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, DEPUTY CHIEF JUSTICE SIR JOHN CHADWICK AND H.E. JUSTICE ALI AL MADHANI

BETWEEN

(1) KENNEH DAVID ROHAN

(2) ANDREW JAMES MOSTYN PUGH

(3) MICHELLE GEMMA MOSTYN PUGH

(4) STUART JAMES COX

Claimants/Respondents in CA-005-2013

and

DAMAN REAL ESTATE CAPITAL PARTNERS LIMITED

Defendant/Appellant

AND BETWEEN

AHMED ZAKI BEYDOUN

Claimant/Respondent in CA-006-2013

and

(1) DAMAN REAL ESTATE CAPITAL PARTNERS LIMITED

First Defendant/Appellant

(2) ASTECO PROPERTY MANAGEMENT LLC

Second Defendant

Hearing: **16 June 2014**

Counsel: Charles Buderi (Curtis, Mallet-Prevost, Colt and Mosle LLP) for the First Defendant/Appellant

Crispin Winser instructed by Kennedys Dubai LLP for the Claimants/Respondents in CA-005-2013

Ravinder Thukral instructed by Al-Wasl International Group Advocates and Legal Consultants for the Claimant/Respondent in CA-006-2013

Judgment: **16 October 2014**

JUDGMENT

Summary of Judgment

These two appeals were re-opened pursuant to leave granted by Justice Roger Giles under RDC (Rules of DIFC Courts) 44.179 upon applications by the Appellant, Daman Real Estate Capital Partner Limited. The appeals were from Orders made by the Deputy Chief Justice at the time, Sir Anthony Colman, in proceedings brought against the Appellant ("the Seller") by purchasers of residential units in a development in the DIFC known as "The Building by Daman". As the appeals raised substantially the same issues, they were heard together.On 11 February 2014 the Court of Appeal had held that Sir Anthony Colman had been correct to hold that the Seller had not exercised its right to extend the Anticipated Completion Date (ACD) under Sale and Purchase Agreements (SPAs) with the purchasers by notices under clauses 4.1 and/or 12.1 of those agreements; and that, accordingly, the purchasers were entitled to terminate those SPAs by notice and to claim against the Seller damages, compensation and costs incurred as a result of their failure to complete within the time required, albeit that the Court of Appeal adopted slightly differing reasons from those relied on by Sir Anthony Colman.

The Court of Appeal, rejected the Appellant's applications to amend its Defences in both cases, on the grounds that even if the Court were persuaded that the Appellant should now be permitted to advance a case that the ACD had been extended pursuant to Clause 12.1 of the SPA due to the occurrence of events of *force majeure* whether or not notice of such extension had been given (in contrast to the position as regards Clause 4.1 of the SPA which provided for extension by written notice) - a case which was inconsistent with the case advanced at trial - the proposed amendments failed to satisfy the requirements identified by the judge - namely that the purchasers were entitled to have the *force majeure* event identified and to be told how much delay such event had caused so as to justify the overall extension of the ACD. Moreover, to allow an amendment to the pleadings would serve no sensible purpose unless the Court were minded to order that the proceedings be remitted for a retrial, which would be inappropriate as it would be disproportionate and unjust to require the purchasers to incur the expense and further delay of a new trial.

The key issue to be considered by the Court on the re-opened hearing of the appeals was whether the Court of Appeal was required to address the question "what was the position at the dates when the Claimants (purchasers) purported to serve termination notices"; or, more specifically, "had the ACD been extended (independently of any notice given by the Seller) by reason of *force majeure* delay to a date which was less than twelve months before the dates on which the purchasers gave notices of termination."

The Court held that it was not required to address that question for the following reasons: (i) it was not a question which had been raised in either the *Rohan* or *Beydoun* pleadings, which rather had focused on whether the ACD had been extended by the service of notices under Clause 4.1 and/or Clause 12.1 of the SPAs(a question on which Sir Anthony Colman's judgment had been upheld by the Court of Appeal); (ii) the question which the Seller now sought to raise before the Court of Appeal - whether, in the events which happened, the ACD had been extended by reason of *force majeure* delay to a date which was less than twelve months before the dates on which the purchasers had given their notices of termination - had not been put before Sir Anthony Colman and therefore could not be the subject of an appeal; (iii) moreover, the absence of a decision in the court below on that question was not in itself a matter which could be the subject of an appeal to the Court of Appeal; there had been no decision because the issue had not been properly put before the judge; (iv) the Seller's assertion that the ACD had in fact "been validly extended to 31 March 2012 on the basis both of the nine-month discretionary extension provided under Clause 4.1 and on the basis of the *force majeure* provisions under Clause 12.1" was not relief which had been sought in the appeal notice; it is not the function of a skeleton argument to seek relief which has not been sought in the appeal notice; the proper course was to seek leave to amend the appeal notice and the grounds of appeal; there was no such application; (v) it was unclear on which grounds it was asserted that Sir Anthony Colman should have held that the ACD had been extended to 31 March 2012.

Specifically in the context of the *Beydoun* appeal, Sir Anthony Colman had quantified the whole period of contractor delay at 665 days, and that finding had not been challenged on appeal. An extension of 665 days on the basis of a *force majeure* delay did not have the effect that the extended ACD was less than 12 months before the date on which the purchaser gave his termination notice. Therefore there was no reason for the Court to address the question whether the ACD had been extended (independently of any notice given by the Seller) as a result of *force majeure* delay to a date which was less than 12 months before the date on which the purchaser had given notice of termination; that question had been answered; and the answer was not the subject of challenge.

Consequently, the February 2014 Court of Appeal decisions in these applications were confirmed and the appeals dismissed.

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

JUDGMENT

UPON hearing Counsel for the Appellant and Counsel for the Respondents on 16 June 2014

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

IT IS HEREBY ORDERED THAT:

1. The Appellant's applications to amend its Defences in both CFI-025-2012 and CFI-023-2012 are denied.
2. The Appellant's appeals in CA-005-2013 and CA-006-2013 are dismissed.
3. Subject to any representations which may be made by the Appellant (in writing, within 14 days of the date of this order with copies to the Respondents) and further order, the costs of these appeals shall be paid by the Appellant to the Respondents within 28 days of this order; the amount of such costs, if not agreed, to be assessed by the Registrar on the standard basis.

Issued by:

Mark Beer

Registrar

Date of Issue: 16 October 2014

At: 9am

DEPUTY CHIEF JUSTICE SIR JOHN CHADWICK:

1. On 11 February 2014 this Court handed down judgment in these appeals. On 26 March 2014, on an application by the Appellant, Daman Real Estate Capital Partners Limited, under RDC 44.179 (then RDC 44.180), Justice Roger Giles gave permission to reopen the appeal under reference CA-006-2013 ("the Beydoun appeal"). On 24 April 2014, on a further application by the Appellant, Justice Giles gave permission to reopen the appeal under reference CA-005-2013 ("the Rohan appeal"). The two appeals came back before this Court for further hearing on 16 June 2014.

