Claim No: CFI 025/2012

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 THE DEPUTY CHIEF JUSTICE SIR ANTHONY COLMAN

Between

(1) KENNETH DAVID ROHAN

(2) ANDREW JAMES MOSTYN PUGH

(3) MICHELLE GEMMA MOSTYN PUGH

(4) STUART JAMES COX

Claimants

-v-

DAMAN REAL ESTATE CAPITAL PARTNERS LIMITED

Defendant

Hearing: 12-13 February 2013

Counsel:Crispin Winser (Kennedys Dubai LLP) for the Claimants

Charles Buderi (Curtis, Mallet-Prevost, Colt & Mosle LLP) for the Defendant

Judgment: 4 August 2013

JUDGMENT OF THE DEPUTY CHIEF JUSTICE SIR ANTHONY COLMAN

Introduction

1. The Defendant carries on the business of property development in the DIFC and was at all material times engaged in the business of selling, as developer, units for occupation as residential apartments in a property development in the DIFC known as "The Buildings by Daman". I refer to that building development as "the Development".

2. The First Claimant purchased four such apartments from the Defendant as follows for the prices shown on the dates set out below.

Apartment 42G for AED 1,287,644.00 on 12 December 2007;

Apartment 29G for AED 1,287,644.00 on 13 December 2007;

Apartment 44D for AED 2,237,836.00 on 23 December 2007;

Apartment 12E for AED 3,059,771.00 on 2 March 2008.

3. In accordance with the terms of the four purchase contracts which were on the Defendant's standard form and in identical terms save as to price and dates, between 13 March 2007 and 15 November 2008 the First Claimant paid to the Defendant instalments of this purchase price totalling:

Apartment 42G: AED 1,030,115.20

Apartment 29G: AED 1,030,115.20

Apartment 44D: AED 671,350.20

Apartment 12E: AED 917,931.51

4. The Second and Third Claimants purchased three such apartments from the Defendant as follows for the prices shown on the dates set out below:

Apartment 48C for AED 2,370,448.00 on 25 March 2008

Apartment 48D for AED 2,146.073.00 on 25 March 2008

5. In accordance with the terms of the two purchase contracts which were on the Defendant's standard form and in identical terms, save as to

price and dates, between 6 December 2007 and 15 September 2008 the Second and Third Claimants paid to the Defendant instalments for the purchase price totalling:

Apartment 48C: AED 1,946,359.40

Apartment 48D: AED 1,716,858.40

Attention Charge: AED 50,000

6. The Fourth Defendant purchased one such apartment (No. 48A) from the Defendant for AED 1,675,198.44 on 30 April 2008 and on and between 21 March 2007 and 15 November 2008 paid to the Defendant in accordance with the terms of such contract which was on the Defendant's standard terms and in identical terms save as to price and dates as all the other sale and purchase contracts referred to above, paid to the Defendant instalments of the purchase price totalling AED 1,236,137.00.

7. The sale and purchase contracts provided by clause 4.1 as follows:

> "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. If the Apartment is substantially completed and ready for occupation before the Anticipated Completion Date, Seller may, subject to Clause 4.2, establish the Completion Date on a date prior to the Anticipated Completion Date."

and by Clause 4.2:

> "4.2 Seller shall give Purchaser not less than thirty (30) days' 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 given."

8. The "Anticipated Completion Date" was defined in Schedule C as:

> "July 31, 2009, or such later date as may be determined pursuant to Clause 4.1 or Clause 12.1"

9. "Completion Date" was defined in Schedule C as:

> "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."

10. Clause 11.3 of the sale and purchase contracts provided:

> "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."

11. Clause 12.1 of the sale and purchase contracts provided:

> "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 minimize 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."

