CA 009/2018 VTJ Limited v Mohammed Ammar Al Hassan

Claim No: CA-009-2018

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 CHIEF JUSTICE MICHAEL HWANG, JUSTICE SIR JEREMY COOKE, H.E. JUSTICE OMAR AL MUHAIRI

BETWEEN

VTJ LIMITED

Appellant

and

MOHAMMED AMMAR AL HASSAN

Respondent

Hearing: **24 September 2018**

Counsel: Michael Patchett-Joyce assisted by Sharon Lakhan instructed by Global Advocacy & Legal Counsel for the Appellant

Maria Rubert assisted by Amanda Lewis instructed by United Advocates for the Respondent

Judgment: **6 November 2018**

JUDGMENT

ORDER

UPON hearing Counsel for the Appellant and Counsel for the Respondent on 24 September 2018

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

IT IS HEREBY DECLARED THAT:

1. The Claimant has complied with all of its obligations under the MOU and that it is the sole legal and beneficial owner of the Unit.
2. The Defendant does not have any interest in the Unit with immediate effect.

IT IS HEREBY ORDERED THAT:

3. The Registrar shall de-register any and all interests and cancel any and all caveats in the name of the Defendant or Registrar or otherwise with respect to the Unit at the DIFC Registry of Real Property.
4. The Registrar shall issue a new title deed in the name of the Claimant alone.
5. The parties are at liberty to apply.
6. The Defendant is to pay the Claimant its costs of the action, to be the subject of assessment if not agreed.

Issued by:

Ayesha Bin Kalban

Assistant Registrar

Date of issue: 6 November 2018

At: 9am

JUDGMENT

JUSTICE SIR JEREMY COOKE

Introduction

1. This is the judgment of the Court on an appeal against the Judgment of H.E. Justice Shamlan AL Sawalehi issued on 30 May 2018 in which the Court dismissed the claim for specific performance of an alleged contract for the sale of Unit DFR/P4/30 in the Parks Tower Development in the DIFC ("the Unit") or for reimbursement of the sums paid under the alleged contract, whilst also dismissing the counterclaim of the Respondent ("the Defendant") for AED 180,000 in respect of the deposit payable under another alleged contract for the sale of the Unit to the Appellant ("the Claimant"). The learned Judge gave permission to the Claimant to appeal and the Defendant did not seek to appeal against the dismissal of his counterclaim. The Second Defendant played no part in the first instance proceedings nor in this appeal and is referred to in this judgment as "the Registrar".

2. The Claimant is an offshore company established pursuant to the regulations of the Jebel Ali Freezone. Its registered shareholders and directors are Mr Tommaso Ambrosio and his son Mr Angelo Ambrosio. The Defendant is a Syrian national, residing in Dubai, who purchased the Unit from Damac Park Towers Company Limited ("Damac") under an Agreement to Sell dated 29 March 2012 ("the Damac Agreement") at a price of AED1,410,000, payable by instalments expressed in percentages of the total price, the first of which was payable on execution of the agreement and the balance in 4 further instalments on fixed dates, the last of which was to be on the handover date of 15 September 2012. It is clear from the documents that full payment of the purchase price under the Damac Agreement was made, following delays in completion of the building of the Unit and in making payments, which attracted penalties which were also duly paid by 22 April 2013, as evidenced by a Damac Payment Clearance Certificate of that date.

3. The Claimant alleges that, some 3 weeks after conclusion of the Damac Agreement, the Defendant entered into a Memorandum of Understanding dated 19 April 2012 ("the MOU") by which the latter agreed to sell the Unit to the Claimant for AED 1,867,750, with payments by instalments of slightly different percentages of that higher price on dates varying between two weeks and six weeks after the instalment dates set out in the Damac Agreement. The evidence adduced on his behalf was that there were no other available units in the block at the time and that the Defendant who invested in property was happy to take the profit on the sub-sale.