2. The appeals are from Orders made by Deputy Chief Justice Sir Anthony Colman in proceedings brought against the Appellant by purchasers of residential units in a development in the Dubai International Financial Centre known as "The Building by Daman". The appeals raise substantially the same issues and were heard together. This judgment must be read with the judgment which was handed down on 11 February 2014 ("the February judgment"); but, for convenience, I rehearse the underlying facts in this judgment. I also summarise the conclusions which the Court reached in the February judgment.

The underlying facts

3. In each case the purchaser entered into a Sale and Purchase Agreement which contained the following terms (so far as material):

> "**2. Purchase and Sale**
>
> Subject to the terms and conditions contained in this Agreement, Seller [Daman Real Estate Capital Partners Limited] hereby sells the Property to Purchaser, and Purchaser hereby purchases the Property [identified on page 2 of the Agreement] from seller.
>
> .
>
> **4. Completion Date; Possession and Occupation**
>
> 4.1 It is expected that the Completion Date will occur on or prior to the Anticipated Completion Date, which is currently established as July 31, 2009. However, and without prejudice to the provisions set forth in Clause 12, Seller reserves the right, in its sole discretion and without payment of interest or other penalty, to extend the Anticipated Completion Date unilaterally and for any reason by a period of up to nine (9) Months by giving written notice to Purchaser. . . .
>
> 4.2 Seller shall give Purchaser not less than thirty (30) day's prior notice in writing of the Completion Date, and the Completion Date shall only be deemed to have been determined when such notice has been completed . . .
>
> **11. Default and Termination**

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11.3 If Purchaser has fulfilled all his obligations under this Agreement and, notwithstanding, the Completion Date has not occurred within twelve (12) months of the Anticipated Completion Date (as that date may be extended pursuant to Clause 4.1 or Clause 12.1), Purchaser may, on thirty (30) days' written notice to Seller, terminate this Agreement and, upon termination, claim against Seller for any damages, compensation or costs it has incurred as a result of Seller's breach.

12. Force Majeure

12.1 Seller shall not be considered to be in default or in breach of its obligations under this Agreement to the extent that performance of such obligations is prevented or delayed by an event of Force Majeure. If Seller considers that an event of Force Majeure has occurred, it shall notify Purchaser in writing, indicating the nature and expected duration or effect on Seller's performance of the Force Majeure event in question, it being understood that Seller shall take reasonable measures which are available to it to minimise the effect of such event on the performance of its obligations hereunder. The Anticipated Completion Date shall be extended for a period of time equal to the delay in performance by Seller caused by the Force Majeure event."

The terms"Anticipated Completion Date", "Completion Date" and "Force Majeure"are defined in Schedule C to the Agreement:

"**Anticipated Completion Date** means July 31, 2009, or such later date as may be determined pursuant to Clause 4.1 or Clause 12.1"

"**Completion Date** means the date upon which the construction and fit-out of the Apartment is substantially completed and it is otherwise ready for occupation, which date shall be determined in accordance with the provisions of Clause 4.2."

"Force Majeure" means any event or circumstance which is beyond the reasonable control of Seller, and which was not the result of the fault or negligence of Seller, which prevents Seller's performance of its obligations in accordance with this Agreement."

Subject to satisfaction of those conditions, Force Majeure included (*inter alia*, and without limitation):

".breach of contract by any contractor or subcontractor of Seller, or any failure or inability of any such contractor or subcontractor to perform for any reason any obligation pursuant to its agreements with Seller, whether such failure or inability is due to the fault of the contractor or subcontractor or is otherwise excused due to force majeure or for any other reason;."

4. On 28 June 2009 the Appellant, as Seller, wrote to each of the Claimants, as Purchasers, to inform them that it was expected that the works would be completed - and the hand-over process would commence during the six-month period comprising the fourth quarter of 2010 and the first quarter of 2011, It was said that the change to the original anticipated date was due to contractor related issues, delays and insufficient material supplies which are out of the Seller's control.

5. That letter was followed, some seventeen months later, by an e-mail sent on 25 November 2010. The Claimants were informed that handover was expected to commence during "the end of Q4 2011 to Q1 2012". It was said that :

"Your contractual terms and conditions (e.g. Clauses 4.1 and 12.1) take account of this situation and allow us to extend the expected date of completion and fit out of your apartment (the *Anticipated Completion Date*)."

6. By letters dated 22 June 2011, 8 October 2011 and 9 July 2012 the Claimants gave notices seeking to terminate the Sale and Purchase Agreements under which they had purchased apartments in the development.

The proceedings

7. Proceedings CFI-025-2012 ("the Rohan proceedings") were commenced by the issue of a claim form on 2 June 2012. The relief claimed in those proceedings included declarations that the respective Sale and Purchase Agreements were terminated pursuant to Clause 11.3 and restitution of monies paid by the Claimants (as Purchasers) to the Defendant (as Seller) as instalments of purchase price under those agreements.

8. The Rohan proceedings came before Deputy Chief Justice Sir Anthony Colman for trial on 12 and 13 February 2013. He delivered judgment in writing on 4 August 2013. After setting out the contractual provisions, the underlying facts and the submissions made to him by the parties, he concluded (at paragraph 66 of that judgment) that the Seller had "at no time effectively extended the Anticipated Completion Date ("the ACD") beyond 31 July 2009". The effect of that conclusion, as the judge pointed out at paragraph 67 of his judgment, was that it was open to the Claimants in those proceedings, pursuant to Clause 11.3 of their respective Sale and Purchase Agreements, to exercise their rights to terminate those agreements on 30 days' notice if - as was the case - the Completion Date had not occurred within 12 months after 31 July 2009. So, as the judge held, the Sale and Purchase Agreements were validly terminated upon the expiration of 30 days from, respectively, the letter of 22 June 2011 (in the case of the fourth-named Claimant, Stuart James Cox) and the letters of 8 November 2011 (in the case of the other Claimants, Kenneth David Rohan, Andrew James Mostyn Pugh and Michelle Gemma Mostyn Pugh).

9. Proceedings CFI-032-2012 ("the Beydoun proceedings") were commenced by the issue of a claim form on 2 September 2012. In those proceedings the Claimant sought an order "to terminate and cancel" his Sale and Purchase Agreement; an order for the refund of all monies which he had paid to the Defendant thereunder; and an order for payment of compensation and damages. Those proceedings came before Deputy Chief Justice Sir Anthony Colman for trial on 15 and 16 May 2013: that is to say, before he had handed down his judgment in the Rohan proceedings. He delivered judgment in the Beydoun proceedings on 25 September 2013. As was to be expected, he relied, in that judgment, on much of the reasoning set out in his judgment in the Rohan proceedings. He accepted a concession made on behalf of the Claimant (Ahmed Zaki Beydoun) that the ACD had been extended to 31 March 2011 by the letter of 28 June 2009; but held that the ACD had not been further extended to 31 March 2012 by the email of 25 November 2010. Accordingly, the Claimant had been entitled to terminate his Sale and Purchase Agreement upon the expiration of 30 days from his letter of 9 July 2012.