12. "Force Majeure" was defined in Schedule C as:

> "any event or circumstance which is beyond the reasonable control of Seller, and which is 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 the satisfaction of the foregoing conditions, Force Majeure shall include, but not be limited to, any act of God including but not limited to fire, flood, earthquake, wind storm or other natural disaster; terrorist attacks; acts of any sovereign including but not limited to war, invasion, act of foreign enemies or other hostilities; labor disputes including but not limited to strikes, lockouts or boycotts; the act of any government or governmental authority (including, but not limited to, the enactment or failure to enact laws, regulations or decisions of any sort, the refusal or revocation of any license, consent or otherwise, or any other act, order, instruction, decision or requirement of any nature), which, for purposes of this Agreement, shall include, but not be limited to, any governmental or semi-governmental authority acting within the U.A.E. or Dubai, including the DIFC; construction or other accidents, including accidents occurring at the Building or the site on which the Building is being constructed; interruption or failure of utility service, including but not limited to electric power, gas, water or telephone services; 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; or any act, instruction, order or requirement of the DIFC or Master Developer, as well as any construction, engineering or other works being carried out by the DIFC or Master Developer which affects the construction or completion of the Building or the Apartment."

13. The Defendant has not issued a notice of the Completion Date under clause 4.2 and completion has therefore not occurred.

14. By letters dated 6 October 2011 the First, Second and Third Claimants have each given to the Defendant 30 days' notice of termination of other respective sale and purchase contracts under clause 11.3 of such contracts. The Fourth Claimant gave such notice of termination by letter dated 22 June 2011. The Defendant has failed to respond to such notices. By reason of those notices each of Claimants alleges that the sale and purchase contracts have been effectively terminated and they claim damages for breach of these contracts together with restitution of the sums paid by way of instalments of the contract price.

15. The Claimants allege in the alternative that the Defendant's failure to complete the properties amounted to a fundamental non-performance of its obligations under the sale and purchase contract rules, Article 86 of the DIFC Contract Law No. 6 of 2004 and that by the letter of 6 October 2011 and 22 June 2011 the Claimants have accepted the Defendants conduct as terminating the contract under Article 87 of that Law. The Claimants claim as follows:

(a) a declaration that the contracts were terminated by operation of clause 11.3 or under DIFC Law No. 6 of 2004;
(b) restitution of the sums already paid by way of instalment or damages in an equivalent amount;
(c) loss of rental income from July 2009, the anticipated completion date identified in clause 4.1 of the contract, and continuing or cost of alternative accommodation;
(d) interest and costs.
The Claimants recognise that the claim for interest for the loss of use of the instalments and the claim for changes for loss of rental income or cost of alternative accommodation overlap.

16. The Defendant's case may be summarised as follows.

By a letter of 28 June 2009 the Defendant by its marketing agents, Asteco Property Management wrote to the Claimants as follows:

"**Project**: The Buildings by Daman at the Dubai International Financial Centre

Unit No(s): 12E, 29G, 42G and 44D

Subject: New Anticipated Completion Date for the Buildings by Daman

Dear Valued Customer,

Daman Real Estate Partners Limited would like to share with you the latest information with regards to the development of the Project.

Kindly be informed that we expect to complete the works and start the handover process of the Project during a six-month period beginning by the fourth quarter 2010 to the first quarter 2011. The change to the original anticipated date is due to contractor related issues, delays and insufficient material supplies which are out of our control. These developments have obliged us to revise the Project completion dates pursuant to the provisions of your sales and purchase contract.

The handover process will take place in stages and the handover dates will be communicated in due course.

We would like to express our gratitude for your patience and continued support."

By a further letter of 25 November 2010 the Defendant by Asteco Property Management, wrote to the Claimants as follows:

"**Subject**: Engagement of New Main Contractor /Revised Anticipated Completion Date

Dear Valued Customer,

As you may be aware, the Buildings By Daman has a new main construction contractor, Al Habtoor Leighton, which re-initiated the construction work on the Building during the first week of May, 2010. The mobilization and takeover of the site began immediately upon the appointment of the new contractor, which has been working on a two shift, 24/7 basis with more than 2000 people on site since mid-June.

