Claim No. SCT 128/2020 THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS In the name of His Highness Sheikh Mohammed Bin Rashid Al Maktoum, Ruler of Dubai IN THE SMALL CLAIMS TRIBUNAL OF DIFC COURTSBEFORE SCT JUDGE MAHA AL MEHAIRI BETWEEN LIBERTY Claimant and (1) LANCE REAL ESTATE BROKER (2) LUCIAN (3) LILYANA (4) LUCILLE (5) LUCCA

Claim No. SCT 128/2020

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

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

IN THE SMALL CLAIMS TRIBUNAL OF DIFC COURTS
BEFORE SCT JUDGE MAHA AL MEHAIRI

BETWEEN

LIBERTY

Claimant

and

(1) LANCE REAL ESTATE BROKER
(2) LUCIAN
(3) LILYANA
(4) LUCILLE
(5) LUCCA
(6) LACEY
(7) LEXI
(8) LAWSAN

Defendants

Hearing **: 19 May 2020**
Judgment **: 18 June 2020**

JUDGMENT OF SCT JUDGE MAHA AL MEHAIRI

UPON this Claim being filed on 9 April 2020

AND UPON the First Defendant filing an Acknowledgment of Service intending to defend all of this Claim dated 15 April 2020

AND UPON the Claimant filing an Amended Claim Form dated 28 April 2020

AND UPON the Second to Eighth Defendants filing their response to the Claim dated 4 May 2020

AND UPON a Consultation being held before SCT Judge Nassir Al Nasser on 10 May 2020

AND UPON the parties failing to reach a settlement at the Consultation

AND UPON a hearing having been listed before SCT Judge Maha Al Mehairi on 19 May 2020, with the Claimant and the Defendants' representative attending

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

IT IS HEREBY ORDERED THAT:

1. The First Defendant shall pay the Claimant the sum of AED 142,000.

2. The Defendants shall pay the Claimant the Court fee in the sum of USD 1,933.29.

Issued by:
Maha Al Mehairi
SCT Judge
Date of issue: 18 June 2020
At: 12pm

THE REASONS

Parties

1. The Claimant is Liberty, an individual who was intending to purchase a property in the DIFC (hereafter the "Claimant").

2. The First Defendant is Lance Real Estate Broker, a real estate brokerage company based in Dubai (hereafter the "First Defendant").

3. The Second Defendant is Lucian, the Third Defendant is Lilyana, the Fourth Defendant is Lucille, the Fifth Defendant is Lucca, the Sixth Defendant is Lacey, the Seventh Defendant is Lexi, and the Eighth Defendant is Lawson, all of whom are siblings and jointly own a residential apartment located at Unit 234, DIFC (hereafter the "Sellers") and (collectively the "Defendants").

Background and the Preceding History

3. The underlying dispute arises over the alleged termination of an agreement for the purchase of a residential apartment located at Unit 234, , DIFC, dated 27 February 2020, due to the Seller's non-performance of the said agreement (the "Second Agreement").

4. The Claimant and the Sellers entered into an agreement to buy the Sellers' property. The Sellers are seven individuals believed to reside in Egypt, all of whom are represented by the First Defendant.

5. The Claimant, with her husband, originally signed an agreement to purchase the property from the Sellers on 22 January 2020 (the "First Agreement"), but with the recommendation of the bank, the Second Agreement was signed on 27 February 2020, with the Claimant as the sole buyer of the property from the Sellers.

6. The Claimant and the Sellers were willing to proceed forward with the sale of the property and perform their obligations under the Second Agreement but were unsuccessful in doing so due to the effects of Covid-19, as the Sellers' representative was unable to travel to the UAE to complete the transfer of the property on the agreed date of transfer.

7. The DIFC Registrar of Real Property ("RORP") offers a remote completion service but a "No Objection Certificate" ("NOC") from the Developer is required prior to completion. In this instance, the Developer, Leti did not offer a remote service to obtain the NOC, and required the Buyer and the Seller to attend in person to obtain the NOC.

8. Due to the Sellers' non-performance of the Second Agreement on the date of transfer, and the travel restrictions imposed by the UAE Government at that time, on 26 March 2020, the Claimant issued a notice of termination of the Second Agreement and asked for the return of the cheque for the deposit amount of AED142,000 held by the First Defendant. However, the First Defendant refused to return the cheque and insisted that the transaction had been affected by "third party delays", which led to a postponement of the completion date by 45 days under the provisions of the Second Agreement.