10. On 1 September 2013 the seller gave notice of intention to appeal from the judgment of Deputy Chief Justice Sir Anthony Colman in the Rohan proceedings. The grounds of appeal, attached to that notice, asserted (so far as material) that the judge's conclusion that the Seller "at no time effectively extended the Anticipated Completion Date beyond 31 July 2009" - and his further conclusion that it was therefore open to the Purchasers to exercise their rights of termination of their Sale and Purchase Agreements on 30 days' notice pursuant to Clause 11.3 "if completion had not occurred within 12 months of 31 July 2009" - were wrong.

11. Notice of intention to appeal from the judgment in the Beydoun proceedings was given on 8 October 2013. The grounds of appeal, attached to that notice, raised (so far as material) substantially the same contentions as those raised in the Rohan appeal. Those contentions were developed in the skeleton arguments filed on behalf of the Appellant in the two appeals; and at the oral hearing of those appeals in December 2013.

12. The issue between the parties, in both the Rohan proceedings and the Beydoun proceedings and on the appeals, was whether the Claimants, as Purchasers, were entitled, in reliance on the notices which they had served and the provisions of Clause 11.3 of the Sale and Purchase Agreements, to treat those agreements as terminated; and to claim against the Seller damages, compensation and costs incurred as a result of the Seller's failure to do complete within the time required by those agreements. It was common ground, both before Deputy Chief Justice Sir Anthony Colman and before this Court in December 2013, that that issue turned on whether the termination notices were given by the Purchasers on dates after the expiry of 12 months from the ACD as defined in those agreements; and it was common ground, also, that the question whether the termination notices were given on dates after the expiry of 12 months from the ACD turned on whether the ACD had been extended by the letter of 28 June 2009 and/or the e-mail of 25 November 2010.

The February judgment

13. This Court held, in the judgment handed down on 11 February 2014, that Deputy Chief Justice Sir Anthony Colman had been correct (for the reasons which he gave at paragraph 53 of his judgment in the Rohan proceedings) to conclude that neither the Seller's letter of 28 June 2009, nor the e-mail of 25 November 2010, could be treated as a valid exercise of the Seller's right to extend the ACD under Clause 4.1 of the agreements.

14. The Court held, also, that neither the letter of 28 June 2009 nor the e-mail of 25 November 2010 could be treated as a valid exercise of the Seller's right to extend the ACD under Clause 12.1 of the agreements. But it reached that conclusion for reasons which differed from those which had attracted Deputy Chief Justice Sir Anthony Colman. In my judgment, with which the other members of this Court agreed, I said this:

"20. [Clause 12.1] comprises three distinct parts; corresponding to the three sentences which it contains:

`Seller shall not be considered to be in default or in breach of its obligations under this Agreement to the extent that performance of such obligations is prevented or delayed by an event of Force Majeure.'

`If Seller considers that an event of Force Majeure has occurred, it shall notify Purchaser in writing, indicating the nature and expected duration or effect on Seller's performance of the Force Majeure event in question, it being understood that Seller shall take reasonable measures which are available to it to minimise the effect of such event on the performance of its obligations hereunder.'

`The Anticipated Completion Date shall be extended for a period of time equal to the delay in performance by Seller caused by the Force Majeure event.'

21. The first of those parts is concerned to protect the Seller from the consequences of a default, or breach of obligation, to the extent that performance of its obligations is prevented or delayed by an event of Force Majeure.

22. If the first part of clause 12.1 stood alone, it might be argued that a Purchaser was entitled to terminate his sale and purchase agreement under clause 11.3 if the Completion Date had not occurred within 12 months of the Anticipated Completion Date (as extended pursuant to clause 4.1) notwithstanding that the delay in completion was attributable to an event of Force Majeure.But that argument is met by the third part of clause 12.1: and the reference to clause 12.1 in the parenthesis in clause 11.3. The Anticipated Completion Date is extended by a period of time equal to the delay in performance by the Seller caused by the Force Majeure event. So, if when the Purchaser would otherwise be entitled to terminate his sale and purchase agreement by notice under clause 11.3 (having regard to any extension of the Anticipated Completion Date from 31 July 2009 pursuant to clause 4.1) the Seller is able to demonstrate that there has been delay in performance caused by a Force Majeure event, the Seller can rely on the actual period of such delay as extending the Anticipated Completion Date; and assert that the time for the service of a termination notice has not been reached.

23. Properly understood, it is clear, I think, that the extension of the Anticipated Completion Date which the third part of clause 12.1 requires is not dependent on the contents of a notice. As I have said, the third part of clause 12.1 provides that "the Anticipated Completion Date is extended by a period of time equal to the delay in performance by the Seller caused by the Force Majeure event". Whether or not the Anticipated Completion Date is extended (and by what period) depends on whether there has been a delay in performance by the Seller caused by a Force Majeure event; and, if so, what has been the period of that delay. The relevant question is `what is the position at the date that the Purchaser serves a termination notice?"; not, `what period of delay (or anticipated delay) has been stated in a notice served by the Seller?".

24. .

25. It follows, in my view, that it was not intended that a notice served under the second part of clause 12.1 would, of itself, have the effect of extending the Anticipated Completion Date; or of determining the period of any extension under the third part of that clause. That was not the purpose of requiring the service of a notice.

26. For those reasons - which differ in part from the reasons which attracted the judge and (I acknowledge) from the reasons advanced on behalf of the Purchasers at the hearing of these appeals - I would uphold the judge's conclusion that the Appellant is not entitled to rely on the letters of 28 June 2009 or 25 November 2010 as a defence to the claims in these proceedings."

15. The Appellant submits that, having reached the conclusion, in paragraph 23 of that judgment, that the relevant question was "what is the position at the date that the Purchaser serves a termination notice?"; not, "what period of delay (or anticipated delay) has been stated in a notice served by the Seller?" - a conclusion with which the Appellant does not quarrel - the Court ought to have gone on to address that question. It is said that, if the Court had addressed that question, it would (or should) have concluded that the position as at the dates on which the various Purchasers served their notices of termination was that the ACD had, in fact, been extended for a period of time equal to the delay in performance by Seller caused by a Force Majeure event or events; and that the effect of such extension was that valid termination notices could not be served on the dates when the Purchasers purported to serve them.

The pleaded issues

16. In order to decide whether, on the hearing of the appeal from the judgments of Deputy Chief Justice Sir Anthony Colman, this Court was required - or entitled - to address the question "what was the position at the dates when the

Claimants purported to serve termination notices" it is necessary to ask whether that question had been raised before him as an issue for determination; and, if so, what conclusion he reached upon that question. It is not for this Court to make findings of primary fact on issues which were not before the judge; and which (if they had been) would have been likely to have given rise to requests by the purchasers for the disclosure, in advance of the trial, of documents which recorded the dealings between the Seller and the main contractor in relation to those issues.