While we are delighted that a contractor of the calibre of Al Habtoor Leighton has taken over responsibility for the completion of the Building, 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, despite our taking all measures reasonably available to us to increase the contractor's pace of work. 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 and seeking an alternative contractor capable of bringing the Project to a successful completion.

While the process of tendering for and contracting a new main contractor resulted in a suspension of work of three months, we believe that it was the only reasonable way to ensure the completion of the Project with as little overall delay as possible given the circumstances. This process is now complete and we are pleased to confirm that Al

> Habtoor Leighton's full engagement on the Project has already evidenced clear and rapid progress.
>
> 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).
>
> We currently calculate this overall delay at approximately 33 months, which will enable us to begin commencement of handover of the apartments during the end of Q4 2011 to Q1 2012. "

17. On behalf of the Defendant Mr Charles Buderi submits that the 28 June 2009 letter operated a valid notice extending the anticipated completion date to the end of the first quarter of 2010. That submission relies on the operation of both clauses 4.1 and clause 12.1 in the following manner. A notice under those two clauses does not require for its validity any particular form: it is sufficient for the purposes of clause 4.1 that the notice must be in writing and must specifically inform the buyer that the Anticipated Completion Date has been extended to a date in the future but that extension must not exceed 9 months from the current Anticipated Completion Date. Under clause 12.1 the notice must also be in writing and must indicate the nature and expected duration or effect on the Seller's performance and the period of extension must not be greater than the period of delay caused by the force majeure.
18. With regard to the 28 June 2009 letter it is submitted that, some two weeks before it was issued, the independent Engineer appointed under the construction contract between the Defendant and the Head Contractor issued a determination in respect of the Head Contractor's applications 1, 2 and 3 for an Extension of Time to the effect that he found that of the 17½ months of delay in the Contract Schedule up to that time (June 2009) approximately 15½ months had been caused by the fault of the Head Contractor. The reference in that letter to "contractor related issues, delays and insufficient Material Supplies which are out of our control" was a sufficient identification of force majeure events causing delay to satisfy the requirements of clause 12.1.
19. Further, that letter sufficiently identified the new Anticipated Completion Date by the words "we expect to complete the works and start the handover process of the Project during a six month period beginning by the fourth quarter (of) 2010 to the first quarter of 2011". The purchaser was thereby informed with sufficient certainty that the new Anticipated Completion Date would be the last date of the 6 month range, namely 31 March 2011. Any right of termination of the contract under clause 11.3 would therefore commence 12 months from 31 March 2011.
20. The total extension of the Anticipated Completion Date in consequence of the 28 June 2009 letter was therefore 20 months (31 July 2009 to 31 March 2011). Of that, according to the findings of the Engineer, 15½ months had been caused by the fault of the Head Contractor and had not justified an extension of time under the construction contract so that such period of time was available to the Defendant *vis a vis* the Claimants as a period of Force Majeure under clause 12.1. However, that in itself was therefore the maximum available extension under that clause. There was, however, no reason why the 28 June 2009 letter should not operate towards an additional extension of the time under clause 4.1 whereby there could be an additional extension of 4½ months to make up the total of 20 months extension claimed by the letter. The notice was capable of operating as a hybrid, based on both clause 12.1 to the extent of 15½ months and under clause 4.1 to the extent of 4½ months. The effect of those two clauses was not to be mutually exclusive for there might well be occasions when there was a succession of periods of delay, some caused by force majeure events and some caused by the Defendant's fault in failing to take reasonable steps to reduce the delay, whereby the aggregate of all such periods exceeded the period solely caused by the force majeure events. There was no reason why clause 4.1 should not be available to provide for those periods not covered by clause 12.1.
21. On 27 January 2010 the Defendant terminated the construction contract with the head contractor, Oger Dubai LLC, due to severe delays which the Defendant regarded to be the fault of the Contractor. The contractor made a total of seven applications to the Engineer for extension of time to the completion date (including the three to which I have already referred) totalling 749 days. At the date when the Defendant terminated the construction contract there had according to the Engineer's determinations been 718 days of delay of which the contractor was responsible for 634. It then took a further three months for the Defendant to locate and appoint a substitute contractor, Al Habtoor Leighton. After that there was a further two months' delay caused by the need to do work remedying defects in the works left by Oger Dubai. As between Oger Dubai and the Defendant there is a pending arbitration with regard to the Engineer's determinations of allowable extensions of time under the first construction contract.
22. The Defendant entered into a replacement construction contract with the new contractors on 20 April 2010. The Project Completion Date under that contract was set at 27 December 2011, some 30 months after the date originally agreed between the Defendant and Oger Dubai. Of that period the Engineers determined that 26 -27 months had been caused by the Contractor, Oger Dubai.
23. The Defendant's 25 November 2010 letter stated that, given that there had been an overall delay of approximately 33 months, they would be able "to begin commencement of handover of the apartments during the end of Q4 2011 to Q1 2012. They extended the already extended Anticipated Date of Completion from 31 March 2011 to 31 March 2012 (the last date in the range) by a period of 12 months. That extra period was roughly equivalent to the additional period of allowable delay (19 days) determined by the Engineer in May 2010 in respect of Oger Dubai's applications 4, 5 and 6 for extensions of time over and above the extensions granted by the Engineer in June 2009 (about 2 months). That left just under 12 months of force majeure delay. Hence the additional extension of 12 months, of which the Defendant gave notice under clause 12.1 by the 25 November 2010 letter. Accordingly, the Defendant had, by the two letters referred to, effectively extended the Anticipated Completion Date to 31 March 2012.
24. The Defendant takes issue with the Claimant's submission that neither of the two letters operated as an effective notice of extension because the 28 April 2010 letter referred neither to its being a notice under clause 4.1 nor under clause 12.1 and because it did not identify the force majeure events relied on and the fact that if the first letter were ineffective, the second letter which was based on the efficiency of the first letter in extending the Anticipated Completion Date, could not be effective. The Defendant submitted that there was no sustainable basis for implying a condition that to be effective a notice must specify the clause under which it was intended to operate or that the notice should specifically refer to the particular force majeure counts. The Defendant relied on the decision of the House of Lords in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co. Ltd* [1997] AC 749 and in particular two passages at page 782:

