DIFC Investments LLC v Mohammed Akbar Mohammed Zia [2017] CA 005

Claim No: CA-005-2017

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF APPEAL

BEFORE THE CHIEF JUSTICE MICHAEL HWANG, JUSTICE SIR JEREMY COOKE AND JUSTICE ZAKI AZMI

BETWEEN

DIFC INVESTMENTS LLC

Respondent

and

MOHAMMED AKBAR MOHAMMED ZIA

Appellant

Hearing: **31 October 2017**

Counsel: Syed Mujtaba Hussein (Emirates Legal FZE) for the Appellant

Michael Patchett-Joyce instructed by Global Advocates for the Respondent

Judgment: **10 January 2018**

JUDGMENT

Summary of Judgment

This is an appeal from the judgement of H. E. Justice Omar Al Muhairi dated 15 May 2017. The Judge at first instance granted the Respondent a declaration that the 72 Contracts executed by the parties dated 3 May 2015, were terminated with effect from 8 July 2015 pursuant to the DIFC Contract Law. He also awarded costs.

The 72 Contracts provided that the Respondent (seller) undertakes to complete all procedures and requirements to transfer the properties to the Appellant (buyer) at Dubai Land Department immediately after taking possession of the agreed price and not later than Sunday 07/06/2015. The Contracts were in identical terms (in both English and Arabic) save for the details of the properties to be transferred.

Clause 6 of the Contracts provided: –

"In the event that the buyer fails to pay the payments as agreed date in clause (3) or fails to complete the transfer on the agreed date due to his own act or omissions, then the seller has the right to terminate this contract, and he shall be entitled to retain the deposit, as long as the termination of the contract was due to violation of the agreed terms, unless they agreed amicably to different terms or dates."

There were a number of attempts by the Appellant to make payment by SBLC (standby letter of credit) which never succeeded in making funds available to the Respondent at any time before termination of the Contracts on 8 July 2015, or by the date when the latter sought to cash the cheque for the deposit or by any of the later dates when the termination was repeated.

It is clear on the evidence that no payment in any form was ever received by the Respondent nor any authorised agent on its behalf by the extended deadline of 18 June 2015, nor by the date of the termination letter of 8 July 2017. No SBLC was opened which was available to the Respondent for immediate encashment by those dates nor, in fact, at any stage thereafter. The letter of termination stated that the Respondent was exercising its rights under Clause 6 to terminate and to encash the security deposit cheque which was held by the real estate brokers.

At around the end of July, the Respondent presented the deposit security cheque which was dishonoured. On 3 August, the Appellant complained at the presentation of the cheque in light of his continuing efforts to negotiate to complete the deal. He set out again various proposed terms for closing the deal including procuring acceptance by the Respondent's bank of the transfer of the SBLC for the full purchase price, the Respondent discounting it, with the discount element to be made good by the Appellant, amendment of the Contracts accordingly and the replacement of the security cheque with another.

The Appellant's case was that, as DIFC law applied, the principles of construction to which the court should have regard were those set out in DIFC Law No 6 of 2004. When construing a contract governed by the law of the DIFC, Part 5 requires the court to look for the common intention of the parties and where it cannot be established, to interpret the contract by reference to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances. The court may look to the statements and conduct of the parties and must have regard to all the circumstances including the nature and purpose of the contract and the meaning commonly given to terms and expressions in the trade concerned (Article 51). Terms and expressions are to be interpreted in the light of the whole contract or statement in which they appear and the contract is to be interpreted in a manner that which gives effect to all the terms rather than in a manner which deprives some of them of effect.

The issue between the parties as to the construction of this provision turned upon the question whether or not the words "due to his own act or omissions" qualified both parts of Clause 6, namely the failure to pay and the failure to complete the transfer on the agreed date. There was a further issue as to whether the clause made time of the essence for such payment. It was the Appellant's case that these words applied to both the failure to pay and the failure to complete and that time was not of the essence. It was also the Appellant's case that the words "act or omissions" meant deliberate or intentional acts or omissions although those words appeared nowhere in the clause in question. We cannot accept any of these submissions.

The terms of Clause 6 conclude the matter against the Appellant under either system of law. The Appellant was bound to pay the purchase price by a set date and failed to do so and that, in itself, gave rise to the right to terminate under the Contracts, of which right the Respondent availed itself, with the result that no other issues, whether of force majeure or cure of breach could arise. Likewise, there is no issue between the parties as to any material difference in the Arabic or English versions of the Contracts, although clause 19 provided that, in the event of any discrepancy, the Arabic text would prevail.

No substantial issues of fact arise here. Whichever system of law applied, there was a right to terminate for non-payment of the price by the extended deadline of 8 June and nothing that the Respondent did amounted to any implied extension or waiver of rights. The Appellant made further proposals to pay after 8 June, which came to nothing and the Respondent was entitled to listen without commitment and to exercise its right to terminate on 8 July.

