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 FIRST INSTANCE

BEFORE JUSTICE ROGER GILES

BETWEEN

AMJAD HAFEEZ

Claimant

and

DAMAC PARK TOWERS COMPANY LIMITED

Defendant

Hearing:23 June 2014

Counsel: Faisal Daudpota (Khalid Daudpota & Co.) for the Claimant

Drew Baiter (Damac Park Towers Company Limited - In-House Counsel) for the Defendant

Judgment:30 June 2014

JUDGMENT OF JUSTICE ROGER GILES

Summary of Judgment

The Claimant entered into a contract with the Defendant for the purchase of an apartment worth AED 1,632,000 to be paid for in installments. He sued the defendant for misrepresentation and deceit, contrary to the DIFC Obligations Law, on the ground that the apartment as constructed differed in certain respects from that depicted in the plan part of the contract, the only relief claimed was damages.

The Defendant applied to strike out the particulars of claim or a judgment in its favour on the following bases:

(i)that the particulars of claim do not give details of the allegations of misrepresentation and deceit, as required by RDC 17.43;

(ii)that the claim is barred by a release signed by the Claimant on 16 December 2012, in anticipation of a handover of possession; and

(iii)that it can have no liability under the Obligations Law because the contract provided for a governing law of "the Laws of the United Arab Emirates and the laws of Dubai".

It was held that the pleading of the Claimant's case was defective and could not stand, but that the other bases for the application were not such as to warrant immediate judgment. The Court ordered a strike out of the particulars of claim dated 29 January 2014, granted leave to file amended particulars of claim within 28 days from the date of this judgment, and otherwise dismissed the application dated 28 April 2014.

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

Introduction

1. The Claimant, Mr Amjad Hafeez, entered into a contract dated 3 July 2004 to purchase from the Defendant, Damac Park Towers Ltd, a one bedroom apartment on the sixth floor of Tower A in the Defendant's property development "Park Towers" in the DIFC. The purchase was off the plan, and the purchase price of AED 1,632,000 was payable by instalments at various stages of construction with the last instalment on completion of the apartment.
2. The contract provided for the giving of possession on a Completion Date, effectively when the apartment was ready for occupation, and for transfer of title as soon as reasonably possible thereafter. The Claimant alleges that in late 2012, after the last instalment had been paid and when possession was to be given, he found that the apartment as constructed was not in accordance with the plans part of the contract in that -
   (a) the plan of the 6th floor showed 8 apartments, whereas there were 10 apartments on the floor
   (b) the apartment's balcony was one quarter the size of that in the plan of the apartment;
   (c) the layout of the apartment was changed in two respects from that in the plan of the apartment; and
   (d) the net covered area of the apartment was 4.35% less than that in the plan of the apartment.
3. Possession has not been taken and transfer of title has not occurred. The Claimant has sued to recover the purchase money he has paid, alleging that the Defendant is liable for misrepresentation under Article 29 of the DIFC Law of Obligations ("the Obligations Law") and for deceit under Article 31 of the Obligations Law. The falsity in what is said to have been represented is said to lie in the differences between the apartment as depicted in the plans and the apartment as constructed.
4. The Claimant seeks to recover the purchase money as damages. Damages are the only relief claimed.
5. This is an application by the Defendant to strike out the particulars of claim pursuant to RDC 4.16, or for immediate judgment in the Defendant's favour pursuant to RDC 24.1.
6. The Defendant does not dispute the Court's jurisdiction. It does not seem to dispute that there are the differences between the apartment as depicted in the plans and the apartment as constructed, and relies in its Defence on provisions of the contract entitling it, within limits, to change the plans.
7. That, however, is not a basis of its application. The bases of the application are -
   (i) that the particulars of claim do not give details of the allegations of misrepresentation and deceit, as required by RDC 17.43;
   (ii) that the claim is barred by a release signed by the Claimant on 16 December 2012, in anticipation of a handover of possession; and
   (iii) that it can have no liability under the Obligations Law because the contract provided for a governing law of "the Laws of the United Arab Emirates and the laws of Dubai".

Details of the misrepresentation and deceit

8. RDC 17.43 relevantly requires that a party -

> ".specifically set out the following matters where he wishes to rely on them in support of his case;
>
> 1. Full and specific details of any allegation of fraud, dishonesty.
>
> .
>
> 2. Details of any misrepresentation.".