4. The MOU was on the letterheading of Alyans Real Estate ("Alyans") and was in formal terms with 13 paragraphs. The MOU recited that the Claimant had paid a booking deposit of AED373,500 and provided that the transfer should take place no later than 30 November 2012, that the defendant would not market or sell the property to any third party, would not increase the purchase price nor make any changes or adjustments to the property after the execution of the MOU. The Defendant was to provide the Original Contract (the Damac Agreement) and all receipts for payment of instalments thereon for NOC/Resale purposes. The governing law was expressed to be that of Dubai and the UAE. On its face, the MOU appeared to be signed by both the Defendant and one or other of the Ambrosios for the Claimant, with both signatures witnessed by Ciro Arianna ("Ciro"), whose part in the events in dispute was critical and who, at that time worked for Alyans. There was no evidence of any commission payable to him or Alyans on the resale although there was some hint of that in the papers.

5. The Defendant in his pleadings and at trial maintained that this MOU was a fabrication and that his signature thereto was a forgery. He maintained that he knew nothing of any sub-sale to the Claimant prior to September 2014 when he and the Claimant entered into a different Memorandum of Understanding for the sale and purchase of the Unit, dated 9 September 2014, at a price of AED 1,800,000, with a deposit of AED 180,000, payable to Alyans Real Estate, Ciro's employer, with the balance payable on completion one month later on 9 October 2014. His case was that this deposit was never paid and that was the subject of the counterclaim.

6. It was alleged by the Claimant that it and the Defendant orally agreed on a variation of the MOU whereby

the former was to pay the instalments owing by the Defendant to Damac under the Damac Agreement directly, and only the balance of the purchase price under the MOU, over and above the purchase price under the Damac Agreement, would be paid to the Defendant. Both the Claimant and the Defendant each claimed to have made the payments due to Damac following the date of the MOU. It appeared to be common ground at the trial and it was certainly common ground on the appeal that these payments had been made by Ciro. The Claimant alleged that payments were made from his funds to Ciro and from thence to Damac under this variation of the MOU.

7. None of the payments actually made tallied with the amounts due on the dates specified in the Damac Agreement or the MOU. Additionally, however, the Claimant alleged that it paid:

7.1. A "community fee" in the sum of AED 36, 142 to Luxury Management LLC on 25 March 2012 by means of a cheque drawn on Taylor Wessing (Middle East) LLP client account, which was said to be the Claimant's former lawyers;

7.2. AED 18,065.51 for district cooling connection fees of on 4 April 2013; and

7.3. AED 48, 265.50 on 7 April 2013 in respect of all outstanding penalties on the Unit.

8. Furthermore, the Claimant alleged that, following completion of the payments due to Damac it, via Ciro, obtained a valuation report for the Unit in May 2013 which was required in order to procure the No Objection Certificate ("the NOC") from DAMAC, and that there was a delayed meeting between the parties and Damac at which the NOC was signed by the Defendant authorising the transfer of the Units to the Claimant, full payment having been made under the MOU. Because of various delays and loss of documents by Damac and the DIFC Registrar of Properties, all of the necessary documents had to be reproduced and a second valuation of the Unit was obtained on 29 September 2014 by Ciro. Thereupon the Claimant sought to effect payment to register his title with the Registrar, but the latter required execution of further transfer documents by the Defendant, which he then refused to do without receipt of an additional payment of AED 400,000 and/or AED 200,000.

9. The Defendant denied entering into the MOU. He entered a criminal complaint against the Claimant six months after the Claimant had commenced these proceedings in the DIFC Courts seeking specific performance of the MOU, alleging that his signature to it had been forged. That complaint was rejected by the Dubai Police as no original version of any MOU was produced. He denied that he had received any money from the Claimant or made any oral agreement relating to the direct payment of monies to Damac by the Claimant. He maintained that all payments made to Damac were made on his behalf, as reflected in the receipts given to Ciro/Alyans which referred to him as the purchaser. He said he knew nothing about any third-party cheques used to pay Damac and that Alyans/Ciro had assisted him and made payments on his behalf.

10. Thus, three linked fundamental questions arose for resolution at trial:

10.1. Was the MOU, apparently signed by the Defendant in the presence of Ciro, genuine?

10.2. For whom was Ciro/Alyans acting when making payments to Damac?

10.3. Who had provided the funds to Ciro for onward transmission to Damac?

11. As there is no appeal against the dismissal of the counterclaim by the Judge, no issue is now raised in relation to the alleged Memorandum of Understanding dated 9 September 2014, but the dismissal of that counterclaim and the findings of the Judge against the Defendant on that issue assumes some significance in the context of the appeal.