9. On 9 April 2020, the Claimant filed a claim in the DIFC Courts' Small Claims Tribunal (the "SCT") claiming the return of the deposit in the sum of AED 142,000 which was being held by the First Defendant, along with a claim for the Court fee associated with filing this claim.

10. On 15 April 2020, the First Defendant filed an Acknowledgment of Service intending to defend all of the claim.

11. The parties met for a Consultation with SCT Judge Nassir Al Nasser on 10 May 2020 but were unable to reach a settlement. In line with the rules and procedures of the SCT, this matter was referred to me for determination, pursuant to a Hearing held on 19 May 2020.

The Claim

12. The Claimant's case is that she is seeking the refund of her deposit. The Claimant paid to the Sellers a deposit in the amount of AED 142,000 by way of a cheque, which is held by the First Defendant. The agreed date of transfer of the property was 1 April 2020 and this date has since passed with an unknown date of transfer.

13. The Claimant submits that she has been ready, willing, and able to perform her obligations under the Second Agreement. The Sellers appear willing but were neither ready nor able to perform the Sellers' obligations due to the fact that the Sellers' representative had been unable to travel to the UAE to complete the transfer and the agreed date of transfer has now passed.

14. The Claimant adds that, in view of the anticipated non-performance of the Second Agreement by the Sellers on the date of transfer due to the factual impossibility created by the circumstances at that time, she issued a notice of termination on 26 March 2020 in reliance on Articles 86, 88 and 90 of the DIFC Contract Law No. 6 of 2004 (the "Contract Law").

15. The total sum claimed by the Claimant as set out in the Claim Form is AED 142,000 in addition to Court fees.

The Defence

16. The First Defendant confirms that the Sellers have been ready, willing and able to complete the transfer prior to the transfer date. However, due to the delays caused by the Claimant, the transaction was delayed to such time that travel restrictions were imposed by the Government and the airlines, at which point the Sellers' representative, was no longer able to travel from Egypt to Dubai for the NOC appointment at Leti where he was required to attend along with the buyer for the appointment.

17. The Defendants submit that the Claimant is simply withdrawing from the Second Agreement. They argues that she should either pay the penalties as stipulated in the Second Agreement for withdrawal or she should accept that the delay, which occurred on the transfer date being 1 April 2020, was, firstly, due to her own actions, and secondly, due to Covid-19 travel restrictions, and the fact that Leti were not open to allow NOC appointments. As such, the Second Agreement should automatically extend as per the terms for 45 days or until such a time that the flight restrictions are lifted and Leti can accommodate the NOC appointment.

18. The First Defendant submits that the Claimant should fully cooperate with her obligations during the time of an extension in a manner that shows she is a ready, willing and able buyer, as she has claimed. The First Defendant argues that this agreement was originally entered into on 22 January, and since then the sellers have accommodated the Claimant's request to enter into a new contract to change the buyer's name, and it should be noted that she has not signed her final mortgage offer letter, and the Sellers' representative had to cancel his flight tickets and hotel bookings

19. Due to the Claimant's cancellation of the NOC appointment at Leti, delays were suffered, and the sale could not go ahead. The Defendants argue that, had this NOC appointment taken place and the Sellers acted in a cooperative manner to the Second Agreement, it is highly likely that the transfer of ownership would have been completed on time. Due to the Claimant's own delays, the sale could not be completed due to the travel restrictions of Covid-19.

20. The Defendants believe that the Claimant is using the reason of Covid-19 as an excuse knowing that the Sellers could not possibly travel but, in reality, the Claimant does not wish to proceed with the purchase, as her actions have demonstrated.

21. As such, the Defendants request that the Second Agreement be extended either by 45 days, which is already stipulated as an automatic extension in the Second Agreement, or until such a time that the flight restrictions imposed due to Covid-19 are lifted so that the Sellers' representative may enter into Dubai to complete the transaction.

Discussion

22. Having considered the written submissions and the arguments put forward at the Hearing, I find that this dispute falls within the jurisdiction of the DIFC Courts and the SCT as the property in dispute is in the DIFC jurisdiction and the parties agreed in the Second Agreement to opt-in to the jurisdiction of the DIFC Courts, as per the below clause:

> "3.1 Applicable Law
>
> This Agreement shall be constructed in accordance with and governed by the laws of the Dubai International Financial Centre (DIFC).
>
> 3.2 Dispute Resolution
>
> Any dispute or claim arising out of or relating to the Agreement or claim of breach hereof shall be brought exclusively in the courts of Dubai International Financial Center (DIFC). By execution of the Agreement, both parties hereby consent to the exclusive jurisdiction of such courts, and waive any right to challenge jurisdiction of such courts regarding any suit, action, or proceedings."

