

UAE: Earnest Money and Damages

Hussain Eisa Al Shiri - Partner, Co-Head of Litigation - Litigation
- Dubai International Financial Centre

Rami Abdellatif

Rami Abdellatif - r.abdellatif@tamimi.com

When entering into a sale agreement that is binding for both parties, and the buyer pays a sum amount as a deposit, Article 148 of Civil Transaction Law stipulates that such deposit is considered part of the price in a final binding agreement unless the agreement or custom dictates that such deposit is considered as earnest money in an agreement where the parties agreed to practice the right to renege; in which case if such agreement is terminated by the buyer, he loses the right to recover such deposit, however, if the agreement was terminated by the seller, he becomes obliged to refund the buyer double the paid deposit.

Facts of the case:

- The Claimant (the buyer) filed a Civil action before Dubai Court of First Instance seeking a court judgment against the Respondent (the Seller) in the amount of AED 3,500,000.00 plus statutory interest until full payment.

On the grounds that:

- The claimant entered into a sale agreement with the respondent to purchase a residential building for the amount of AED 23 million, where the claimant made a down payment of AED 1,500,000.00 of the contract sum.

- The Respondent agreed to transfer the title deed of the property upon issuance of the building's completion certificate within 45 days of the date of the agreement, accordingly the second payment of AED 21,500,000 would be due and payable upon registration within 45 days. However, the respondent sold the property to another party and transferred the title deed thereto. He should therefore refund the amount he received and pay compensation of damages in respect of anticipated profit and loss suffered in the amount of AED 2 million.

- The Respondent on the other hand filed a counter claim seeking a court judgment against the claimant in the amount of AED 5,155,000.00 as damages

On the grounds that:

- The parties agreed in their sale agreement that the Respondent undertook to issue the certificate of completion of the building within 45 days from date of signing the contract, in return the Claimant would pay the balance of AED 21,500,000.00 upon registration of the deed.

- The Respondent obtained the completion certificate for the property subject of the contract and notified the Claimant of the same requesting that he paid the balance of the agreed price and state his position in terms of whether he wished to pay balance of the purchased price.

- the Respondent further sent a fax to the Claimant advising that the 45 days deadline had expired and the contract is to be considered terminated. Therefore, filing the counter action claiming the said compensation on the basis that the Respondent suffered material and moral damages as a result of the Claimant's failure to comply with his obligations within the timeframe set forth in the contract.

Court of First Instance:

- The court of First Instance ordered in the main action that the Respondent refund the sum of AED 1,

500,000.00 with 5% interest from the date the action was filed until full payment and dismissed the counter claim.

Court of Appeal:

- The parties appealed and the Court of Appeal upheld the lower court's ruling.
- The Respondent appealed to the court of Cassation arguing that the lower court contradicted the law, erred in its reasoning, went against the weight of evidence, prejudiced his right of defense and delivered a contradictory decision.
- The Court of Cassation

The Respondent argued:

1) That it is construed from documents and the correspondences between parties, that the deposit paid is tied to the parties right to retract from the agreement, furthermore, whereas their correspondences clearly stated that where the buyer fails to perform his obligations set forth in the contract, he shall not be entitled for a refund of the sum paid which the Claimant was aware of and didn't object but rather sent his acceptance to confirm the sale agreement.

2) That the period agreed upon according to the sale agreement was 45 days from date of its signature which has expired prior to issuance of the appealed judgment. the Respondent further alleged that it is construed from statements of the agreement that it shall be deemed revoked upon expiration of its period, Therefore, the trial court erred in its application of the law when it declared the contract revoked.

The Cassation Court responded to the above arguments as follows:

1) According to Article 148 of the Civil Transactions Law (1) payment of earnest money shall be regarded as evidence that the contract has become final and irrevocable unless the agreement or custom are to the contrary; (2) If the two parties agree that the earnest money shall be forfeited in the event of renegeing, each of them shall have the right to renege, and if the person who has paid the money reneges he shall lose and if the person receiving it reneges, he shall pay double the amount.