The Judgment

12. In the short operative part of his judgment, the Judge dismissed the Claimant's claim essentially because he found that the latter had not established that it was responsible for the payments made by Ciro to Damac and the burden rested upon the Claimant to do so. He attached weight to the fact that the payment sums and dates did not correspond to the scheduled payments set out in the MOU and he appears to have rejected the

existence of the alleged oral variation concerning direct payment to Damac on the basis that there was no written evidence to support it. He considered that the Claimant had not proved an agreement by conduct by reason of payments by it to Damac and because the payments were not in line with those set out in the MOU, the validity of the MOU itself was called into question.

13. The Judge stated that he was not convinced by either the Claimant's or the Defendant's submissions that either the MOU or the later September 9 Memorandum of Understanding were valid and binding agreements. He accepted that there was "some understanding that the Claimant would buy the Unit from the Defendant and that Alyans Real Estate would act as the agent in this transaction", but stated that he was not persuaded by Mr Ciro's evidence as against that of the Defendant when there was nothing in writing show that the payments had been made to Damac on behalf of the Claimant as opposed to the Defendant.

The Appeal

14. This Court exercises a review function on appeal. The Claimant appeals on the basis that the conclusion of the Judge was against the weight of the evidence and was one which no court properly directing itself could have reached and was therefore wrong in law. In reaching the conclusion he did, the Judge had necessarily made a finding of fraud against the Claimant in relation to the forgery of the MOU without any good evidence to that effect and without the point being put to the Claimant's witness, Ciro, who had witnessed the execution of the MOU and gave evidence of its validity. Even allowing some latitude to the Defendant in the conduct of cross examination, the fact remained that the Defendant appeared to have signed the MOU and there was no good evidence of forgery of that signature above and beyond his apparent denial of any knowledge of it and of any sub-sale to the Claimant prior to September 2014. The documents showed the clear involvement of the Claimant in making payments in respect of the Unit long before that and the evidence of Ciro was that direct payments were made to Damac by Alyans with monies provided by the Claimant in cash to Alyans because it had no active bank account in the UAE. Equally, payments due to Damac and to the Defendant were made, usually in cash by Alyans, but some other payments were made by the Claimant by other means.

15. It is, as the Claimant submits, trite law that fraud must be distinctly alleged and distinctly proved and in the absence of such proof, it is not open to the Judge to make a finding of fraud. Whilst the Judge did not make any such express finding, the effect of his conclusion inevitably involves a finding that the MOU was not binding because it was a fabrication. Otherwise he must have held it to be a valid agreement which, whether varied or not, required the Defendant to transfer title to the Claimant, subject to its terms. No forensic evidence was adduced of forgery and although the MOU produced to the Court was a copy and not the original, that does not detract from the burden of establishing that it was forged. We have examined the evidence before the Judge, including the Witness Statements of Ciro and the Defendant and the transcripts of their oral evidence adduced before the Judge and can find nothing justify such a finding. In his witness statement the Defendant confined himself to denying the existence of any MOU or agreement with the Claimant other than the MOU dated 9 September 2014, referring to purported agreements of 1 March 2012 and 1 May 2013 (which were not produced to this Court). There is no reference to the MOU of 19 April 2012 at all. In his oral evidence he made no mention of the MOU of 19 April 2012 or of any variation of it and merely said that Ciro produced a MOU to him in September 2014, which he signed and of which he retained a copy, but had never received anything further from him by way of original signed for the Claimant.

16. Whilst giving due deference to the Judge who had the advantage of seeing the two witnesses at the trial, in all the circumstances, we do not see how the Judge could have rejected the evidence of Ciro in paragraph 7 of his witness statement that the MOU was executed on 19 April 2012 by both parties, which was not the subject of any challenge in cross examination. We equally do not see how the Judge could properly reject Ciro's evidence in his witness statement and under cross examination that this MOU was varied so that the

Claimant was to make direct payments to Damac in respect of the Defendant's obligations under the Damac Agreement.