17. At paragraph 2.4 of the Particulars of Claim filed in the Rohan proceedings it is pleaded that:

> "2.4 Pursuant to the Agreements the Anticipated Completion Date can only be extended in one of two ways: either by written notice of unilateral extension under Clause 4.1 or by written notice of a Force Majeure event under Clause 12.1."

And, at paragraphs 4.2 to 4.5, that:

> "4.2 The Defendant has purported to extend the Anticipated Completion Date on the grounds of contractor related issues in a letter of 28 June 2009 and an email of 28 November 2010 (*sic*), the latter referring to an overall delay of approximately 33 months, to Q1 2012.
>
> 4.3 Neither of these communications constitutes a valid notice under Clause 12.1 (or indeed under Clause 4.1 if such were to be contended for).
>
> 4.4 No relevant period of delay has been directly caused by a Force Majeure event.
>
> 4.5 Alternatively if, which is denied, any part of the delay has been caused by a Force Majeure event, any period of Force Majeure delay that has occurred is not of sufficient duration to extend the Anticipated Completion Date beyond the point at which the Claimants are entitled to terminate the Agreements. . . ."

18. In response to those allegations, it is pleaded in the Defence in the Rohan proceedings that:

> "11. The Defendant acknowledges paragraph 2.4.
>
> .
>
> 14.• The Defendant denies paragraphs.4.3 and notes paragraph 4.2. Both communications referred to in paragraph 4.3 constitute valid notice pursuant to clause 4.1 and/or 12.1 of the Agreements whose effect was to extend the Anticipated Completion Date.
>
> 15.• The Defendant denies paragraph 4.4.Both of the notices referred to in paragraph 4.3 refer to and describe.force majeure events. Furthermore, the Defendant is entitled, pursuant to Clause 4.1 of the Agreements, to extend the Anticipated Completion Date for a further period of 9 months at its discretion.
>
> 16.• The Defendant denies paragraph 4.5 which is misleading. In this regard the Defendant notes that Clause 12.1 of the Agreements provides that in the event of an occurrence of force majeure as defined in the Agreements `The Anticipated Completion Date shall be extended for a period of time equal to the delay in performance by Seller caused by the Force Majeure event.'"

19. It can be seen, first, that the seller/Defendant did not challenge the purchasers'/Claimants' assertion that there were only two ways in which the ACD could be extended: by written notice of unilateral extension under Clause 4.1 or by written notice of a Force Majeure event under Clause 12.1. It was not contended that the ACD was, in fact, extended (without notice), pursuant to the third part of Clause 12.1 by a period of time equal to the actual delay in performance by Seller caused by the Force Majeure event. In paragraph 16 of its defence, the seller "notes" that Clause 12.1 did contain a provision upon which the Seller could have sought to rely if it had intended to advance that contention. But it did not do so; it was not pleaded that, in the events which had happened. There had been an actual delay in performance by the Seller caused by Force Majeure events; or, what the period of actual delay had been.

20. The position was much the same in the Beydoun proceedings. At paragraph 21 of the Particulars of Claim, dated 12 November 2012, it is pleaded that:

> "21. In accordance with the Agreement the Anticipated Completion Date can be extended in two ways: either unilaterally where the First defendant [the Seller] by written notice can extend the anticipated completion date by further 9 months as mentioned in clause 4.1 or by a written notice of a Force Majeure event under Clause 12.1. . ."

And, at paragraphs 26 to 29, that:

> 26. The Claimant had not received any notice of an extension to the Anticipated Completion Date under Clauses 4.1 or 12.1.
>
> 27. The Defendant had alleged to extend the Anticipated Completion Date in their letter dated 28 June 2009 on the grounds of contractor related issues, delays and insufficient materials. Furthermore in the First Defendant's letter dated 25th November 2010, in which they state that the overall delay is approximately 33 months and that the handover date is anticipated to be the first quarter (Q1) of 2012.
>
> 28. Therefore these communications does not constitute as a valid notice under clause 4.1 or 12.1 of the Agreement. The First Defendant's letter dated 28th June 2009 does not refer to clause 4.1 or 12.1 of the agreement and is vague as to the nature that caused the delay and furthermore it's ambiguous when the Property will be handed over to the Claimant.
>
> 29. Hence there was no evidences of any event of Force Majeure has occurred that could have directly delayed the Anticipated Completion Date."

21. In response, it is pleaded in the Defence to the Beydoun proceedings that:

> "14. The defendant notes paragraphs 21 to 25.
>
> 15.• The Defendant rejects paragraph 26, notes paragraph 27 and rejects paragraphs 28 and 29. The Defendant notes that the Agreements (*sic*) provide that an event of Force Majeure for the purposes of the Agreements includes `breach of contract by any contractor or subcontractor to perform for any reason any obligation pursuant to its agreements with Seller, whether such failure or inability is due to the fault of the contractor or subcontractor or is otherwise excused due to force majeure of for any other reason'. Both of the notices referred to in paragraph 28 refer to and describe such force majeure events."

22. Again, it can be seen that the Seller did not challenge the Purchaser's assertion that there were only two ways in which the ACD could be extended; that it was not contended that the ACD was extended (without notice), pursuant to the third part of Clause 12.1 by a period of time equal to the actual delay in performance by the Seller caused by the Force Majeure event; that it was not contended that, in the events which had happened, there had been an actual delay in performance by the Seller caused by Force Majeure events; that there is no assertion as to what the period of actual delay had been.

23. Given that the seller had referred - both in its defence in the Rohan proceedings (at paragraph 15) and in its defence in the Beydoun proceedings (also at paragraph 15) - to Force Majeure events having been described in the letter of 28 June 2009 and the e-mail of 25 November 2010, it is pertinent to have in mind the terms in which those events were described. In the letter of 28 June 2009 it was said (so far as material) that:

> "The change to the original anticipated date is due to contractor related issues, delays and insufficient material supplies which are out of our control."

In the e-mail sent on 25 November 2010, after informing the Purchasers that the Seller had engaged a new main construction contractor "which re-initiated the construction work on the Building during the first week of May 2010", it was said that:

> "the engagement of Al Habtoor Leighton has only been made necessary by the persistent and uncured delays in performance by the previous contractor. These delays were brought to your attention in June 2009 and unfortunately continued during the subsequent months of the year.Finally and in order to minimize the effect of these continuing force majeure delays on the completion of the Project, we were forced to take the ultimate step of terminating the previous contractor's involvement in the Project at the end of January 2010.
>
> .the process of tendering for and contracting a new contractor resulted in a suspension of work of three months."