Apart from an order for costs, all that was sought by the Respondent was a declaration that the 72 Contracts dated 3 May 2016 were validly terminated with effect from 8 July 2015 or alternatively terminated by the court. The Respondent reserved the right to claim the deposit which should have been paid when the Security Deposit cheque was presented but bounced. This, it was entitled to do and the Appellants can have no cause for complaint on that score. Although the Judge's reasoning for his conclusion is open to criticism because he failed to construe the critical clause, Clause 6, and permission to appeal was doubtless given because of that, the conclusion that he reached was, in our view, inevitable. He should have determined the effect of Clause 6 under the relevant governing law but it would have made no difference whether he had found the governing law to be that of the DIFC or that of onshore Dubai. In practice, the terms of Clause 6 conclude the issue under either system of law. In the absence of payment by the extended deadline, DIFCI had the right to terminate the Contracts and to present the security deposit cheque, as it duly did.

The appeal was dismissed with costs.

This summary is not part of the Judgment and should not be cited as such

ORDER

UPON hearing Counsel for the Appellant and Counsel for the Respondent on 31 October 2018

AND UPON reading the submissions and evidence filed and recorded on the Court file

IT IS HEREBY ORDERED THAT:

1.The Appellant's Appeal is dismissed.

2. The Appellant shall pay the Respondent's costs of this appeal on the standard basis to be assessed if not agreed.

Issued by:
Natasha Bakirci
Assistant Registrar
Date of Issue: 10 January 2018
At: 9 am

JUSTICE SIR JEREMY COOKE:

Introduction

1.This is an appeal from the judgement of H. E. Justice Omar Al Muhairi dated 15 May 2017. Permission to appeal was given on 16 July 2017 in respect of all grounds of appeal set out in an Appeal Notice, save for Ground 3 which was based on the contention that the Part 8 Application procedure was inappropriate for resolution of the dispute in the Court of First Instance. That ground was untenable, since it was said that the Appellant was prejudiced by the procedure because of inability to pursue a defence and counterclaim in it (which is not the case) and because substantial issues of fact were involved in determination of the claim made by the Respondent (to whom we shall refer as DIFCI), when the underlying facts were not only clear, but largely undisputed.

2. The Judge at first instance granted DIFCI a declaration that "the 72 Contracts executed by [DIFCI] and [the Appellant] dated 3 May 2015 were terminated with effect from 8 July 2015 pursuant to the DIFC Contract Law." He also awarded DIFCI its costs. It will be noted that he decided the claim under the law of the DIFC, which was the governing law for which the Appellant contended, whilst DIFCI had submitted that the proper law of the Contracts was that of onshore Dubai and the UAE. There is a Respondent's Notice in which DIFCI pursues its case on governing law but its primary contention is that it matters not whether the governing law is that of the DIFC or that of onshore Dubai since the end result is the same and that the Judge was right to come to the conclusion that he did.

3. The Appellant's Notice of Appeal runs to 5 closely typed pages and the skeleton argument, to be read in conjunction with it, dated 15 June 2017, stated that there were 17 critical issues for the Court of Appeal to consider, three of which fell out of the reckoning when permission to appeal was refused on Ground 3. Whilst the Appellant submits that the matter is complex and requires detailed determination of fact, the Judge at first instance did not think so and when permission to appeal was given, the Appellant was ordered to file a further Skeleton Argument to set out his further submissions as to the applicable provisions of the governing law for which he contended and how their application would give rise to a different result from that to which the Judge came. Accordingly, on 6 August of this year, the Appellant filed further submissions, relying essentially on Article 86 of the DIFC Contract Law in combination with Clause 6 of the Contracts. The Appellant, through Counsel, based its appeal on the law of DIFC and challenged the Judge's findings at first instance that the provisions of Articles 77, 80, 81, 82, 83, 86, 87 and 89 justified termination of the Contracts by DIFCI. He contended that the Judge was wrong to find that there was a fundamental non-performance of the obligation to pay the purchase price, without having regard for the reason for failure to perform. He criticised the Judge's failure to construe the terms of Clause 6 and argued that Clause 6 and Article 86 of the DIFC Contract Law required there to be an intentional or reckless failure to pay for DIFCI to be justified in terminating the Contracts. Furthermore, the Appellant alleged that the failure to pay was due to DIFCI's refusal to provide details to its Bank, Emirates NBD, to enable it to receive a standby letter of credit (SBLC).

