**Claim No: CFI 083/2018**

**THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS**

**In the name of His Highness Sheikh Mohammed Bin Rashied Al Maktoum, Ruler of Dubai**

**IN THE COURT OF FIRST INSTANCE**

BETWEEN

**MR. SALEM DWELA**

Claimant

and

**DAMAC PARK TOWERS COMPANY LIMITED**

Defendant

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Hearing **: 2 June 2020**
Judgment **: 1 July 2020**

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**JUDGMENT OF H.E JUSTICE OMAR AL MUHAIRI**

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**UPON** considering the Defendant's application filed on 27 February 2020 (the "**Application**")

**AND UPON** hearing from Mr Walid Dwela acting as a McKenzie friend on behalf of his father, the Claimant, and Mr Julien DeLange, who is employed by the Defendant company as Senior Manager - Legal (Construction)

**AND UPON** reading the submissions and evidence filed and recorded in the Court file

**IT IS HEREBY ORDERED THAT:**

1. The Application is granted.

2. The claim is struck out due to the expiry of the limitation period.

3. The Claimant is to pay the Defendant's costs up until service of its defence (filed on 20 May 2019) as well as the costs of this Application, to be assessed by a Registrar, if not agreed.

Issued by:
**Nour Hineidi**
Deputy Registrar
Date of issue: 1 July 2020
At: 11am
Re-issued at: 12pm

**JUDGMENT**

1. This Application involves a request to strike out the Claimant's claim on the grounds that it was commenced outside of the 6 year statutory limitation period imposed by Article 123 of DIFC Law No. 6 of 2004 (being the DIFC Contract Law)(the "**Contract Law**").

2. The Claimant issued a claim on 19 December 2018 for breach of contract against the Defendant for failing to deliver a 2402.53 sqft unit located in the Defendant's Park Towers complex in the DIFC.

3. The agreement between the parties is set out in a document entitled Sale and Purchase Agreement dated 18 May 2010, the ("**SPA**"). Under the terms of the SPA the Claimant agreed to purchase a unit for the sum of AED 3,844,048, the ("**Unit**").

4. Article 123 of the Contract Law states:

> "An action for breach of any contract must be commenced within six years after the cause of action has accrued or in the case of fraud, when the aggrieved party becomes aware of the fraud. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it. A cause of action occurs when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach."

5. Mr Salem in his submission, stated that the claim was fundamentally one of fraud and, as such, there is no limitation period for fraud claims under Article 9 of DIFC Law No. 5 of 2005, the ("**Law of Obligations**"), which states;

> "Where a cause of action arises as a result of fraud by the defendant, there is no time limit before which the action must be commenced."

6. Having considered the particulars of claim filed on 21 April 2019, drafted by the Claimant's legal representative at the time, Mahmood Hussain Advocates and Legal Consultancy, no specific reference of fraud was pleaded. The particulars of claim should clearly set out the causes of action which the Claimant seeks to rely upon.

7. Moreover, the Law of Obligations applies to cases of negligence and misrepresentation but the Contract Law applies strictly to contractual disputes. Both statutes set out a very different position in relation to fraud. The Law of Obligations imposes no time limit on fraudulent matters as a result of negligence or breach of duty. Whereas the Contract Law requires that contractual disputes are brought before the Court within a six year timeframe regardless of knowledge but in the case of fraud the limitation period is six years from the date of knowledge, as opposed to limitless.

8. Although the Claimant is now acting in person, the particulars of claim provides the basis upon which his claim is made and was drafted by his legal representatives at the time on his instruction. There are a number of causes of action that could have arisen from the circumstances brought before this Court but it is not for the Court to interpret what these are and which causes of action are being relied upon by the Claimant.