Save for the general reference to contractor related issues, delays and insufficient material supplies during 2009 - and to a three month suspension of work while a new contractor was found and engaged - there is nothing in the letter of 28 June 2009 or in the e-mail sent on 25 November 2010 to identify the nature of the events said to constitute Force Majeure delay; or to specify what the total period of alleged Force Majeure delay had been up to 25 November 2010. And there was nothing to indicate what, if any, would be the period of any further Force Majeure delay after 25 November 2010. Reference by the seller in its defences to the description of Force Majeure events in the letter of 28 June 2009 and the e-mail of 25 November 2010 is of no assistance in understanding whether it is alleged that the ACD was, in fact, extended by Force Majeure delay (pursuant to the third part of Clause 12.1 of the agreements and independently of any notices served by the Seller) to a date which was within the 12 month period immediately preceding the dates on which the purchasers served their termination notices.

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The judge's observations in relation to delay caused by Force Majeure

24.•At paragraphs 71 and 72 of his judgment in the Rohan proceedings Deputy Chief Justice Sir Anthony Colman said this:

> "71. In view of my conclusion that all the Claimants were entitled to terminate their contracts with the Defendant by giving notice under clause 11.3 of the Sale and Purchase Contract, by reason of the invalidity of the Defendant's notices of 28 June 2009 and 25 November 2010, it is unnecessary to consider in detail the issue which occupied a large part of the trial, namely whether the Defendant can establish that the delay in completion was exclusively caused by force majeure such that the Defendant was entitled to extend time under clause 12.1 and/or Article 82.3 of the DIFC Contract Law.
>
> 72. However, I can briefly outline the conclusions which I would have reached on this part of the case had it been necessary to do so."

25. The judge went on to observe, at paragraph 73 of that judgment, that the Purchaser was entitled to have the Force Majeure event identified; and to be told how much delay such event had caused to the works so as to justify the overall extension of the ACD. But, he asked rhetorically, is that all he is entitled to? In answer, the judge expressed the provisional view that a term could be implied to the effect that, when giving a notice under Clause 12.1, the Seller would disclose such primary documentary evidence as it had to support the case that a Force Majeure event had caused the delay and that it could not reasonably have been prevented by the Seller. But he said that he would not have decided the case on that ground, because the point had not been argued.

26. The judge observed, at paragraph 77 of his judgment in the Rohan proceedings, that it was common ground that, for the purposes of Clause 12.1 of the Sale and Purchase Agreements, the burden of proof of the existence and causal effect of a Force Majeure event rested on the Seller. Further, he said, proof of that causal effect necessarily involved proof that it was "beyond the reasonable control of Seller and.not the result of the fault or negligence of Seller"; and that that involved proof by the Seller that it could not have prevented or reduced the delay caused by the event or events. After referring (at paragraphs 79 to 87 of his judgment) to the evidence adduced by the seller in that context (which included the evidence of the Engineer appointed under the construction contract between the Seller and the main contractor), the judge said this:

> •"88.• On the whole of the evidence addressed at this trial I am satisfied that the criticisms of, and question marks raised by, the Engineer's determinations under the construction contract are such that I am left in doubt as to whether any weight can be attached to them as evidence as to the precise extent of force majeure net delay. On the materials before this court the evidential burden has passed back to the Defendant. A serious attempt to provide comprehensive disclosure of the documents underlying the Engineer's determinations might have discharged this evidential burden but that was not done. I would therefore not have held that in the absence of further evidence the Defendant was entitled to claim against the Claimants the period of extension time relied upon in its two clause 12.1 notices."

It is important to note that (as he made clear in the final sentence of that paragraph) the question which the judge was addressing in that section of his judgment was whether the Seller was entitled to rely, in answer to the Purchasers'

termination notices, on "the period of extension time relied upon in its two Clause 12.1 notices"; that is to say, the period of extension time relied upon in the letter of 28 June 2009 and the e-mail sent on 25 November 2010. He was not addressing the question whether the Seller had established that the ACD had been extended (pursuant to the third part of Clause 12.1 and independently of any notice which the Seller had given) to a date which was within the period of 12 months immediately preceding the dates on which the termination notices had been given: that is to say, to a date after 22 June 2010 or 8 October 2010 (as the case might be). That question had not been raised in the pleadings as an issue for determination at the trial.

27.The judge reached a different conclusion in his judgment in the Beydoun proceedings. In order to understand why he did so, it is necessary to examine his reasoning in some detail.

28. Paragraphs 34 and 46 of the judgment in the Beydoun proceedings reflect and adopt the approach which the judge had adopted in paragraphs 71, 72 and 77 of his judgment in the Rohan proceedings. He said this:

> "34. Having regard to my decision that the letter of 25 November 2010 was not an effective notice extension of the ACD and to the agreed position that the letter of 28 June 2009 was an effective notice and was in proper form to extend the ACD to 31 March 2011, it is not necessary for the purposes of this claim to investigate whether on the facts the Defendant was entitled to invoke Clause 12.1 by a notice in proper form; that is to say whether the Defendant has established that as a matter of evidence Force Majeure events within the meaning of Clause 12.1 occurred and if so, whether they caused the delay to the Defendant in achieving completion under the SPA, which it relied upon in any extension notice under Clause 12.1. However, since the argument and the evidence during the short hearing of the matter was mainly devoted to this underlying issue, it is right that I should make findings lest this matter goes to appeal. I shall, however, do so in brief form."
>
> "46. It was common ground that for the purposes of Clause 12.1 the burden of proof of the existence and Causal effect of a Force Majeure event rested on the Defendant. Moreover, proof of that causal event necessarily involves proof that it was `beyond the reasonable control of Seller and.not the result of the fault or negligence of Seller. That involves proof by the Defendant that, acting reasonably, it could not have prevented or reduced the delay caused by the event or events."

29. The judge explained (at paragraph 37 of his judgment in the Beydoun proceedings) that it was the Purchaser's case that, although there had been very serious and on-going delays in performance of the construction contract from April 2007 right up to and beyond the 25 November 2010 letter, those delays had been allowed to occur due to the seller's inertia. At paragraphs 47 and 48 he said this:

> "47. It is to be observed that the Claimant did not challenge the Defendant's computation of Contractor delay nor did he submit that, subject to his case on the Defendant's negligent inertia, in failing to Cause the works to be speeded up or ultimately to replace Oger [the main contractor], the periods of contractor delay so computed should not be treated as capable of being Force Majeure delay for the purpose of Clause 12.1. In this respect the case advanced by the Claimant differed from that advanced and considered by this court in the Kenneth Rowan (*sic*) case. Indeed the Claimant specifically accepted that the Defendant was entitled to rely on the determinations of the Engineer with regard to the seven applications for extension of time as evidence of contractor delay, that is to say all periods of time included in such applications less such extension time as was allowed by the Engineer to the effect that they could be treated as evidence of contractor's delay and therefore as Force Majeure time, subject always to the issue of the Defendant's negligent failure to intervene.
>
> 48.&#65533; Accordingly, were the message of 25 November 2010 a valid Clause 12.1 notice of extension, the only substantial issue as Force Majeure would have been whether the Defendant had established on the balance of probabilities that by its failure to replace Oger at an earlier stage it was disentitled to rely as Force Majeure time on subsequently accumulated delay."