The Background Facts

4. The Contracts were in identical terms (in both English and Arabic) save for the details of the properties to

be transferred. The relevant provisions in English were as follows: –

> "2. The Seller undertakes to provide all documents proving that he is the current owner of the property. Also the Seller undertakes to complete all procedures and requirements to transfer the property to the buyer's name at Dubai Land Department immediately after taking possession of the agreed price under this contract and not later than Sunday 07/06/2015.
>
> 3. The Buyer agrees to pay to the seller:
>
> A. A security deposit of 10% as part of total cumulative deposit of AED 10,512,960.00 with Ch. No. 113301, National Bank of Oman for cumulative total price of 72 units of AED 105, 134, 400.00 simultaneously with signing this contract.
>
> B. Total amount of the sale price, AED 1,064, 400.00 by Manager Check or any other guaranteed method of payment that is acceptable by the Dubai Land Department, as follows;
>
> One Year Irrevocable Validity SBLC [standby letter of credit] issued by Estrategia Investimentimanios Bank ("Estrategia") to be advised by Mashreq Bank on the name of DIFC Investments LLC for cumulative total price of 72 units of AED 105, 134, 400.00 to be issued to DIFC on the date of receiving the NOC from the Developer Union Properties that can be encashed immediately by presenting it to Sellers Bank and the transfer shall happen once the money is realised by the sellers.
>
> …
>
> 6. In the event that the buyer fails to pay the payments as agreed date in clause (3) or fails to complete the transfer on the agreed date due to his own act or omissions, then the seller has the right to terminate this contract, and he shall be entitled to retain the deposit, as long as the termination of the contract was due to violation of the agreed terms, unless they agreed amicably to different terms or dates.
>
> 7. In the event that the seller fails to complete the transfer on the agreed date due to his own act or omissions, then the full deposit will be refunded to the buyer, and also the seller agrees to pay the same deposit amount to the buyer as a compensation for the loss of the said property, unless they agreed amicably to different terms or dates.
>
> ….
>
> 17. This contract is governed by and shall be construed in accordance with the local and federal laws applicable within the Emirate of Dubai.
>
> 18. Any dispute…… Shall be resolved amicably… In the case if the parties unable to reach an amicable solution, the dispute shall be referred to the competent courts in the Emirate of Dubai……"

5. The underlying facts were set out in paragraphs 4-19 of the judgment of the Court of First Instance. [here set out paras 4-19 of the judgment]

6. In reality, very little of this summary of facts given by the Judge is in dispute. Issues are said to arise in relation to the failure to pay but the reality is that there were a number of attempts by the Appellant to make payment by SBLC which never succeeded in making funds available to DIFCI at any time before termination of the Contracts on 8 July 2015, or by the date when the latter sought to cash the cheque for the deposit (between 29 July and 3 August) or by any of the later dates when the termination was repeated (in letters dated 11 August, 25 August and 26 August 2015). The evidence shows clearly that:

> 6.1. The SBLCs which were opened were never advised to DIFCI by a local bank in Dubai, since both Mashraq Bank and Emirates NBD refused to deal with the Appellant's bank Estrategia in relation to the SBLCs, the former because of "compliance issues" and the latter because it had no relationship with Estrategia.
>
> 6.2. The SBLCs did not provide for payment of the purchase price until the expiry of each letter of credit, which was one year or so from their issue. Although discounting was possible and the Appellant offered at various times to pay the difference on the sums discounted, those sums were not properly quantified or

paid. The SBLCs did not accord with the amendments suggested by Emirates NBD as to when payment would be triggered nor the documents which would trigger it (immediate encashment on presentation of a demand), nor the terms which would govern it.

6.3. The SBLCs did not, as was suggested by the Appellant in his evidence and as was repeated in argument, require the presentation of title documents to the land to trigger payment and there was therefore no good reason why the initial SBLC, issued by Estrategia on the application of a company owned by the Appellant, namely Interglobe General Trading LLC (Interglobe) could not have been issued in favour of DIFCI, particularly once NOCs had been furnished and as the Contracts provided.

6.4. Contrary to the contention of the Appellant, there was no failure on the part of DIFCI to carry out any contractual obligation of any kind, whether in relation to receipt of payment or otherwise and the issues which arose in relation to payment were of the Appellant's own making and/or related to regulatory problems concerning him and his companies and an investigation by Interpol.

