

Dubai Court Finds Seller Liable for Non-Registration of Off-Plan Unit Despite Developer's Fault

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Introduction

As a result, the parties would be returned to the position they were in before the sale and purchase agreement and the unit will remain with the seller. But would this be applied even if the law required the developer or sub developer to register the unit and they failed to do so and the purchaser wishes to continue with the contract? This Court of Cassation judgment addresses this situation as detailed below.

Background

A Sale and Purchase Agreement (SPA) was entered into for the sale of an off plan unit. The purchaser fulfilled his obligations; however, the transaction was not completed. The purchaser agreed to pay the amount required in order for the seller to obtain approval from the developer; nevertheless, the developer's actions resulted in the sale remaining unregistered with the Real Estate Regulatory Agency (RERA). The seller requested the court to add the developer as a second defendant as it was the developer's obligation to register the sale, and they failed to do so.

The Court of First Instance ruled against the seller and ordered him to repay the purchase price of AED 295,000 in addition to 5% interest. That judgment was a consequence of the off-plan unit remaining unregistered.

The seller appealed that decision to repay the funds, claiming that he was not the party in default. The developer failed to fulfill his obligations; therefore, the burden of repayment should be upon him. The Court of Appeal confirmed the lower court's decision and rejected the appeal.

Court of Cassation

The matter went to the Court of Cassation. The seller put forward two grounds of appeal. Firstly, the seller insisted that the finding that the contract was void was not a result of his actions. Secondly, as it was the developer's failure to register the unit, it was the developer who should repay the amount ordered to the purchaser.

Articles 3 and 5 of Law 13 of 2008 specifies that all transactions relation to off-plan units must be registered in the interim registrar, and places the obligation of said registration on the seller, developer and/or sub-developer.

In this case, the developer's failure to register the SPA rendered it void and unenforceable. Consequently, regardless of who was in breach, the SPA will nonetheless be considered void and the funds paid must be repaid in order to prevent unjust enrichment. Any related agreements to the SPA will also be considered void due to the non-registration.

The Court applied Article 210 (1) of the Civil Code which states:

“A void contract is one which is unlawful in its essence and form, in that its essential elements or subject matter or purpose or its form as laid down by law for the making of a contract are imperfect, and such contract shall be of no effect, and no approval thereof shall be operative.”

Since the sale of off-plan units have been given a specific form as per Law 13 of 2008 and that form has not been met since the unit was left unregistered, the contract is considered void. The fact that the SPA was void meant that the seller must refund the amount paid and to the parties should be returned to the state they were in prior to the formation of the agreement.

The Court emphasized that the main decisive factor in such cases is not which party was to blame for non-registration; it is the fact that the off-plan unit is unregistered and therefore it is void. In such matters, the amount will always be ordered against the seller and paid back to the purchaser. Furthermore, the Court recognized that the developer was at fault; however, it stated that the amount was to be paid by the seller as he is the one who received the payment. Thus, in an effort to return all parties to their original state prior to the creation of the SPA, the seller must return the funds paid to him.

Conclusion

It is always wise for the seller and the purchaser to register the unit in order to avoid such cases from arising. It is also pertinent to ensure that before filing a claim for compensation or breach against a seller or developer for a dispute arising from an SPA relating to an off-plan unit, the purchaser must always make sure that the unit is registered. Once the court enquires about the unit with RERA and a lack of registration is revealed, the Court will view the contract as null and void and will order a repayment of funds regardless of the intentions of the parties.

This article has been co-authored by Fatima Al Numairy trainee lawyer at Al Tamimi & Company.