17. Furthermore, Ciro's evidence was unambiguously clear that all payments made to Damac were made on behalf of the Claimant and out of funds received into Alyan's accounts in cash from the Claimant. The funds came from the Claimant from the Dominican Republic, and this could, he said, be checked with Alyans, although no documents were produced to the Court in support of that evidence. Payments to Damac were usually made in cash or by cheque from Alyans. Ciro stated expressly that he never received any funds from the Defendant, whether by way of cheque or cash and never acted for him. He gave evidence that all payments for service charges, facility management fees and utilities had been made by him on behalf of the Claimant, including the penalty payment to Damac in respect of late payments of instalments, but in the name of the Defendant as he was the party to the Damac Agreement. He stated in his witness statement and in cross examination that a NOC was signed by the Defendant authorizing the transfer of the Unit to the Claimant, following payment to Damac and the Defendant of everything that was due. Issues arose over registration with the Registrar and lost documents which caused delay and gave rise to the opportunity for the Defendant to refuse to execute any further transfer documents unless a further payment to him was made of AED 400,000 (later reduced to a demand for AED 200,000), the Defendant stating that he was in desperate need of cash.

18. Whilst there is a shortage of documentary evidence, and the Court suspects, as no doubt, did the Judge, that it has not been given the full picture and that Ciro's evidence leaves out much else that occurred, the essentials of that evidence, as described above, lead inexorably to the conclusion that the claim must succeed unless there are good reasons for rejecting his evidence. The paucity of documents does not assist the Court but does not detract from his evidence, and there are enough documents to show that the essence of the version of events put forward by Ciro and the Claimant is correct and to show that the Defendant's version of events cannot be right.

19. The Documents establish that:

19.1. 100% of the purchase price under the Damac agreement had been paid by 22 April 2013.

19.2. Most payments to Damac were made in cash but that a cheque number 000006 drawn on Emirates NBD for AED 272,000 was received by Damac on 20 May 2012 as shown by the most complete statement of account from Damac dated 4 April 2016.

19.3. A penalty payment was imposed by Damac (as shown by the same statement of account) on 17 February 2013 for AED 69,130, of which AED 20,851.50 was waived on 14 March 2013, but an additional penalty was imposed on the same day of AED 375, giving rise to a resultant figure of AED 48653.50 as the actual penalty imposed.

20. The significance of these points is that:

20.1. The cheque drawn on Emirates NBD was an Alyans cheque of which the Defendant had no knowledge, and which contradicted his case of payments by him and Mr Ciro entirely in cash: and

20.2. The Claimant was able to provide details of the make-up of the discount and the ultimate penalty figure whereas the Defendant not only denied that such a payment had been made by the Claimant but alleged that the Defendant itself had paid the full figure as part of the purchase price.

21. Of greater weight, however, is the involvement of Taylor Wessing, who only ever acted for the Claimant and not the Defendant. The evidence established that Taylor Wessing, whose address was given as that of the Claimant in Dubai in the Claim Form, previously acted for the Claimant. This was not seriously disputed by the Defendant.

21. 1. A cheque numbered 603154 for AED 36,142 dated 25 March 2013 drawn on Taylor Wessing, was paid to Luxury Facilities Management LLC in respect of community fees on the Unit. This could only have

been a payment made on behalf of the Claimant long before any time at which the Defendant suggests that there was a sub- sale to the Claimant. This in itself establishes the Claimant's involvement in defraying expenditure for the Unit in a manner consistent with its own case but inconsistent with that of the Defendant.

21.2. The point is reinforced by an attempted payment by Taylor Wessing to the Registrar in October 2014 utilising a RBS Managers Cheque dated 15 May 2014 in the sum of AED 78,300 in respect of transfer fees due to DIFC for the transfer from the Defendant to the Claimant of the Unit. This too is consistent with the Claimant's case but not that of the Defendant. It was the increase in fees due that resulted in the use of that cheque plus additional cash at the later stage, rather than the cheque alone at a time when, on the Defendant's case, the Claimant had no involvement with the Unit.

21.3. There are in the documents two surveyors' valuations of the property, each procured by Ciro, which relate to this.

21.3.1. The first valuation is dated May 2013, after full payment had been made to Damac. It was required for the purpose of registering title with the Registrar in order to establish the value upon which a transfer fee would be payable. The Claimant pleaded that, following this valuation, a NOC was signed by the Defendant at a meeting with Damac authorising transfer to the Claimant. The documents were to be forwarded by Damac to the Registrar. Ciro's evidence was to this effect.

