purchase of an apartment. Contractual delivery was to occur two years later; however, the Developer failed to meet its delivery obligation and the Claimant filed a case against the Developer requesting the court to:

1. cancel the contract;
2. order the Developer to reimburse the money that was paid for the apartment; and
3. pay damages incurred by the Claimant as a result of the delay.

The Defendant argued that the delay was caused by reasons beyond his control and that he made every effort to deliver the apartment on the delivery date despite the fact that infrastructure services were not provided to the Developer by the Master Developer. The Defendant filed a counter claim and requested the court to appoint an engineering expert from the Land Department to assess the Defendant's justification for the delay. The Court appointed an expert who prepared a report in favour of the Defendant confirming that the causes for delay were outside the Defendant's control. As a result of the report and the Court of First Instance's evaluation of the Claimant's reasons for termination, the Court of First Instance rejected the Claimant's case to terminate the contract and decided that the Defendant had fulfilled its obligations to the best of his ability.

The Court's reasoning for rejecting the Claimant's case is set out below:

1. At the outset the Court made reference to the concept of good faith contained in article 246 of the Civil Code which provides that the parties have an obligation to conduct themselves towards each other in the performance of the contract in a manner that is consistent with principles of good faith.

Pursuant to Article 246 of the Civil Code, the Court looked at the issue of the Defendant's performance and whether the delay, by the Defendant in performing its obligations was due to his own fault and whether such delay constitutes grounds for granting the Claimant his request to terminate the contract. In this case, the courts decided that the Defendant fulfilled its obligations in good faith as the Defendant had reached the final stage of completion (and obtained all the necessary approvals) but for reasons beyond its control was unable to obtain a completion certificate and accordingly unable to meet the precondition for contractual delivery.

2. It was further established that according to Article 267 of the Civil Code, "if the contract is valid and binding, it shall not be permissible for either of the contracting parties to resile from it, or to vary or cancel

it, save by mutual consent or an order of the court, or under a provision of the law.” In this case, the Court decided that the contract between the Developer and the Claimant was still valid. Any variation or cancellation would have to be sought by way of a court order.

3. On the issue of termination, the contract contained a clause that mirrored the wording set out under Article 271 of the Civil Code which provides that “it shall be permissible to agree that a contract shall be regarded as being cancelled spontaneously [automatically] without the need for a judicial order upon non-performance of the obligations arising thereout, and such agreement shall not dispense with notice unless the contracting parties have expressly agreed that it should be dispensed with.” Notwithstanding the parties’ agreement to dispense with the need for a court order to achieve valid termination, the court still has the right to hear the Claimant’s reasons for termination and the discretion to rule on whether or not termination is valid on the facts.

4. In addition, Article 243 (2) of the Civil Code, provides that “with regard to the rights (obligations) arising out of the contract, each of the contracting parties must perform that which the contract obliges him to do.” Accordingly, in order to terminate a binding contract, a claimant seeking termination must not have neglected his obligations under the contract and the respondent’s breach must be due to the respondent’s neglect rather than the failure to exercise a legal right (Court of Cassation decision numbered 187 of 1999).

Conclusion

The court held that despite the contract containing an effective and enforceable termination clause under Article 271, this does not prevent the Court from sitting in judgment to hear the reasons for termination.

In this specific case involving a developer and purchaser, it was clear that the Developer had defaulted in its delivery obligation, however, the courts applied its discretion and held that, in the circumstances of the case, delay was not sufficient to terminate the contract. The Court also considered the concept of duty of good faith and the Defendant’s performance, noting that the Defendant had done everything he could do to meet its contractual obligations, and held that as there were specific events beyond the control of the Developer which hindered the Defendant’s performance, he could not be held liable for the failure to deliver the apartment.

In summary, the Courts will consider each case on its own facts and uphold the terms of the parties’ contract, however, the courts will always be free to exercise its discretion when determining the issue of termination.

In addition, a resolution was issued last year which is consistent with the Courts’ approach when determining Developer/purchaser disputes and also helps counter uncertainty with respect to the type of issues mentioned above. The Government of Dubai issued Executive Council Resolution 6 of 2010 approving the executive regulation of Law 13 of 2008 concerning the regulation of the Interim Real Estate Register in the Emirate of Dubai which contains provisions setting out a list of events where:

- (a) purchaser may apply to the courts to terminate its contract with the developer (for example, “if the developer materially changes the agreed specifications”);
- (b) reasons considered to be beyond the developer’s control (for example, “if the Master Developer makes any variations to the site of the project which leads to a change in the boundaries and area of the project in such a manner that affects the performance by the Sub-developer of its obligations”); and
- (c) when a developer shall be considered to have failed or neglected to perform its obligations (For example, “delay in obtaining the written approval of the Master Developer of the plans and designs”).