7. As appears from the Appellant's own evidence, a standby letter of credit was issued by Estrategia with the date of 3 June 2015, on the application of Interglobe, but the named beneficiary was Emirates Moon General Trading LLC, another company belonging to the Appellant. Although the standby letter of credit was transferable, the transferee had to issue a transfer letter and amendments were required for it to comply with the terms of the Contracts, as was pointed out on 11 June by Emirates NBD, by being payable immediately on presentation, as opposed to 3 June 2016. The letter of credit provided for payment "at expiry", whereas it should have provided for payment "on or before" the expiry date, so as to be capable of immediate encashment. Further, the documents required to be presented required alteration and the letter of credit was to be governed by ISP 98, not UCP 600, if it was to be acceptable. The Appellant, in his three witness statements, accepted that amendments were needed and that efforts were made to satisfy DIFCI's bank but did not assert that the amendments were made or that a conforming letter of credit was ever provided. On 14 June, DIFCI confirmed that it would accept a SBLC issued by Estrategia, to be advised by Mashreq Bank in the name of DIFCI for the full purchase price and government charges. Although, on 18 June, the Appellant sent instructions to Mashreq Bank to transfer the SBLC to DIFCI as soon as possible, the amendments were never made and Mashreq Bank never advised DIFCI of the authenticity or availability of it.

8. Whilst the Contracts provided that completion (and therefore payment which was to precede it) had to take place by 7 June 2017, it is common ground that the parties agreed an extension to 18 June. The request for transfer of the non-conforming SBLC was therefore made on the last day. It is common ground however, as appears from the Appellant's own witness statements, that Mashreq bank refused to comply with the Appellant's requests to advise or confirm a transfer of the letter of credit because of "compliance issues". Mashreq Bank was, at best, an advising bank, which acted or, as it turned out, refused to act, on the instructions of the Appellant or his companies and was not in any sense the agent of DIFCI. In an uncontroverted witness statement from Saleh Al Akrabi, adduced by DIFCI, the reason is given for Mashreq's stance. In the criminal complaint, referred to at paragraph 16 of the first instance judgement, a representative of Mashreq Bank submitted a statement in which it was said that Interglobe was under investigation by Interpol and that Interpol had issued a warrant in relation to the Appellant himself. By 29 June, if not before, it was clear to the Appellant and to DIFCI that Mashreq would not recognise a transfer of the SBLC. The Appellant said that he had only heard of this from Mashreq Bank that day and then suggested that he might "send this instrument directly to your account to avoid more delay."

9. Following the failure to open a conforming letter of credit and to obtain authentication from Mashreq Bank, which notified the Appellant that it was not prepared to advise DIFCI of the SBLC, the Appellant made other efforts to effect payment and on 2 or 7 July asked for the assistance of DIFCI in accepting a Return Merchandise Authorisation from Estrategia so that the SBLC could be transferred to DIFCI's account at

Emirates NBD. In the same letter, the Appellant requested “more time till the RMA established between your bank and the SBLC issuer bank”. Although it was contended at first instance that there had been some implied extension or forbearance, it was not argued before this court that any extension of time was ever agreed by DIFCI beyond the extension already given to 18 June.

10. It is therefore clear on the evidence that no payment in any form was ever received by DIFCI nor any authorised agent on its behalf by the extended deadline of 18 June 2015, nor by the date of the termination letter of 8 July 2017. No SBLC was opened which was available to DIFCI for immediate encashment by those dates nor, in fact, at any stage thereafter. The letter of termination stated that DIFCI was exercising its rights under Clause 6 to terminate and to encash the security deposit cheque which was held by the real estate brokers.

11. The disputes of fact which the Appellant would like to raise all concerned matters after 18 June 2015, the extended deadline for payment and mostly after 8 July 2015, the date of termination of the Contracts by DIFCI. DIFCI made its position plain in its termination letter of the latter date. Whilst Counsel for the Appellant asked rhetorically in argument why it was, if time was of the essence, that DIFCI had waited after 18 June until 8 July before terminating the Contracts, there is no basis for any suggestion that there was any waiver of the right to terminate. No evidence was adduced before the Judge or this court to show any agreement, express or implied, to any extension beyond 18 June nor of any waiver of the right to terminate for non-payment by that date, if such a right existed.

12. The notice of termination on 8 July was followed by further efforts by the Appellant to make payment, including a meeting or meetings with DIFCI personnel but it is not suggested that there was any change in DIFCI’s position. In a 12 July letter, he offered to send the SBLC directly to Emirates NBD whilst saying that Emirates NBD was working on the RMA “to complete the formalities”. The Appellant requested a further meeting to negotiate on the discounting charges which DIFCI would incur for the SBLC which remained payable only at expiry, stating that this deficient element in the SLBC was due to a misunderstanding of the Contracts on his part. A further 15 day extension was requested for completion, but not granted. On 22 July, the Appellant, in a letter, maintained that Emirates NBD had not received the transfer of the SBLC because it had not received any documents relating to the transaction from DIFCI. Later, however, on 2 August, the Appellant’s letter stated that the SBLC had not been transferred to DIFCI’s account with Emirates NBD because that bank had no relationship with Estrategia. He asked for further assistance from DIFCI in the form of provision of details of another bank or in establishing a relationship between Estrategia and Emirates NBD.