> "the standard of reference is that of the reasonable man exercising his common sense in the context and circumstances of the particular case. It is not an absolute clarity or an absolute absence of any possible ambiguity which is desiderated."

and

> ". Even if such notices under contractual rights reserved contain errors they may be valid if they are 'sufficiently clear

and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate."

25. The reader of both the 28 April 2010 letter and the 25 November 2010 email would have been in no reasonable doubt that both had the obvious purpose of extending the Anticipated Completion Date to the last day in the range primarily on the grounds of delay by the head contractor amounting to force majeure under clause 12.1. In this connection the Defendant relies on the fact, which I accept, that all the Claimants except Mrs Pugh were reasonably knowledgeable about the property market in the DIFC and had read the purchase contract. Indeed, Ms Rohan was a property agent involved in marketing certain office floors in the very same development.
26. The Defendant refutes the argument that the notices in the two letters were not sent in accordance with Article 82(3) of DIFC Contract Law No.6 of 2004 by which it is provided as follows under the heading "Force Majeure".

> "(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt."

27. The Defendant argues that there is no time limit imposed under clause 12.1 given that the latter clause supersedes the relevant provisions of Article 82. The effect of Article 11 of the Contracts Law is to cause the lack of provision of a specific time limit in clause 12.1 to displace the provisions of Article 82(3) as to the giving of a clause 12.1 notice within a reasonable time. The Defendant further submits in the alternative that both notices were given within a reasonable time after the Defendant became aware of the Engineer's decisions which disallowed the vast majority of the Contractor's applications for extensions of time on the grounds that the contractor was responsible for the periods of delay.
28. The Defendant further challenges the Claimant's position that a clause 4.1 notice can only be given once: there was nothing in that clause to preclude multiple notices provided that the aggregate of all such notices did not exceed nine months. Similarly, provided there was no double-counting of extension time caused by force majeure events, a clause 12.1 notice could also be given more than once.
29. Although Clause 14 of the contract provided as follows:

> "All notices and other communications required or permitted under this Agreement shall be given in writing and shall be personally delivered or sent by major international courier or by fax. Any notice personally delivered shall be deemed as received at the time of delivery. Any notice sent by major international courier shall be deemed as received on the date of delivery, as evidenced by the records of the courier. Any notice sent by fax shall be deemed as received on the date of transmission, as evidenced by the sender's transmission report."

and although the notice of the 25 November 2010 letter was sent by email, the Defendant submits that in view of the evidence that the Claimants did actually receive that email, the Claimants are estopped from asserting that it was sent in the wrong form. The Defendant relies on *MW Trustees Ltd v Telular Corporation* [2011] EWHC 104 (ch).

30. The argument advanced by the Claimants that any notice of extension of the Anticipated Completion Date must be issued before the pre-existing Anticipated Completion Date was misconceived. There was no basis for implying into the purchase contract such a limitation on the availability of either clause 4.1 or 12.1. Neither the common intention of the policies nor necessity to make the contract effective required such implication.

31. To the extent necessary I shall return to consider the Defendant's further submissions as to the incidence of force majeure events later in this judgment.

32. The Defendant argues that the letters of 22 June 2011 on behalf of Mr Cox and that of 6 October 2011, by which the Claimants sought to terminate the purchase contracts under the provisions of clause 11.3, were ineffective to do so. Nor, it is submitted, were the Claimants entitled to terminate pursuant to Article 86 of the Contract Law which provides as follows:

> "(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."

33. It is submitted that clause 11.3 provides a comprehensive remedy for the Defendant's failure to complete the Property and therefore displaces Article 86 by its effect of deferring the right to terminate for a further 12 months provided non-completion continues that long. By application of clause 11.3, given that the Claimants had sought to terminate the purchase contract by notices on 22 June 2010 (Mr Cox) and subsequently on 6 October 2011 (the other Claimants) those notices could only be effective if by those dates 12 months had already elapsed since Completion of the property to which each notice referred. Accordingly since the combined effect of the letters of 28 June 2009 and 25 November 2010 was as the Defendant intended, to extend the Anticipated Completion Date to 31 March 2012, both the purported notices of termination were premature and consequently ineffective because 12 months since the last Anticipated Completion Date had not yet expired.

34. As to the claims for restitution of the price instalments paid to the Defendant by the Claimant, clause 11.3 by the last sentence referred only to

a claim for "any damages, compensation or costs (the Purchaser) has incurred as a result of the Seller's breach". There being no mention of restitution, there could be no such valid claims.

35. As to the claims for damages, the Defendant says that the Claimants have not adduced evidence of sufficient probative value either of loss of rental income or of the cost of alternative accommodation.

36. The submissions made by Mr Crispin Winser on behalf of the Claimant may be summarised as follows.

37. With regard to the Defendant's letter of 28 June 2009 the Claimants submit that it is not an effective exercise of the Defendant's right to extend the Anticipated Completion Date under clause 4.1 because it makes no reference to that clause and because it does not make clear by how long the Date was being extended since it fails to identify a final date but instead identifies a range of dates. That did not provide the purchaser with an identifiable final date. Further, as a clause 4.1 notice had been given by the 28 June 2009 letter it was not open to the Defendant to give another clause 4.1 notice at a later date.