I confess that I find the judge's formulation of the "only substantial issue" at paragraph 48 of the judgment in the Beydoun proceedings difficult to reconcile with his earlier observation, at paragraph 46, that it was for the Defendant (as seller) to prove causal effect of the Force Majeure event relied upon by establishing that it (the seller) "acting reasonably,.could not have prevented or reduced the delay caused by the event or events". It seems to me likely that the judge intended to hold (at paragraph 48) that the only substantial issue as Force Majeure would have been whether the Defendant had established on the balance of probabilities that its failure to replace Oger at an earlier stage *did not have the effect that* it wasdisentitled to rely as Force Majeure time on subsequently accumulated delay.

30. The judge determined that issue - whether the Seller had established on the balance of probabilities that its failure to replace Oger at an earlier stage did not have the effect that it was disentitled to rely as Force Majeure time on subsequently accumulated delay - in favour of the Seller. He said this (at paragraph 49 of his judgment in the Beydoun proceedings):

> "49. On the evidence adduced and Submissions made in this trial, I would have concluded that that the Defendant had indeed discharged the burden of proof required by Clause 12.1. The evidence of Mr Alami, the project manager of 31 years experience in the construction industry, would have caused me to conclude that on balance the Defendant did all that it reasonably could to cause Oger to expedite the work from 2008 to 2009 and that it probably would not have been able to find a suitably qualified replacement contractor much before the beginning of 2010 due to the fact that the boom in the Dubai construction industry continued until 2009. Accordingly, the Defendant would have been entitled to rely on the whole period of contractor delay evidenced by the Engineer's extension of time determinations as justifying the 12 months ACD extension notified in the 25 November 2010 email."

31. In referring to "the whole period of contractor delay evidenced by the Engineer's extension of time determinations" the judge had in mind the difference between the aggregate of the periods of extension of time sought by the contractor in its applications under the construction contract (749 days) and the aggregate period allowed by the Engineer's determinations in response to those applications (84 days). As the judge put it (at paragraph 39), when referring to the Seller's submissions:

> "39 .That left 665 days delay which was thereby established to have been caused by the fault of the contractor and so to be Force Majeure time within Clause 12.1."

But it is pertinent to keep in mind that the judge made no finding of fact as to the true extent of net Force Majeure delay. To have done so (without explanation for the basis for that finding) would have been inconsistent with his conclusion at paragraph 88 of his judgment in the Rohan proceedings that he did not have the evidential material on which to do so. As he said - in paragraph 47 of his judgment in the Beydoun proceedings which I have set out earlier in this judgment - the purchaser did not challenge the seller's computation of Contractor delay; rather, the purchaser accepted that the seller was entitled to rely on the determinations of the Engineer with regard to the applications for extension of time as evidence of contractor delay.

32. It is important to note that in this section of his judgment - as in the corresponding section of his judgment in the Rohan proceedings -&#65533; the question which the judge was addressing was "whether Force Majeure events within the meaning of Clause 12.1.[had] caused the delay.which [the Seller] relied upon in any extension notice under Clause 12.1" (paragraph 34); or whether the Seller would have been entitled to rely on the whole period of contractor delay "as justifying the 12 months ACD extension notified in the 25 November email" (paragraph 49). He was not addressing the question whether the Seller had established that the ACD had been extended (pursuant to the third part of Clause 12.1 and independently of any notice which the Seller had given) to a date which was within the period of 12 months immediately preceding the date on which the Purchaser's termination notice had been given: that is to say, to a date after 9 July 2011. Again, that question had not been raised in the pleadings as an issue for determination at the trial.

33. If he had addressed that question, he would have concluded (on the basis of his finding at paragraph 39 of his judgment) that - notwithstanding the concession as to Force Majeure delay made by the Purchaser - the seller had not established that the ACD had been extended to a date after 9 July 2011. He had held that the "the whole period of contractor delay evidenced by the Engineer's extension of time determinations" - which (subject to the question whether the cause of that delay was, in part, attributable to the seller's "negligent inertia"; which the judge determined against the purchaser) was accepted by the Purchaser to be Force Majeure delay for the purposes of Clause 12.1 of the Agreement - was established to be 665 days. But an extension of 665 days from 31 July 2009 (the original ACD specified in the Agreement) would give an extended ACD of 27 May 2011.

The issues raised by the Seller in its grounds of appeal

34.&#65533;The grounds upon which the seller relied in the Rohan appeal are annexed to its appeal notice dated 29 August 2013 (filed on 1 September 2013). They are set out in thirteen sub-paragraphs. At sub-paragraph 3(f) it is said that the judge erred in holding that the Seller's compliance with the relevant notice provisions in (*inter alia*) Clause 12.1 of the Sale and Purchase Agreement was a condition precedent to reliance on the Force Majeure provision itself. In its February judgment this Court upheld that submission. But it is not asserted in any of those thirteen sub-paragraphs that the judge erred in failing to find, as a fact, that the ACD had been extended for a period of time such that valid termination notices could not be served on the dates (22 June 2011 and 8 October 2011) when they were given by the Purchasers. In particular, it was not said in terms that the judge ought to have held that the effect of Force Majeure events was that the ACD had been extended to a date after 22 June 2010 (or 8 October 2010, as the case may be) - that is to say, to a date which was less than twelve months before the service of the termination notices - and it was not said in terms that the judge erred in holding (as he did, at paragraph 88 of his judgment in the Rohan proceedings) that the evidence did not enable him determine the extent of the Force Majeure delay. The most that is said (at sub-paragraph 3(l) of the grounds of appeal) is that "The learned Deputy Chief Justice has also erred in various key findings set out in the Judgment obiter dicta from paragraph 71 through 88".

35. The seller sought to develop sub-paragraph 3(l) of the grounds of appeal in the skeleton argument, dated 15 September 2013, which was submitted on its behalf in support of the Rohan appeal. In section E of that document (paragraphs 51 to 58, under the heading "The Learned Judge erred in Obiter Dicta that the Defendant did not establish a Force Majeure event caused by Construction Delay") it is said that the judge was wrong to hold that the Seller had not discharged the burden of establishing the precise extent of the Force Majeure delay. But nowhere in that section is it said what finding the judge should have made as to the extent of the Force Majeure delay: in particular, it is not said that the judge ought to have held that the effect of Force Majeure events was that the ACD had been extended to a date after 22 June 2010 (or 8 October 2010, as the case may be). At paragraph 61 of that skeleton argument (in Section H, under the heading "Relief Sought"), it is said that the seller sought "a holding that the Anticipated Completion date was in fact validly extended to the 31st of March 2012 on the basis both of the nine-month discretionary extension provided under Clause 4.1 and on the basis of the force majeure provisions under Clause 12.1". But that is not relief sought in the Appeal Notice or in the Grounds of Appeal; and, in any event, it is unclear whether it is asserted that the judge should have held that the ACD was extended to 31 March 2012 on the basis of the Force Majeure provisions alone; or (if so) why he should have reached that conclusion.