13. At around the end of the month DIFCI presented the deposit security cheque which was dishonoured. On 3 August, the Appellant complained at the presentation of the cheque in the light of his continuing efforts to negotiate to complete the deal. He set out again various proposed terms for closing the deal including procuring acceptance by DIFCI’s bank of the transfer of the SBLC for the full purchase price, DIFCI discounting it, with the discount element to be made good by the Appellant, amendment of the Contracts accordingly and the replacement of the security cheque with another.

14. By a letter of 11 August, DIFCI set out the history of the Appellant’s failure to make payment by SBLC by the deadline of 18 June and the nonconformities in the SBLC offered, referring also to the Appellant’s requests to make payment by other means which were not entirely clear to it and did not accord with the Contracts. The letter referred to the presentation of the security cheque which was dishonoured owing to lack of funds in the Appellant’s account and went on; “DIFCI hereby wishes to terminate the Property Sales contract due to your failure to pay the purchase price by the deadline date of 18 June 2015 and DIFCI wishes to recover the security deposit amount to which it is entitled.” Although the letter spoke of DIFCI’s “wish” to terminate and recover the security deposit, in the context of the 8 July letter of termination and the attempt to make such recovery by presentation of the deposit security cheque, this letter cannot be read as meaning that the

contract was still being treated as alive by DIFCI. It did no more than make it plain that its continuing intention was termination and recovery of the deposit, as had been made plain on 8 July, notwithstanding the Appellants' later efforts to revive the deal.

15. Interglobe then opened two fresh letters of credit on 14 and 18 August in respect of the deposit and the purchase price, both in favour of DIFCI but each without the amendments earlier suggested. Each was payable at expiry (12 August 2016 and 18 August 2016) and was not capable of encashment for the full amount immediately in accordance with the terms of the Contracts. A further meeting took place on 20 August and by a letter of 25 August, the Appellant again offered to pay the discounting charges, stating that he had fulfilled the terms of the Contracts. He was met with further letters of 25 and 26 August in which DIFCI made it plain that it still considered itself not bound by the Contracts because of the failure to pay the price. As DIFC pointed out, moreover, those letters of credit suffered from the same type of defects as the earlier SBLC and the Contracts had already come to an end, as DIFCI maintained and the Judge held, if the notice of termination of 8 July was effective under the Contracts. All such further attempts at payment were not in accordance with the Contracts and would then be too late.

16. The different ways in which the Appellant puts his arguments on his appeal cannot avail him when the issues are properly analysed. The criticisms of the judge in this respect are ill founded save for his failure to grapple with clause 6 of the Contracts and its proper construction. That clause was the central point in dispute between the parties regardless of issues of proper law since both parties accepted that the result would be or at least was likely to be exactly the same, by reason of this clause, whichever system of law governed the transactions.

Jurisdiction

17. Before turning to clause 6, it is worth emphasising that it was common ground between the parties that the DIFC Court had jurisdiction by reason of Article 5 (A) (i) (a) of Law No. 12 of 2004 which provides that the DIFC Court of First Instance shall have exclusive jurisdiction to hear and determine civil or commercial claims and actions to which the DIFC or any DIFC Body, DIFC Establishment or Licensed DIFC Establishment is a party. The claim was commenced by DIFCI, a DIFC body, in these courts and the Appellant submitted to their jurisdiction.

Clause 6

18. For the sake of convenience, I set out clause 6 once again: –

> "In the event that the buyer fails to pay the payments as agreed date in clause (3) or fails to complete the transfer on the agreed date due to his own act or omissions, then the seller has the right to terminate this contract, and he shall be entitled to retain the deposit, as long as the termination of the contract was due to violation of the agreed terms, unless they agreed amicably to different terms or dates."

19. The Appellant's case was that, as DIFC law applied, the principles of construction to which the court should have regard were those set out in DIFC Law No 6 of 2004. When construing a contract governed by the law of the DIFC, Part 5 requires the court to look for the common intention of the parties and where it cannot be established, to interpret the contract by reference to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances. The court may look to the statements and conduct of the parties and must have regard to all the circumstances including the nature and purpose of the contract and the meaning commonly given to terms and expressions in the trade concerned (Article 51). Terms and expressions are to be interpreted in the light of the whole contract or statement in which they appear and the contract is to be interpreted in a manner that which gives effect to all the terms rather than in a manner which deprives some of them of effect.

20. The issue between the parties as to the construction of this provision turned upon the question whether or not the words "due to his own act or omissions" qualified both parts of Clause 6, namely the failure to pay and

the failure to complete the transfer on the agreed date. There was a further issue as to whether the clause made time of the essence for such payment. It was the Appellant's case that these words applied to both the failure to pay and the failure to complete and that time was not of the essence. It was also the Appellant's case that the words "act or omissions" meant deliberate or intentional acts or omissions although those words appeared nowhere in the clause in question. We cannot accept any of these submissions.