38. The notice given on 28 June 2009 was not an effective notice to extend on the ground of force majeure, because it made no express reference to force majeure, but merely referred to a vague generic description in "contractor related issues, delays and insufficient material supplies" and it gave no indication of the expected duration or effect of the force majeure event on completion..."we expect to complete the works and start the handover process of the Project during a six months period beginning by the fourth quarter 2010 to the first quarter 2011". Finally, to the extent that the Defendant relied on a force majeure event said to have been caused by the Head Contractor, the 28 June 2009 notice was not given within a reasonable time of the Defendant becoming aware of the event in question. By April 2007 at the earliest and by 17 May 2008 at the latest the Defendant knew or ought to have known of the force majeure event, that is to say the accumulating delays caused by the Head Contractor's work falling far behind schedule. Yet it was not until 28 June 2010, more than two years after the earlier date (April 2007) and some 13 months after the later date that the notice was given. That represented an unreasonable delay in giving notice to extend the Anticipated Completion Date on the grounds of force majeure. Consequently, that period of unreasonable delay could not be relied on as lost force majeure time. The Defendant had informed Mr and Mrs Pugh on 15 April 2008 that the project was on schedule. Accordingly, it was not open to the Defendant subsequently to rely on the force majeure delay which had by that date already started to accumulate to the Defendant's knowledge.

39. The Claimant submits that the Defendant's email of 25 October 2010 was ineffective to extend the Anticipated Completion Date either under clause 4.1 or clause 12.1 or by operation of a combination of both clauses. In particular, if as the Claimants submit, the letter of 28 June 2009 did not have the effect of extending the Anticipated Completion Date to 31 March (9 months after the notice) it remained unchanged at its original date of 31 July 2009 which was about 16 months before the email of 24 October 2010. It was not open to the Defendant to extend the Date after that previously fixed had passed. Even if the effect of the 28 June 2009 letter was to extend the Date by nine months to 30 April 2010, the notice would have been given nearly 7 months too late. Further, even if the 25 October 2010 email was capable of being an effective notice extending the Date, made under Clause 12.1, it could only effect such an extension for "a period of time equal to the delay in performance by the Seller caused by the force majeure event". So the Defendant had the burden of proving that Completion was delayed solely by the Head Contractor's delays for the whole period of time from 31 July 2009 (the original Date) to the date of the email (25 October 2010), otherwise it would not be open to extend the Date further because it would already have expired before the 25 October notice.

40. Finally, with regard to the notice under clause 12.1, neither the letter of 28 June 2009 nor the email of 25 October 2010 adequately or sufficiently identified the nature of the Force Majeure event or its precise extent. Even if the letter or email did adequately specify the nature and extent of the Force Majeure, the Defendant would have to prove the accuracy of that specific information before it could make good its case that a valid and effective clause 12.1 notice had been given.

Discussion

41. Before considering whether the Defendant has established the nature and extent force majeure, I shall investigate the content of the alleged notices extending the Anticipated Completion Date.

42. For this purpose, it is necessary to identify the part played by clauses 4.1 and 12.1 within the entire context of the Sale and Purchase Contracts.

43. In order for either of these two provisions to operate within the context of the contract it is necessary for the Seller to give specific notice that it is relying on either or both of them. The Purchaser has to be able to tell from the purported notice exactly which clause is being relied upon and the exact temporal effect on the Anticipated Completion Date. The reason why it is of the utmost importance that the Purchaser should know from the outset by exactly how much that Date is sought to be postponed is because he must be able to prepare in advance to occupy the apartment and therefore to know when he is likely to be able to move in and secondly because the mechanism of termination of the contract prescribed by clause 11.3 depends upon the giving of notice by the Purchaser which can only be given at the end of 12 months precisely calculated from the last identified Anticipated Completion Date. If the latter Date is not precisely known the termination procedure cannot effectively be operated. Accordingly, precision in the identification of that Date in each notice under clause 4.1 and 12.1 must be a condition of the validity of the notice. This is not a matter of the implication of a term but simply of the meaning to be given to the words of clause 4.1 ("to extend the Anticipated Completion Date unilaterally) and of clause 12.1 ("it shall notify the Purchaser in writing indicating the nature and expected duration or effect on Seller's performance" and "The Anticipated Completion Date shall be extended for a period of time equal to the delay.").