9. The Claimant's particulars of claim do not do so. Their deficiency is more fundamental than an absence of the requisite details; the case to be made is wholly obscure.
10. A representation is pleaded (para 5), from the floor plan part of the contract, that there will be only eight apartments on the floor.
11. In a narrative way, all four differences and not just the number of apartments on the floor are said (para 9) to make the apartment "not the one that had been represented by the Defendant in the Agreement".

12. After allegations concerning the Claimant's discovery of the differences and the signature of the letter of 16 December 2012, the ultimate pleading is -

"19. That above noted facts of the instance case clearly demonstrate that the Defendant knew that many of its statements and representations as regards the Apartment, per the Agreement, have become false by the time the handover of property was being arranged, and that the Defendant failed in its duty to disclose the truth to the Claimant in a timely manner.
20. The above facts also clearly demonstrate that the misrepresentation by the Defendant was, material to the Agreement, material to the Apartment, and that it induced the Claimant to enter into the Agreement and pay the price of AED 1,632,000 or US$ 453,333 (US Dollars Four Hundred and Fifty Three Thousand Three Hundred and Thirty Three) for an Apartment that should have been one of the eight apartment on the given floor as per the floor plan shown in the Agreement. Thus, the Claimant relied on the misrepresentation of the Defendant and entered into the Agreement and paid the agreed price.

21. That above narrated facts also clearly demonstrate that the Defendant was also making fraudulent statements and fraudulent representations at all the material times in connection with the agreement and its performance, and that the Claimant relied upon such fraudulent statements, and that such reliance resulted into economic losses to the Claimant. It is also clear that the Defendants statements and representations were fraudulent because the defendant knew of them being false, or itself did not belief in their truth, or was reckless as to whether they are true or false."
13. Without being exhaustive of the imperfections in the pleading -
(i) It is not clear whether the "many.statements and representations as regards the Apartment" in para 19 go beyond the representation pleaded in para 5; nor is it clear whether the Claimant relies on all the differences as contrary to a statement or representation.
(ii) Paragraph 19 suggests that the misrepresentation and deceit was through failure to disclose, after the date of the contract as changes were made in the course of construction, that the apartment and the floor would differ from the plans part of the contract; but it is alleged in para 20 that the Claimant relied on a misrepresentation as to the floor in entering into the contract.
(iii) The pleading of fraudulent statements and representations in para 21 is not tied to representation from the plans and is quite open-ended and non-specific.
(iv) There is a wrapped-up allegation that the (non-specific) statements and representations were fraudulent because they were known to be false or because of recklessness as to their correctness; there is an important difference.
14. There is obscurity as to whether the Claimant's case is one of pre-contract misrepresentation through the plans part of the contract (or perhaps otherwise), or post-contract misrepresentation by failure to disclose changes in the course of construction, or some other case of fraudulent statements (para 21). Given the contractual entitlement to change the plans, it is particularly necessary to plead the representations with precision and taking that into account. It is also necessary to plead with precision how the representation(s) were made, what made them false and, where deceit is alleged, what it was that made the Defendant's conduct deceitful. The particulars of claim cannot stand.
15. The Claimant's legal representative helpfully clarified his case at the hearing of the application. Subject to the other bases for the Defendant's application, the Claimant should have leave to file amended particulars of claim. It is appropriate to invite the Claimant's attention to whether damages alone are an appropriate and effective remedy while the contract remains on foot.
16. I deal with the other bases for the Defendant's application on the assumption that the amended particulars of claim properly plead and detail a case of liability for misrepresentation and deceit under Articles 29 and 31 of the Obligations Law.

Release

17. The release was contained in a "Letter of Discharge and Adherence" ("the letter"), relevantly reading -

> "We have executed the Unit Sale and Purchase Agreement dated 3-JUL-2014 ("SPA") with Damac Park Towers Company Limited, ("Seller") to purchase Unit No. DFA/6/A606 at PARK TOWERS in DIFC ("Property") and we do hereby unconditionally and irrevocably accept the possession of the Property from the Seller in good condition ready for occupancy and in the size at handover and constructed in accordance with the agreed plans, specifications and free from and all defects and deficiencies (except as listed in the annexure), and accordingly we hereby completely release and discharge the Seller and any of its nominees or representatives or subsidiaries its past, present and future successors, officers, directors, agents and employees, from all the claims, damages (including but not limited to general, special, punitive, liquidated and compensatory damages) and causes of action of every kind, nature and character, known or unknown, in law or equity, fixed or contingent, which I may now have or I ever had arising from or in any way connected in respect of the Property, The foregoing acceptance, release and discharge is without prejudice to the condition stipulated in the SPA regarding rectification of any defective works,, fixtures and fittings in the Property, for a period of twelve (12) months from the Completion Date."