23. The main issue before the Court is whether the Claimant is entitled to terminate the Second Agreement and, if so, are there any penalties to be applied for such action.

24. Looking at the circumstances of the incident in question, the parties have been unable to complete the last two steps to finalise the sale of the concerned property. In order for the parties to be ready and able to complete the transfer, the Sellers had to complete the following stages:

> (a) Obtain a NOC from the Developer, Leti, for the resale of the property. As mentioned above, to obtain the NOC, the Sellers needed to schedule an appointment at the Developer's office and visit the office along with the Buyer. The NOC appointments cannot be made remotely and require attendance in person.
>
> (b) Make an appointment with the DIFC RORP to register the transfer. This generally requires the personal attendance of the Buyer and the Seller, but in view of the Covid-19 situation, remote appointments were made available to those who could not attend in person.

25. Thus, in light of the above, the purchase cannot be finalised in the current situation that the country is enduring, and, in addition, I note that the Second Agreement stipulates as follows:

> "2.11 Should on the date of transfer, both Buyer and Seller be ready, willing and able to transfer however, transfer cannot take place due to delay by a third party (including but not limited to bank for either Buyer, Seller or the developer), this Agreement of Sale will AUTOMATICALLY be extended for forty five (45) days ("Extension Period")"

26. On 19 March 2020, the First Defendant informed the Claimant that the Sellers' representative was unable to travel to the UAE due to the travel disruption caused by Covid-19. On 25 March 2020, the UAE Government imposed formal travel restrictions which continue to remain in effect today.

27. If the automatic extension of 45 days is placed into effect from 19 March 2020, the period has elapsed and there is still no lift on the travel ban, and the UAE Government has no indication as to when the travel ban will be lifted.

28. The Court acknowledges that there were delays from the Claimant's side from the beginning of the sale process but considers that these delays are unintentional and cannot be predicted. On 19 March 2020, the Claimant was able and willing to continue with the sales process, but the travel ban was issued. As the Covid-19 pandemic was unpredictable and as these are unprecedented times, the sale cannot be finalised in the current situation. I am of the view that the delay is not caused by any of the parties to the Second Agreement but that it is a consequence of an unfortunate turn of events where no one knows when the situation will be over.

29. The Second Agreement cannot be extended for an uncertain period of time as each party does not know how these unprecedent times will avail. I am of the view that the Claimant is not withdrawing from the Second Agreement, but that the Second Agreement is broken due to non-performance.

30. The Contract Law also stipulates the following

"86. Right to terminate the contract

(1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.

(2) In determining whether a failure to perform an obligation amounts to a fundamental non performance regard shall be had, in particular, to whether:

(a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract;

(b) strict compliance with the obligation which has not been performed is of essence under the contract;

(c) the non-performance is intentional or reckless;

(d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance.

(3) In the case of delay the aggrieved party may also terminate the contract if the other party fails to perform before the time allowed under Article 81 has expired.

87. Notice of termination

(1) The right of a party to terminate the contract is exercised by notice to the other party.

(2) If performance has been offered late or otherwise does not conform to the contract the aggrieved party will lose its right to terminate the contract unless it gives notice to the other party within a reasonable time after it has or ought to have become aware of the nonconforming performance.

88. Anticipatory non-performance

Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract.

..

90. Restitution

(1) On termination of contract pursuant to Articles 86 or 88 either party may claim restitution of whatever it has supplied, provided that such party concurrently makes restitution of whatever it has received. If restitution in kind is not possible or appropriate allowance should be made in money whenever reasonable.

(2) However, if performance of the contract has extended over a period of time and the contract is divisible, such restitution can only be claimed for the period after termination has taken effect."

31. The Court finds that the Claimant has acted within her rights in accordance with the Second Agreement and the DIFC Contract Law, and it is obvious that during these uncertain times the Defendants cannot commit to a new date for the transfer. The Claimant terminated the Second Agreement in accordance with the Contract Law and restitution to the original status should be achieved when possible.

32. As such for the above cited reasons, I find that the Claimant is entitled to the refund of the deposit in the amount of AED 142,000 that was paid to the First Defendant.

33. The Defendants shall pay the Claimant the amount of USD 1,933.29 being 5% of the judgment sum owed to the Claimant.

Issued by:
Maha Al Mehairi
SCT Judge
Date of issue: 18 June 2020
At: 12pm