44. There was much discussion in the course of argument as to whether a notice which gave a range of dates inside which it was anticipated by the Seller Completion would take place was a sufficiently certain expression of the extended Anticipated Completion Date. The argument that it was not proceeds on the implicit basis that the Purchaser is entitled under the Contract to be notified not only of the latest date by which he is entitled to expect completion but also the date before which completion will not be effected. This is fallacious. The contractual regime does not operate on that basis. Its effect is similar to the provision of a date of shipment in a contract for the sale of goods: see for example *Charles H. Windschuegl Ltd v Alexander Picketing & Co Ltd.* [1950] 44 LI.L.Rep 89, *Agricultores Federados Argentinos v Ampro S.A.* [1965] 2 *Lloyd's Rep. 157.* Provided that delivery takes place at any time within the contractual period, it is a contractual delivery. So in this case, if, apart from any question of the extent of force majeure, a notice were issued stating that the Anticipated Completion Date would be "March 2011", the relevant Date would

therefore be 31 March 2011.

45. Although identification of the Anticipated Completion Date by reference to a range of dates is therefore permissible under both clause 4.1 and clause 12.1, it is also necessary specifically and unequivocally to indicate by the notice that Completion, as defined by the contract, of the apartment, the subject of the contract, is anticipated to take place on the date thereby identified.

46. Completion is defined as meaning "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 provisions of clause 4.2".

47. Accordingly the notice must be expressed with sufficient clarity for a reasonable recipient in the position of the Purchaser to understand with confidence what is the latest date which at the point of time of the notification the Seller anticipates that the apartment, the subject of the contract, will be substantially completed and "otherwise ready for occupation".

48. The letter of 28 June 2009 made the following statements:

(a) It was sent by reference to each of the "units" identified in the heading.
(b) The Seller then expected to complete the works in respect of the whole Project during the six months period beginning by the fourth quarter of 2010 and the (end of) the first quarter of 2011.
(c) The Seller then expected to "start the handover process" of the Project during that same period.
(d) The change to the original Anticipated Completion Date was caused by "contractor related issues, delays and insufficient material supplies out of the Seller's control".

49. The words "complete the works and start the handover process" would, in my judgment, be understood to mean that the Seller expected to give a notice under clause 4.2 by no later than 30 days before 31 March 2011 (the last day of the first quarter of 2011). The process of handover pursuant to clause 4.3 of the contract involved inspection by the Purchaser pursuant to clause 5 and payment by the Purchaser of the final instalment of the purchase price and of any other amounts due under the contract and the transfer of title under clause 6. Then to achieve both completion and the start of handover by 31 March the Seller would have to give notice under clause 4.2 at the latest 30 days before 31 March in respect of each of the apartments to which the letter of 28 June 2009 referred.

50. That was, in my view, a sufficiently clear indication to the Purchaser as to when he should expect a clause 4.2 notice.

51. That, however, is not the end of the issue as to the validity of the 28 June 2009 letter as an extension of the Anticipated Completion Date.

52. Firstly does its omission specifically to identify the clause or clauses of the contract under which it is supposed to constitute a valid extension notice render it ineffective?

53. The only indication as to which of clause 4.1 or clause 12.1 is relied upon is the overall length of time of the extension - 20 months which exceeds the 9 months extension facility under clause 4.1 and the reference to "contractor related issues, delays and insufficient material supplies which are out of our control". On the face of it the latter words suggest Force Majeure. A Purchaser reading that letter would, in my view, be entitled to assume that the Seller was relying only on clause 12.1. If a Seller intended to rely on both clause 4.1 for part of the extension time and clause 12.1 for the balance, a Purchaser could reasonably expect that the notice would specify the precise period of extension time claimed under each of clause 4.1 and clause 12.1. The Defendant having failed expressly to refer to a division of the amount of time as between clause 4.1 and clause 12.1, I conclude that the letter is to be understood as an attempt to extend the Anticipated Completion Date on the basis only of clause 12.1.