9. The particulars of claim does not contend that a duty care was owed to the Claimant by the Defendant or that fraud occurred; on this basis, it is not within the ambit of my task to consider tortious or fraudulent matters with regards to the claim. As no duty of care or negligence has been pleaded, negligence and the tort of deceit does not apply. With regard to misrepresentation; the Claimant has not specified the nature of the misrepresentation relied upon. In particular, the elements of fraudulent misrepresentation have not been set out.

10. Article 123 the Contract Law, is very clear that the limitation period runs from the date of the breach, whether or not the injured party has any knowledge of said breach, other than in cases of fraud.

11. The Claimant has failed to specify, in submissions or in his skeleton argument, when he contends that the cause of action accrued, as did the Defendant. Given that this application was brought by the Defendant, it would have been helpful to have heard submissions, from the Defendant, as to when it considered the cause of action to have arisen. Yet, Mr DeLange's approach was to work back from the issue date,18 December 2018, and submitted that no further events since 18 December 2012 triggered a new cause of action. This approach did not assist me in making my determination.

12. A simple interpretation of the factual position is that breach of contract occurred when the Unit was built, or perhaps when the Unit was allocated to the Claimant under the SPA, depending on the process undertaken by the Defendant. At this time the Defendant purportedly had constructed the Unit in a smaller size than agreed or the Defendant had allocated a small Unit than agreed, to the Claimant. The Defendant has not specified exactly when this occurred but from the chronology which is effectively agree by the parties, it must have been around the time that the notice to complete was issued on 5 January 2012, with handover to commence on 30 January 2012. A second notice to complete was issued on 23 February 2012, noting a mistake as to the size of the Unit in the earlier notice to complete. I am confident from the facts of the case that this event was well before 17 December 2012. The same event would have triggered the additional cause of action for the lack of a swimming pool view. As the breach of contract was likely to have occurred in or around the time of the service of the notice to complete which indicated that the Unit was ready for transfer to the Claimant, or at least near to completion. The cause of action in relation to the aforementioned breaches would have occurred therefore in or around February 2012.

13. As a result, the Claimant would have had a six year time period from this date to bring his claim under Article 123 of the Contract Law. In issuing the claim on 18 December 2018, the Claimant was outside this time limit and the claim, therefore fails. In accordance with Article 123 of the Contract Law, the claim for breach of contract, in absence of fraud, must be struck out.

14. Mr Salem was explicit that the Claimant's claim was one of fraud. The claim form and the particulars of claim references misrepresentation under Article 29 of the Law of Obligations but does not specify the form of misrepresentation relied upon, whether it be fraudulent, negligent or innocent misrepresentation. In reviewing the particulars of claim there is no specific reference to an allegation of fraud. As considered above, it is not for this Court to interpret or imply what causes of action the Claimant is seeking to rely upon and the elements of fraudulent misrepresentation have not been set out in the Claimant's particulars of claim.

15. Mr DeLange submitted that the requirements for fraud had not been made out and that I should therefore disregard the Claimant's submissions on fraud. However, I am not required to consider the merits of claim, or the defence, in considering the Defendant's Application. Moreover, I should not, as the parties have not yet submitted substantive evidence and the same has not been tested by cross-examination. It would be inappropriate for me to consider the merits of the case. The matter before me is one of limitation of time only.

16. However, if the Claimant had brought a claim on the basis of fraudulent breach of contract, the limitation period would have already expired at the time of issue. The period of six years under Article 123 runs from the date of knowledge for fraud.

17. In my view, this is not simply the case when actual knowledge occurs but when the injured party could reasonably have been expected to have knowledge of the fraud. The Unit was purchased by the Claimant and the Claimant seemingly had seen the Unit at some time before 24 April 2012.

18. Paragraph 13 of the particulars of claim states

> "The Claimant contacted the Defendant on telephone and [by] email dated 24 April 2012 pointing out that the area was smaller and the location was different from that which he was promised."

19. Mr Salem stated in his submissions that it was evident that the Unit was not fit for purpose due to its size and the fact that it had no natural light, such that the Unit provided was not usable as an office. I consider that if these breaches were so fundamental that they caused the Unit not to be fit for purpose as an office, they would have been apparent at the time of viewing the Unit.

