

Caution: Selling mortgaged property in Dubai

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The Facts

The Seller had purchased a substantial number of plots in a development through financing from a Bank. All the plots were subject to the Bank's mortgage.

Subsequently, the Seller sold 20 plots to the Purchaser whilst the mortgage remained on the land.

The Purchaser fell behind on his payments to the Seller after cheques amounting over AED 120 million were dishonoured. The Seller filed a criminal complaint against the Purchaser.

The Purchaser denied the charges on the basis that the Seller had defrauded him by selling property that was mortgaged, a fact the Seller had failed to disclose to him as alleged by him. He sought to be acquitted of the crime of dishonoured cheques. Al Tamimi represented the Seller in this case.

Court of First Instance

The Court sentenced the Purchaser on the basis of the dishonoured cheques.

Court of Appeal

The Purchaser appealed to the Court of Appeal.

The Court of Appeal acquitted the Purchaser on the basis that the Seller had obtained the cheques fraudulently because of the non-disclosure of the mortgages. The Court of Appeal had erroneously applied Law 14 of 2008 because they had relied on Article 10 of Law 14 of 2008 which obliged the Seller to get the consent of the mortgagee to sell the mortgaged property.

Court of Cassation

The Seller appealed the decision before the Court of Cassation and encouraged the Public Prosecutor to appeal. The Public Prosecutor accepted the application and appealed based on the following grounds:

- The Court of Appeal applied and based its decision on Article 10 of Law No. 14 of 2008 (Dubai Mortgage Law) which provides that "*The Mortgagor shall not sell, gift or otherwise dispose of the Mortgaged Property Unit or Property or create any right in rem or personal right over the Mortgaged Property Unit or Property without the approval of the Mortgagee and subject to the assignee agreeing to take over the obligations of the Mortgagor under the mortgage contract...*". However Law No. 14 was not applicable in this case and could not be applied retrospectively since the sale of the plots of land was executed before Law 14 of 2008 was issued.
- In relation to the issue of the applicable law, it was argued that the Court should differentiate between the provisions that govern mortgage contracts in Dubai under the new Law No. 14 of 2008 and the provisions under the UAE Civil Code which also deals with mortgage contracts. Under the Civil Code, consent from the bank/mortgagee is not required and the purchaser does not need to be notified of the existence of the mortgage (Article 1412 of the UAE Civil Code) provided that this does not affect the

mortgagee's rights.

- It is common practice in Dubai for developers to mortgage plots prior to the commencement of a project and sell off-plan units to end users. The Appeal Court's decision could lead to the invalidity of most sales in Dubai.
- The validity or otherwise of the sale and purchase agreement had no bearing on the offence of giving a cheque in bad faith.

The Court of Cassation's Findings

Disposing mortgaged property

The Court of Cassation rejected the Purchaser's argument pertaining to the failure to disclose to the Purchaser that the land sold was actually mortgaged and could not be disposed of by the Seller. The Court of Cassation accepted the counter-argument that the sale and purchase agreement had no bearing on the offence of giving a cheque in bad faith.

The Court of Cassation also accepted the argument that the transaction between the parties and receipt of the cheques occurred before the Dubai Mortgage law (14 of 2008) came into force. The Court held that a law takes effect upon its issuance by the relevant authority which is evidenced by publication in the Official Gazette (which is when it becomes public knowledge).

Law No. 14 of 2008 was issued on 14 August 2008. The law came into force 60 days from the date of publication. Accordingly, the provisions of Law 14 of 2008 should not have been applied to this case, as the transaction took place on 22 April 2008. In relying, amongst other things, upon the provisions of that law, the Court of Appeal erred and its decision should be overturned. Instead, the Civil Code was to be applied, specifically Article 1412 of the Civil Code which states:

"The mortgagor may dispose of his property, which is pledged by way of security without the same affecting the rights of the mortgagee."

Under this article there is no requirement for the mortgagor to obtain the mortgagee's consent prior to disposing the property.

The Court of Cassation also confirmed that a person who owns mortgaged property has the right to dispose of the property to which he still holds title. Selling the property or obtaining additional mortgages would not constitute fraud within the meaning of Article 399 of the Penal Code. Exercising a right of ownership does not attract any criminal liability or entail deception.

Finally, the Court of Cassation held that the defence of non-responsibility does not arise if a cheque is issued in connection with a legitimate transaction, regardless of the extent of the defect marring the contract. Article 401 of the Penal Code would only apply if a cheque is issued in connection with any of the property-theft crimes listed in the provision.

Conclusion

The Court of Cassation decided to issue its judgment on the merits from the first appeal without returning the case back to the Court of Appeal. The application of Law 14 of 2008 was disregarded and the Court of Cassation applied UAE Civil Code (Article 1412) which does not require the mortgagee's consent for the owner to sell his mortgaged property.

This case is important because it confirms that Law No. 14 of 2008 (Dubai Mortgage Law) does not apply retrospectively. If the court had held otherwise then this may have invalidated a number of sales contracts in Dubai. The market can however now take confidence that agreements made before the introduction of

law No. 14 of 2008 are still valid and enforceable.

Sellers of property, however, must now ensure they obtain the consent of both the purchaser and the mortgagee when selling mortgaged property. If consent is not obtained, the courts may consider this as a violation of Article 10 of Law 14 of 2008 and the contract deemed void.