18. The contract does not provide for such a letter, or for a release, at the time of handover of possession.
19. The Defendant may obtain immediate judgment under RDC 24.1 if the Court considers that the Claimant "has no real prospect of succeeding on the claim" and there is no other compelling reason why the case should be disposed of at trial. It is not necessary further to elaborate on the principles on which an application for immediate judgment should be determined. For at least two reasons, immediate judgment should not be given.
20. First, although also obscurely, in his Reply to the Defence the Claimant appears to contend (para 1, taking up para 9 of the particulars of claim) that his signature of the letter was obtained in circumstances where its contents were not truly appreciated and the misrepresentation by silence operated. If that is the Claimant's case, and the clarification of the Claimant's case included that it was, a more explicit pleading is required. The embryonic vitiation of a release (which might include whether the letter had contractual effect) is a reason for permitting the case to continue.

21. Secondly, and apart from the preceding reason, the release is from claims etc. "arising from or in any way connected in respect of the Property [sic]". The Property is the apartment, and the surrounding text is concerned with the physical state of the apartment. In my view it is well arguable, and it is neither necessary nor appropriate to express a more definite opinion, that the release does not extend to a claim that the entry into the contract was induced by misrepresentation, or a claim that instalments of the purchase price were paid when they would not have been paid but for misrepresentation. Further, ascertaining the scope of the release may be assisted by evidence of the circumstances in which the letter was proffered and signed. In my opinion, the efficacy of the letter as a release is a matter for the trial.

The applicable law

22. The contract provided -

> "20. Governing Law and Jurisdiction
>
> This Agreement in the English language and the rights of the Parties hereunder shall be governed by the Laws of the United Arab Emirates and the Laws of Dubai and the Parties agree that any legal action or proceedings with respect to this Agreement shall be subject to the non-exclusive jurisdiction of the Courts of Dubai, United Arab Emirates."

23. The Defendant submitted that in Hardt v Damac (DIFC) Company Ltd (Justice Sir Anthony Colman, CFI-036-2009, 31 March 2010) it was held in relation to an identical provision that the "Laws of Dubai" meant the Laws of the Emirate excluding DIFC laws. I doubt that that is so; it was said, perhaps obiter, that these words did not confine the laws to DIFC laws. It does not matter. Whatever the specified laws, they govern the contract and the rights of the parties thereunder. The Claimant's claims are not contractual, or an assertion of rights under the contract. They are external to the contract, addressing the Defendant's conduct prior to contract or during its currency. Although, as submitted by the Defendant, they may depend on what was represented by or in the contract, that does not define their nature.
24. Referring again to RDC 24.1, in my view it cannot be said that the Obligations Law is so clearly excluded by Clause 20 that the claims have no real prospect of success.

Case Management

25. The case management orders made by H E Justice Shamlan al Sawalehi on 14 April 2014 require adjustment.
26. The amended defence to the amended particulars of claim and any amended reply should be filed in accordance with the Rules.
27. The dates in orders 4 and 5, specified as within fourteen and thirty days respectively of judgment on this application, must be extended to allow for the re-pleading. They will be extended to fourteen and thirty days after the filing of the Claimant's reply or if no reply is filed within the time stated in the Rules, twenty-one and forty days after the filing of the Defendant's defence.

Costs

28. Each of the parties has succeeded in part and failed in part. In my view, a just order as to costs is that no order be made, so that each party shall pay his or its own costs. The Defendant asked for an order for the costs thrown away by pleading to the defective points of claim, but I think it preferable that this be considered, if appropriate, in the ultimate disposition of costs; also, the Defendant chose to plead where it could have immediately complained that the points of claim were defective.

Orders

29. It is hereby ordered to:

(i) Strike out the particulars of claim dated 29 January 2014.
(ii) Grant leave to file amended particulars of claim within 28 days from the date of this judgment.
(iii) Otherwise dismiss the application dated 28 April 2014.
(iv) Vary the case management orders made on 14 April 2014 as stated above.
(v) No order as to costs.

Issued by:**Natasha Bakirci**Assistant RegistrarDate of Issue: 30 June 2014At: 2pm