36. The grounds upon which the seller relied in the Beydoun appeal are annexed to the appeal notice dated 7 October 2013 (filed on 8 October 2013). They are set out in eleven sub-paragraphs, the first five of which are in substantially the same terms as the corresponding sub-paragraphs of the grounds in the Rohan appeal. In particular, at sub-paragraph 3(f) it is said that the judge erred in holding that the seller's compliance with the relevant notice provisions in (*inter alia*) Clause 12.1 of the Sale and Purchase Agreement was a condition precedent to reliance on the Force Majeure provision itself. As I have explained this Court upheld that submission in its February judgment.

37. It is not asserted in any of the eleven sub-paragraphs of the grounds relied upon in the Beydoun appeal that the judge erred in failing to find, as a fact, that the ACD had been extended for a period of time such that a valid termination notice could not be served on the date (9 July 2012) when it was given by the Purchaser. In particular, it was not said in terms that the judge ought to have held that the effect of Force Majeure events was that the ACD had been extended to a date after 9 July 2011; that is to say, to a date which was less than twelve months before the service of the termination notice.

38. Nevertheless, notwithstanding that the issue was not raised in the grounds of appeal, it is said, at paragraph 50(d) of the skeleton argument, dated 22 October 2013, submitted on behalf of the seller in support of the Beydoun appeal, that the seller sought "a holding that the Anticipated Completion date was in fact validly extended to 31 March 2012 on the basis both of the nine-month discretionary extension provided under Clause 4.1 and on the basis of the force majeure provisions under Clause 12.1, as set out in the Second ACD Extension Notice". But, again, that is not relief sought in the Appeal Notice or in the Grounds of Appeal; and, again, it is unclear whether it is asserted that the judge should have held that the ACD was extended to 31 March 2012 on the basis of the Force Majeure provisions alone; or (if so) why he should have reached that conclusion.

The Seller's applications to amend its defences

39.&#65533;I have explained, earlier in this judgment, that it was pleaded by the purchasers - both in the Rohan proceedings (at paragraph 2.4 of the Particulars of Claim) and in the Beydoun proceedings (at paragraph 21 of the Particulars of Claim) - that, pursuant to the Sale and Purchase Agreements there were two ways in which the ACD could be extended: either by written notice of unilateral extension under Clause 4.1 or by written notice of a Force Majeure event under Clause 12.1. The seller's response (at paragraph 11 of its defence in the Rohan proceedings and at paragraph 14 of its defence in the Beydoun proceedings) was to "acknowledge" or "note" that assertion: the assertion was not challenged or otherwise put in issue.

40. Further, it was pleaded by the purchasers (at paragraphs 4.4 and 4.5 of the Particulars of Claim in the Rohan proceedings and at paragraph 29 of the Particulars of Claim in the Beydoun proceedings) that no relevant period of delay had been directly caused by a force majeure event; alternatively that no period of Force Majeure delay had been of sufficient duration to extend the ACD to a date which disentitled the Purchasers to serve notices of termination when they did. As I have explained, earlier in this judgment, it was not asserted by way of defence in either the Rohan proceedings or the Beydoun proceedings that the ACD was extended (without notice), pursuant to the third part of Clause 12.1, by a period of time equal to the actual delay in performance by Seller caused by the Force Majeure event; and it was not contended that there had, in fact, been an actual delay in performance by the Seller caused by Force Majeure events or what the period of actual delay had been.

41. At the conclusion of the oral hearing of the re-opened appeals, this Court invited the seller to consider whether it wished to apply to amend its defences in the Rohan proceedings and the Beydoun proceedings. Applications to amend were made some days later, on 2 July 2014. It is now said (in the proposed amended defences) that the seller acknowledges that the ACD could be extended by written notice pursuant to Clause 4.1 of the Sale and Purchase Agreement; and "that it is extended pursuant to Clause 12.1 of the SPA due to the occurrence of events of Force Majeure, in which case the extension operates whether or not a notice of extension is given." Further, it is said that there were "significant periods of contractor-related Force Majeure which had resulted in the extension of the ACD until at least 30 September 2011".

42. I would refuse the seller's applications to amend its defences in the Rohan proceedings and the Beydoun proceedings. Even if I were persuaded that the seller should now (after obtaining a decision in this Court in its favour on the true construction of Clause 12.1 of the agreements) be permitted to advance a case - that the ACD was extended pursuant to Clause 12.1 due to the occurrence of events of force majeure whether or not notice of extension had been given - which was inconsistent with the case which it advanced at trial, the case as now sought to be pleaded fails to satisfy the requirements identified by the judge (at paragraph 73 of his judgment in the Rohan proceedings). As the judge said: the Purchaser was entitled to have the Force Majeure event identified and to be told how much delay such event had caused so as to justify the overall extension of the ACD. The case, as now sought to be pleaded, fails to identify each Force Majeure event relied upon, fails to specify what delay is said to be attributable to that event; and fails to assert that the Seller could not reasonably have prevented all or any of that delay. No attempt has been made to meet the basic requirements necessary for a properly pleaded case. Further, as it seems to me, to allow an amendment to the pleadings would serve no sensible purpose unless the Court were minded to order that the proceedings be remitted for a retrial; and, for my part, I would not think that an appropriate order to make. It would, in my view, be disproportionate and unjust, in the circumstances of this case, to require these purchasers to incur the expense and further delay of a new trial.

The determination of these appeals

43.&#65533;As I have said the first issue for determination by this Court is whether, on the hearing of the appeals from the judgments of Deputy Chief Justice Sir Anthony Colman, this Court was required to address the question "what was the position at the dates when the claimants purported to serve termination notices"; or, more specifically, "had the ACD been extended (independently of any notice given by the Seller) by reason of Force Majeure delay to a date which was less than twelve months before the dates on which the purchasers gave notices of termination".

44. Notwithstanding the views expressed by Justice Roger Giles when granting permission to re-open these appeals, I am not persuaded that this Court was, or is now, required to address that question. I am led to that conclusion for the following reasons:

(a)&#65533; It was not a question raised by the pleadings in either the Rohan proceedings or Beydoun proceedings. The question raised by the pleadings was whether the ACD had been extended by the service of notices under Clause 4.1 and/or Clause 12.1 of the Sale and Purchase Agreements. The judge held that the answer to that question was "No"; and this Court has upheld his decision in that respect.