21. Clause 6, as DIFCI submits, sets out the effect of two alternative failures by the buyer namely a failure to make the payment and a failure to complete the transfer, both by reference to the agreed date. The words "due to his own act or omissions" appear only after the words relating to failure to complete and not after the words referring to failure to pay by the due date. The rationale of this is obvious. Whereas the obligation to pay rests only upon the buyer and is in no sense dependent upon the seller, the obligation to complete rests upon both seller and buyer, as the terms of clauses 6 and 7 together make clear, because each uses the same phraseology "due to his own act or omissions". Each provides for liability on the buyer and seller respectively for a failure to complete the transfer due to his or its own act or omission. Whereas the purchaser alone has to pay, whether by Manager Cheque or other guaranteed method of payment, or, as here, SBLC, completion of the transaction requires buyer and seller to play their part. The seller has to effect the transfer and various formalities of registration may be required such as the requirements of the Government of Dubai Lands Department. Liability could not devolve upon the buyer for a failure to complete as a result of the seller's failures in the same way that liability could only devolve upon the seller as a result of failure to complete due to its own acts or omissions and not that of the buyer. Payment, however, is the obligation of the buyer alone, whether in the form of cash or its equivalent in the form of a standby letter of credit, and is something for which the buyer alone is responsible. Payment of the price was the essential consideration for the seller's transfer of the land and had to be fulfilled by the buyer.

22. As already mentioned, there is nothing in the clause which refers to a deliberate or intentional failure in any event. Both clauses 6 and 7 referred to the buyers' or sellers' "own act or omissions" but do not require those acts or omissions to have any particular character beyond the act or omission itself, as a matter of construction of the Contracts, absent some principle of applicable law which requires that.

23. DIFCI relied on the decision of Justice Sir Anthony Colman in Ithmar Capital v8 Investments Inc [2007] DIFC CFI- 008, where, at paragraph 72, in reliance on a series of English authorities, he held that the deposit of a cheque by the agreed date under a MOU (to be held in escrow) required strict compliance and that such compliance was of the essence of the contract. The MOU was for the sale of an office block and Clause 7 of it did not, unlike Clause 6 here, contain an express right of termination in the event of non-payment by the agreed date. Reference can be made also to Millichamp v Jones [1982] 1WLR 1422 per Warner J at page 1430 and the other cases cited in Ithmar. We gained no assistance from the only authority cited by the Appellant in this regard, Hakimzay v Swailes [2015] HC -2914-000606, a case where it was said that time could not be of the essence where was no fixed date set for completion.

24. It is, as DIFCI submit, fanciful to consider that Clause 6 of the Contracts did not make time of the essence. The very expression "time of the essence" means that fulfilment of the relevant obligation must occur by the due date and if it is not, the innocent party is entitled to treat the contract as at an end. Clause 6 provided for payment by a given date – "the agreed date" – unless the parties agreed amicably to different terms or dates. In the absence of any such agreement the seller was specifically given the right to terminate the contract for the buyer's default, whether it was a failure to pay simpliciter or a failure to complete by reason of the buyers' act or omission. The parties expressly agreed for a right of termination for the seller if payment was not made by the due date, as well as an entitlement to retain the deposit. In the same way as clause 7 contained its own express provision for rights accruing to the buyer, should the seller fail to complete the transfer on the agreed date due to his own act or omissions, clause 6 made express provision for the seller to have the right of

termination either for the buyer's failure to make payment or to complete the transaction where the latter is due to the buyer's own act or omissions. Whilst Clause 6 emphasises the need for the buyer to be in violation of the agreed terms as the cause of the termination, this adds nothing where the failure to pay in itself constitutes the breach of contract and of the obligations set out in the clause.

25. The inescapable conclusion on the basis of clause 6 is reinforced by the fact that the properties in question were being bought and sold as an investment- as part of a commercial business transaction, where time is ordinarily of the essence, whether or not the specific terms of the contract give an express right to terminate if delivery or payment is not made by the contractual date. Here, the terms of the contract were clear in giving such a right in both clause 6 and 7 and there is no room for a court to do anything other than apply the terms agreed in the commercial context in which the contract was made.

26. Whilst the Judge at first instance failed to decide the point of construction on Clause 6, and chose to seek to determine the matter on the basis of the general contract law of the DIFC, the terms of Clause 6, which were fully argued before him, in our judgement, determine the position against the Appellant, unless there is some peculiarity of applicable law which could give rise to a different result, which, for the reasons set out below, is not the case.

The Contract Law of DIFC- Law No.6 of 2004.