20. Paragraph 13 of the particulars of claim demonstrates that the Claimant was aware of the issues complained of on or before 24 April 2012. Even if the size of the Unit were not so apparent from viewing the Unit, the Claimant was at liberty to instruct his own surveyor to calculate the size, particularly in circumstances where his suspicion as to the size of the Unit was aroused by the Defendant's inaccuracies.

21. Therefore, even if actual knowledge had not occurred the Claimant ought have reasonably known about the alleged breaches when the Claimant was able to view the Unit or to send someone on his behalf before 24 April 2012.

22. Consequently, the limitation period for fraudulent breach of contract would have expired at the latest on 24 April 2018, just under eight months before the claim was issued.

23. Further, the elements for fraudulent misrepresentation have not been out in the particulars of claim. Should the Claimant have wished to rely upon the extended time limit for fraud, as set out in the Law of Obligations, the same should have been specifically set out by the Claimant. Furthermore, no reference was made in the parties' correspondence before me of an allegation of fraud. In addition, the Defendant seems to suggest at paragraph 3.1 of its skeleton the Claimant's solicitors had written to the Defendant stating that the claim was being issued for limitation purposes on 17 December 2012. This indicates that the Claimant's claim was not intended to be put forward on the basis of fraudulent misrepresentation, which would have had an unlimited limitation period under Article 9 of the Law of Obligations.

24. I am not persuaded that the Claimant was prevented from bringing this claim any earlier for some other reason or that the extended limitation period under Article 9 of the Law of Obligations should apply. The Claimant was well aware of the purported breaches in April 2012. It would appear, even from his own correspondence that one of the main reasons for the Claimant's delay in bringing the claim was due to his own legal advisor's negligence in incorrectly bringing a claim in the Dubai Courts. However, that is a matter between the Claimant and his then solicitors and of no concern to the Defendant.

25. In light of the reasons I have just explored, I grant the Defendant's application for strike out.

**Costs**

26. Now moving on to the issue of costs, as the Defendant has been successful in its application, the general rule is that the successful party is entitled to its costs. However, pursuant to RDC 38.8 I must also consider the conduct of the parties.

27. Mr DeLange stated in his submissions that the Defendant could not be criticised for seeking to negotiate with the Claimant even though it was aware that the limitation period had expired. The Defendant may have been seeking to preserve an ongoing working relationship or was seeking to settle the matter for some other reason. I am not entitled to speculate as the reasons why the Defendant was seeking to settle a matter for which it considered that the limitation period had already expired.

28. In considering the conduct of the parties I should also have regard to the overriding objective as set out at RDC 1.6 which requires cases to be dealt with expeditiously, fairly and saving expense. In my view, bring an application for strike out due to expiry of the limitation period, which would have been evident from the Defendant's legal team at the time of issue. I appreciate that the Claimant is acting as a litigant in person, but the reality of the situation is that the Defendant is a large construction company with the benefit of its own legal team.

29. With regard to the overriding objective, this Application should have been brought before the Court at the earliest opportunity. If the Defendant was aware that limitation had already expired, as submitted by Mr DeLange then it should not have delayed in bringing the Application. In delaying, the Defendant has wasted the time of the Court and the Claimant, as such the Defendant should not be entitled to all of its costs having unnecessarily incurred a proportion of them itself. Should the Defendant have brought this application within a reasonable period of time, this matter would have been dealt with in a matter of months after filing the Defence and at a significantly lower cost.

30. Therefore, subject to further submissions from the parties, I consider that the appropriate order is for the Claimant to pay the Defendant's costs up until service of the Defence and the costs of this application. Such costs are to be assessed by the Registrar, if not agreed.

Issued by:
**Nour Hineidi**
Deputy Registrar
Date of issue: 1 July 2020
At: 11am
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