(b)&#65533; The question "had the ACD been extended by reason of Force Majeure delay to a date which was less than twelve months before the dates on which the Purchasers gave notices of termination" was not before the judge. He did not need to decide it; and he did not do so. The question to which his observations on the question of Force Majeure delay were addressed - observations which, it is accepted, were *obiter dicta* -was (as it was put in his judgment in the Rohan proceedings) whether the Seller was entitled to rely, in answer to the Purchasers' termination notices, on "the period of extension time relied upon in its two Clause 12.1 notices"; or (as it was put in his judgment in the Beydoun proceedings) "whether the Seller would have been entitled to rely on the whole period of contractor delay "as justifying the 12 months ACD extension notified in the 25 November email". Accordingly, there was no decision in the court below on the question which the seller now seeks to raise before this Court which can be the subject of an appeal.

(c)&#65533; The absence of a decision in the court below is not, of itself, a matter which can be the subject of an appeal to this Court. There was no decision because the issue was not properly before the judge.

(d)&#65533; The question which the seller now seeks to persuade this Court to address was not raised in either the Appeal Notices or in the grounds of appeal. It is incorrect for the seller to assert, in its skeleton arguments, that it seeks "a holding that the ACD was in fact validly extended to 31 March 2012 on the basis both of the nine-month discretionary extension provided under Clause 4.1 and on the basis of the Force Majeure provisions under Clause 12.1, as set out in the Second ACD Extension Notice". That was not relief sought on the appeal as brought. It is not a function of a skeleton argument to seek relief which was not sought in the Appeal Notice. The proper course is to seek leave to amend the Appeal Notice and the grounds of appeal. There was no such application.

(e)&#65533; In any event, it is unclear whether it is asserted (in the skeleton argument) that the judge should have held that the ACD was extended to 31 March 2012 on the basis of the Force Majeure provisions alone; or (if so) why he should have reached that conclusion.

These matters are not, in my view, to be dismissed as mere technicalities. Parties to litigation are entitled to know what case they must come prepared to meet, both at trial and on appeal. They should not be required to address a case which shifts from time to time as the other party has further thoughts; or a better understanding of the real issues.

45. Given that (as I would hold) this Court is not required to address the question "had the ACD been extended (independently of any notice given by the Seller) by reason of Force Majeure delay to a date which was less than twelve months before the dates on which the Purchasers gave notices of termination", I take the view that it should not attempt to do so.

46. In the context of the Rohan appeal, it is, I think, important to have regard to the observations of Deputy Chief Justice Sir Anthony Colman at paragraphs 77 to 88 of his judgment in those proceedings. After pointing out that it was common ground that the burden of proof as to the existence and causal effect of a Force Majeure event rested on the Seller; and that proof of that causal effect necessarily involved proof that, acting reasonably, it could not have prevented or reduced the delay caused by the event or events, he identified the three strands of evidence on which the seller relied. Those were, first, the evidence of the Engineer appointed under the main construction contract; second, the evidence of the oral evidence of the seller's project manager, Mr Al Alami; and third, the evidence of the expert witness called by the seller, Mr Powell.

47. As to the first of those sources - the evidence of the Engineer - the judge observed that it was essential that the underlying calculations should be in evidence in order to ascertain whether the Engineer's conclusions were accurate. Those calculations had not been disclosed. Further (at paragraph 82 of his judgment in the Rohan proceedings) the judge pointed out that none of the documents in the arbitration between the Seller and the main contractor (in which the main contractor had, it seems, challenged the Engineer's determination of the allowable extensions of time) had been disclosed. He observed (at paragraph 86) that the real defects of the Engineer's determinations of extensions of time were that "they do not tell the whole story and it is impossible to test their accuracy as to the relevant periods of delay relevant to the operation of Clause 12.1 (*sic*) due to lack of underlying primary evidence". And he pointed out (at paragraph 88 of his judgment, in a passage which I have cited earlier in this judgment): "A serious attempt to provide comprehensive disclosure of the documents underlying the Engineer's determinations might have discharged [the] evidential burden but that was not done".

48. As to the second of those sources - the evidence of Mr Al Alami - there was no explanation as to the reason why, although it had become apparent from April 2007 that delays had begun to accumulate such that the project was not going to be completed by the original ACD, the Seller waited until January 2010 before deciding to replace the main contractor. As the judge observed (at paragraph 87 of his judgment in the Rohan proceedings), even if it were assumed that the Engineer's determinations were accurate as far as they went "they do not answer the question whether and, if so, exactly when in the period April 2007 to January 2010 a reasonable developer would have terminated the construction contract with [the main contractor]".

49. As to the third of those sources - the evidence of Mr Powell -&#65533; the judge observed that he was constrained to accept that "on the basis of the very limited number of documents disclosed by the seller, it was impossible to analyse the delays to completion and to apportion responsibility as between [the seller] and [the main contractor]."

50. One reason why there had been inadequate disclosure by the seller, as it seems to me, was that the question as to the extent and cause of the Force Majeure delay - in relation to which the evidential burden of proof lay on the seller - had not been raised in the pleadings: it was not an issue in relation to which there was a proper basis upon which the purchasers could make requests for specific disclosure of documents which were in the seller's possession. Be that as it may, in the light of the judge's comments as to the absence of proper disclosure, I can feel no confidence that this Court has before it the materials that it would need to make findings of primary fact on an unpleaded issue. In my view this Court should resist invitations to go down that route.

51. I take the same view in relation to the Beydoun appeal; but for different reasons. The position is different in that (i) the purchaser accepted before the judge that (subject to the question of "negligent inertia" on the part of the seller) the seller could rely on the whole period of contractor delay evidenced by the Engineer's extension of time determinations; and (ii) the judge determined the question of "negligent inertia" in favour of the seller. But the judge quantified the whole period of contractor delay at 665 days; and that finding has not been challenged on the appeal. And, as I have explained, an extension of 665 days on the basis of Force Majeure delay does not have the effect that the extended ACD is less than 12 months before the date on which the Purchaser gave his termination notice. In those circumstances - in the absence of any challenge to the extent of the period of contractor delay which the purchaser conceded and the judge accepted - there is no reason for this Court to address the question "had the ACD been extended (independently of any notice given by the seller) by reason of Force Majeure delay to a date which was less than twelve months before the date on which the Purchaser gave notice of termination" in the context of the Beydoun appeal. The answer is not in doubt: plainly, the ACD was not extended to a date which was less than 12 months before 9 July 2012.

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Conclusion

52.&#65533;For those reasons I would confirm the decision reached by this Court in its February judgment. These appeals should be dismissed.

CHIEF JUSTICE MICHAEL HWANG:

53.&#65533;&#65533;I agree with the Judgment of the Deputy Chief Justice Sir John Chadwick and have nothing further to add.

H.E. JUSTICE ALI AL MADHANI:

54.&#65533;I agree with the Judgment of the Deputy Chief Justice Sir John Chadwick and have nothing further to add.

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