In light of the above, the Court interpreted the aforementioned article decided that Earnest money is a deposit paid to demonstrate commitment, to bind a contract and that neither parties shall have the right to renege unless the agreement or the custom dictates otherwise.

The court further stated that the reliable reference is parties intention contented from the agreement to determine whether the earnest money is to be considered a deposit in a final binding agreement or if it can be forfeited in the event of reneguing (retracting) by either party.

Furthermore, the trial court has full discretion to:

- Interpret the intention of the parties from the circumstances and merits of the case in order to conclude whether the sum paid is to be considered as earnest money in a conclusive agreement or earnest money subject to forfeiture in the event of reneguing the contract.
- Construe, and evaluate evidence and documents presented, interpretation of the contract provisions subject of dispute under no interference from the Cassation court as long as the former does not violate its discretionary power.

The court concluded from provisions of the sale agreement entered into between the Claimant and the Respondent that the deposit paid by the Claimant was considered as earnest money in a final binding sale agreement. According to the following:

1-A particular clause included in the agreement that stated "upon issuance of the building completion

certificate, the final payment of AED 21,500,000 shall be deemed due and payable.”

2-The parties didn't expressly state that the advance payment is to be considered as earnest money to be forfeited by the buyer should he retract from the sale agreement and to be refunded double the amount by the seller should he retract from concluding the agreement.

In light of the above, the Court ordered the Respondent to refund the amount of AED 1, 5000,000 received from the Claimant on the basis that the paid amount was considered as earnest money in a conclusive sale agreement rather than earnest money in a sale agreement with the right of both parties to renege.

2) That the Respondent's allegations that the sale contract subject of dispute was terminated by expiry of the term agreed upon (45 days) was baseless as this contract was not a periodical contract but rather a contract with immediate effect as to its rights and obligations.

The court further contended that according to Article 267 of the Civil Transactions law and its explanatory memorandum, “If the contract is valid and binding, it shall not be permissible for either of the contracting parties to resile from it, nor to vary or rescind it, save by mutual consent or an order of the court, or under a provision of the law”. In addition, Article 247 of the said law stipulates that “In contracts binding upon both parties, if the mutual obligations are due for performance, each of the parties may refuse to perform his obligation if the other contracting party does not perform that which he is obliged to do” consequently if one of the parties to a contract fails to perform his obligations set forth in the contract, it is permissible for the other party to seize performing his obligation without notification or seeking a court order to terminate the contract, Accordingly, the buyer is entitled to distrain from paying the remainder of the sale price - even when such remainder is due (for performance) - until the risks resulting from non performance of the corresponding obligations due by the seller cease to exist and unless he has forfeited his right to do so after such right has been established or the contract incorporates a condition that prevents him from enjoying the said right”.

Furthermore, it is construed from Articles 247 and 271 of the said Civil Transaction Law that a contract shall not be deemed terminated automatically when either party distrains performing his obligations unless the contracting parties have expressly agreed otherwise. Additionally, if the contract is deemed terminated both contracting parties shall be returned to their pre-contractual position and the appealed judgment contended that “even though the Claimant has failed to pay the remainder of the price agreed upon although repeatedly notified by the Responded, doesn't justify the respondent's exercising sole discretion in terminating the contract and selling the property to another as the latter was ought to obtain a court judgment to terminate the contract. Consequently, the court did not see the necessity to order for further investigations as long as it was construed that the Respondent did not hold the right to terminate the contract with his sole discretion.

The court ruled that on the one hand the Claimant in his statement of claim emphasized that the Responded didn't have the right to exercise sole discretion in terminating the contract, but on the other hand, the former claimed refund of the sum paid in advance as part of the price, and further requested compensation thus this implies the Claimant's wish to terminate the contract specially when the Respondent did not file for specific performance, the court therefore ordered refund of the paid earnest money.” Consequently the court concluded the same in relation to the Respondent's request for compensation, where the Claimant claimed refund of the earnest money, the court therefore interpreted his implied consent to terminate the contract and thus denied his request for compensation on the same grounds the lower court denied the Respondent's counter claim requesting damages as mentioned above.

Conclusion

The Cassation Court upheld the lower court's decision based on the facts illustrated above and therefore dismissed the Appeal.