27. The Appellant submitted to the judge and to this court that the governing law of the Contracts was the law of the DIFC. The Appellant averred that Clause 6 was in no way in conflict with either the law of the DIFC or the law of onshore Dubai. Nonetheless, the Appellant contended that, in the same way that, on his case, Clause 6 required deliberate or intentional breach in failing to pay, so also the right to terminate the contract under Article 86 of the Contract Law only arose where the non-performance was intentional or reckless. This is a misreading of Article 86 (1) which provides for the right to terminate the contract "where the failure of the other party to perform an obligation under the contract amounts to a fundamental non—performance".

28. Article 86 (2) provides that, in determining whether a failure to perform an obligation amounts to a fundamental non-performance, regard shall be had, in particular, to four different factors, as set out in subparagraphs (a)-(d). The first factor is whether the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract. The second factor is whether strict compliance with the obligation which has not been performed is "of essence under the contract". The third is whether the non-performance is intentional or reckless and the fourth is whether the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance. Whilst therefore the question of intentional or reckless non-performance is a factor in determining whether the non-performance amounts to a fundamental non-performance, it is not determinative of the question and the other factors fall to be taken into account. Here, the non—performance did substantially deprive the aggrieved party of what it was entitled to expect under the contract. The seller was entitled to expect payment by the due date as the terms of Clause 6 made plain (in the absence of which it had the express right to terminate). The purchase price was, from the seller's viewpoint, the consideration for the transfer of the land so that being deprived of it was undoubtedly a substantial deprivation of what it was entitled to expect to receive under the contract. Furthermore, strict compliance with the obligation to pay was of the essence of the contract as the provision relating to termination in Clause 6 made clear. Furthermore, given the background to the failure to pay and the compliance problems encountered, the buyer's non-performance can be said to have given the seller reason to believe that it could not rely on the other party's future performance. We have no hesitation in saying that the failure to pay by the due date was a fundamental non-performance which gave rise to DIFCI's right to terminate, in the light of the provisions of Clause 6.

29. The Judge's conclusions in this respect are unchallengeable. The judge expressly found in paragraph 81 of the judgement that the Appellant's failure to make payment by the extended due date of 18 June 2015 was

“non-performance” under the DIFC Contract Law regardless of the reason for the failure to perform. At paragraph 83, the judge held that the Contracts contemplated a sale and transfer on a specific date, which could only be extended by mutual consent of the parties. He held that this was the essence of the Contracts. There was therefore no possibility of cure under the terms of Article 80. DIFCI no longer wanted to extend the date thereafter and any additional time for cure was therefore inappropriate in the circumstances, as provided by Article 80 (b). DIFCI had a legitimate interest in seeking to prevent further delay and to adhere to the express terms of the Contracts requiring performance by the extended deadline. Article 80 could therefore have no application. (Moreover, the Appellant never produced a conforming letter of credit with funds available immediately at any time before any of the various letters were sent which repeated that the contract was terminated and the deposit was being claimed and no cure was therefore offered).

30. The judge held that the Appellant’s failure to pay by the agreed date amounted to a fundamental non-performance under Article 86 because the essence of the Contracts was to receive payment in exchange for the properties. Strict compliance with the payment and transfer terms, unless mutually agreed otherwise, was the critical obligation imposed on the buyer to be performed if the sale was to take place. By those terms, payment had to be made by the due date before any transfer could occur. In those circumstances, if payment was not made by the due date, DIFCI was entitled to terminate the contract pursuant to Article 86 (1), as Clause 6 provided.

31. Whilst therefore, in our view, the judge was wrong to eschew a determination of the proper construction of Clause 6, he reached the right result by reference to the law of the DIFC, in isolation. As this was the law for which the Appellant contended, he can have no complaint at the result, when regard is had to Clause 6, which is determinative of the conclusion to be reached in the light of DIFC law and which is entirely consonant with the general provisions of that law.

The Law of onshore Dubai.

32. There is no need for us to determine the position under the law of on shore Dubai because the Appellant did not contend for its application. There is clearly an available argument that the governing law of the Contracts was that system of law because of the wording of Clause 17, the location of the property in on shore Dubai and the use of the standard form F for the Contracts which is the form used in Dubai. Under section 14 of DIFC Law no 10 of 2005, the law governing rights to property is the law of the jurisdiction where the property is located. The dispute concerned contractual rights relating to property which was located in Motor City in Dubai, not in DIFC and that law had a greater connection to the properties in issue. (See the waterfall provisions of Article 8 of DIFC Law No 3 of 2004).

33. The parties were free to choose the applicable law in the absence of some compulsorily applicable law. The local and federal laws applicable within the Emirate of Dubai could encompass either the law of DIFC or on- shore Dubai but the location of the property might suggest that a contract for sale of such property should be governed by the law applicable to transfer of the property, even though a DIFC body was the seller. We do not need to decide whether it is the applicable law, because the same result would be reached on the basis of Clause 6, if it fell to be construed in accordance with the principles of that system of law, for all the reasons given by DIFCI in its submissions to the court.