21.3.2. The second valuation is dated September 2014, following the delays and loss of documents by the Registrar and/or Damac, and was part of a second attempt to register the Claimant's title to the Unit. By this time the fees had increased from 3.5% to 5% of the total value, which gave rise to the Claimant's instructions to Taylor Wessing to deposit such a fee with the Registrar, as it did on 2 October 2014 by means of utilisation of the RBS Managers Cheque referred to above and an additional sum in cash in respect of the increase in the fee, as shown by a Cash Deposit Advice and Cheque Deposit Form issued by HSBC.

22. None of this is controverted by the Defendant, nor is it controvertible, and the evidence of Ciro on these points is thus supported by these documents. The Defendant's story of a first agreement in September 2014 is thus contradicted by these documents which establish that the Defendant's version of events is inaccurate and not just unproven (as found by the Judge) and such documents are wholly consistent with the Claimant's case. Whilst the documents are limited they give the lie to the Defendant's defence and support the Claimant's case.

23. The Defendant's own evidence as to his relationship with Alyans/Ciro was limited and unimpressive apart from being contradicted by Ciro. In his witness statement he said that Ciro was a broker he was in touch with who used to assist him as his agent, but no details were given. He stated baldly that payments to Damac would either be made by himself or by Ciro on his instructions in the event that he was unavailable and that he had given oral instructions to make such payments. No evidence was given by him in that witness statement as to any funds which he supplied to Ciro/Alyans from which such payments could be made. In his oral evidence he stated that he was introduced to Ciro by the manager of Alyans who told him about the Unit and said he would manage everything for him. In his oral evidence, he said that he would give Ciro cash and email instructions, but no email instructions were produced and no evidence of any cash payments either. In short there was no documentary evidence to support the Defendant's case.

24. When this is placed alongside the absence of challenge to the evidence of the MOU, the uncontested or unchallengeable evidence of Ciro as to payments, supported by (albeit limited) documents, and the inevitable finding which the judge made that there was some arrangement that the Claimant would purchase the Unit from the Defendant, the only possible conclusion is that the Claimant's case must be accepted as to the agreement between them. It is nothing to the point that Damac issued documents to Ciro which referred to

receipts of payment from the Defendant, since Damac's contract was with the latter. It is also nothing to the point that the KYC forms completed named the Defendant as customer, for the same reason.

25. Whilst we are sympathetic to the position in which the Judge found himself, with a lack of documentary evidence in many areas where the court would expect to see such evidence, the evidence that was presented, in our judgement, could only lead to one conclusion. To deny the claim and the counterclaim on the basis of absence of proof is wholly unsatisfactory and a last resort for a court whose function it is to determine, on the balance of probabilities, where the truth lies, on the evidence put before it. A close examination of the evidence that was adduced leads to the conclusion that the MOU was binding, that it was varied to provide for direct payments to Damac by the Claimant and that such payments were in fact made. In those circumstances, the judge's conclusions were against the weight of the evidence and the appeal must succeed.

26. This being a contract for the sale of real property, the presumption is in favour of an order for specific performance, where a defendant has, in breach, refused to complete a sale. The Claim form sought the following relief:

26.1. A declaration that the Claimant has complied with all of its obligations under the MOU and that it is the sole legal and beneficial owner of the Unit.

26.2. A declaration that the Defendant does not have any interest in the Unit with immediate effect

26.3. An order that the Registrar de-registers any and all interests and cancels any and all caveats in the name of the Defendant or Registrar or otherwise with respect to the Unit at the DIFC Registry of Real Property.

26.4. An order that the Registrar issues a new title deed in the name of the Claimant alone.

26.5. Such further or other relief as the Court considers appropriate

27. In our judgment, the Claimant is entitled to an order for specific performance of the MOU which means that the Defendant can be ordered to transfer the Unit to the Claimant but in order to obviate any delay in that, the Court should make the orders sought and does so (with the exception of the order sought in [26.5], which shall be substituted by an order that the parties be at liberty to apply).

28. Costs must follow the event and the Defendant is therefore to pay the Claimant its costs of the action, to be the subject of assessment if not agreed.

CHIEF JUSTICE MICHEAL HWANG

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

H.E. JUSTICE OMAR AL MUHAIRI

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

Issued by:

Ayesha Bin Kalban

Assistant Registrar

Date of issue: 6 November 2018

At: 9am