34. Under the terms of Article 271 of the UAE Civil Code, it is open to parties to agree that a contract is to be terminated for a failure to perform by one party, without the need for a court order. The Article goes on to say that such an agreement is not to dispense with notice unless there is express agreement to that effect. Clause 6 of the Contracts provides in terms for termination at the option of the seller for non-payment by the due date, so that there is no need for any court order to bring about that termination. The question arises as to the notice to which the Article refers, because there was no express agreement for such notice (whatever it entailed) to be dispensed with. The Ministry of Justice Commentary on the UAE Civil Code refers to Article 271

as involving a consensual cancellation (as opposed to a mutual revocation of the contract under Article 268) without the need for a Court order although the innocent party has the option of insisting on performance or cancelling. Although, if the non- performing party claims that he has performed the contract, in whole or in part, it is necessary for the court to determine the position, its sole function (unlike that under Article 272) is to establish whether or not there has been such performance, and it cannot extend the time for compliance. When, therefore, the parties have agreed, as they have in Clause 6, that the contract is to come to an end at the option of the seller for non- payment by the buyer on the due date, the notice in question is a notice of non-performance and termination on the basis of it, since it cannot be a notice which requires performance.
35. This is to be contrasted with the terms of Article 272 which provides that if there is a failure to perform by one party (without any agreement to permit or require termination on that basis), the other party may, after giving notice to the obligor, require the contract to be performed or cancelled and the court may then order either that the contract be performed forthwith or may defer performance to a specified time, or order cancellation and compensation, if appropriate. The notice to the obligor there is therefore a notice requiring the obligor to perform or face cancellation by the court. If the court orders cancellation, however, it does so with retrospective effect, as provided in paragraph 2-0324 of the Commentary, which means retrospectively to the date of the notice. Article 272 is inapplicable in the present situation, because there was agreement in Clause 6 that the seller could terminate the Contracts in the event of non- payment by the due date and there was no need for the Court to order cancellation (or time to pay) and no notice requiring performance or future cancellation by the court.

Conclusion

36. The terms of Clause 6 therefore conclude the matter against the Appellant under either system of law. The Appellant was bound to pay the purchase price by a set date and failed to do so and that, in itself, gave rise to the right to terminate under the Contracts, of which right DIFCI availed itself, with the result that no other issues, whether of force majeure or cure of breach could arise. Likewise, there is no issue between the parties as to any material difference in the Arabic or English versions of the Contracts, although clause 19 provided that, in the event of any discrepancy, the Arabic text would prevail.
37. No substantial issues of fact arise here. Whichever system of law applied, there was a right to terminate for non-payment of the price by the extended deadline of 8 June and nothing that DIFCI did amounted to any implied extension or waiver of rights. The Appellant made further proposals to pay after 8 June, which came to nothing and DIFCI was entitled to listen without commitment and to exercise its right to terminate on 8 July. The English Court of Appeal case, cited by Justice Sir Anthony Colman in Ithmar (ibid), Nichimen Corporation v Gatoil [1987] 2 Lloyd’s Rep.47 is a clear illustration of the same point, in connection with the opening of a letter of credit in an oil transaction.
38. Apart from an order for costs, all that was sought by DIFCI was a declaration that the 72 contracts dated 3 May 2016 were validly terminated with effect from 8 July 2015 or alternatively terminated by the court. DIFCI reserved the right to claim the deposit which should have been paid when the Security Deposit cheque was presented but bounced. This, it was entitled to do and the Appellants can have no cause for complaint on that score. It has not been claimed in these proceedings. Although the Judge’s reasoning for his conclusion is open to criticism because he failed to construe the critical clause, Clause 6, and permission to appeal was doubtless given because of that, the conclusion that he reached was, in our view, inevitable. He should have determined the effect of Clause 6 under the relevant governing law but it would have made no difference whether he had found the governing law to be that of the DIFC or that of onshore Dubai. In practice, the terms of Clause 6 conclude the issue under either system of law. In the absence of payment by the extended deadline, DIFCI had the right to terminate the Contracts and to present the security deposit cheque, as it duly did.
39. In the circumstances, the appeal must be dismissed with costs, with the amount to be assessed by the

Registrar in the absence of agreement between the parties.

CHIEF JUSTICE MICHAEL HWANG:

1.I agree with the above mentioned judgment and have nothing further to add.

JUSTICE ZAKI AZMI

2.I agree with the judgment and have nothing further to add.

Issued by:
Natasha Bakirci
Assistant Registrar
Date of Issue: 10 January 2018
At: 9am