54. Clause 12.1 is very specific about the information which is required to be provided in any notification of an event of Force Majeure. The Seller is to be notified in writing "indicating the nature and expected duration or effect on Seller's performance of a Force Majeure event in question". This means that, if there is reliance on more than one event of Force Majeure, the Seller is obliged to indicate the nature of each such event, if such event is continuing how long it is expected to continue and, if it has finished, what effect it has in terms of increased net delay in the Seller's performance.

55. Thus, in the letter of 28 June 2009 the Defendant provides a vague description of three apparently distinct causes of delay: contractors' role issues which are not described, delays, the causes not being provided and insufficient material supplies. There is, however, no indication of whether any of those causes is still continuing or for how long any of them has already continued or of the amount of delay caused by each.

56. I have no doubt that this is a wholly insufficient attempt to invoke clause 12.1. Here are Purchasers each of whom has paid most of the purchase price and who are now being told that the Anticipated Completion Date is to be extended by most of two years, yet without any but the vaguest description of the circumstances which have brought about the need for extension except that they were outside the Seller's control. This is a fundamental misuse of the power of extension under clause 12.1. It is not for the Purchaser to assist the Seller to rectify these deficiencies by inviting it to provide particulars of the events or to quantify the amount of delay caused conclusively by each event. The provision of these particulars is a condition of valid notice. If they are missing, the Purchaser is entitled to treat the notice as a nullity and to proceed on the basis that the Anticipated Completion Date was not thereby extended beyond 31 July 2009. Although it would be open to the Purchaser to waive such a defect by words or conduct which unequivocally treated the notice as valid, but none of the Claimants did that.

57. As to the letter of 25 November 2010, it was sent by email some 16 months after the original Anticipated Completion Date. Like the letter of 28 June 2009, it was expressed by reference to a range of dates Q4 2011 to Q1 2012, within which it was calculated that the Defendant would be able to begin commencement of handover of the apartments. Read together with the fourth and fifth paragraphs that reference to handover shows that this purports to be notification of an extended Anticipated Completion Date. As I have indicated with reference to the letter of 28 June 2009, were this to be a valid notification of extension, its effect would be to substitute 31 March 2012 - the last day of the range as the new Anticipated Completion Date.

58. Whereas this message expressly refers in the fourth paragraph to Clauses 4.1 and 12.1 allowing the Defendant to extend the Anticipated

Completion Date, there is no indication of the extent to which reliance is placed on either provision. Although the fifth paragraph states that the overall delay is calculated at approximately 33 months, one is left to speculate as to what period is relied on as delay exclusively caused by a Force Majeure event or events and what part is an extension of the Date under the Seller's general exercise of its discretion under clause 4.1.

59. Further, although the letter refers to "persistent and uncured delays in performance by the previous contractor as having previously been brought to the Purchaser's attention by the letter of June 2009 (which, as I have already held, did not quantify the extent of contractors' delays) then goes on to state that they continued during the subsequent months of 2009 and to describe how the Defendant was forced to terminate the previous contractor's involvement so as to minimise the effect of the force majeure delays on completion thereby causing a suspension of work pending appointment of the new contractor - Al Habtoor Leighton.

60. Thus, the Purchaser having been informed that some delay up to June 2009 has been caused by the contractor, some by insufficient material supplies, some by unspecified causes and some subsequent to June 2009 by the contractor and the appointment of a new contractor, the whole adding up to 33 months, the Purchaser has been given no information as to how much delay has been caused by which force majeure event and, notwithstanding the reference to clause 4.1 how much of the extension time has been provided for under that clause 12.1.

61. Clause 12.1 requires the Seller to notify the Purchaser "if the Seller considers that an event of force majeure has occurred". These words in context contemplate either a one-off event or the entitlement of the Seller to notify in that it considers such an event to have occurred. That, in my judgment, must by implication involve a requirement that, as soon as the Seller appreciates that a force majeure event has occurred which can be expected to delay the original or existing Anticipated Completion Date, the Seller should so inform the Purchaser. Given that the 28 June 2009 letter was an ineffective clause 12.1 notification, the Defendant had delayed well beyond what was a reasonable time in informing the Claimants of the forcemMajeure event. The message of 25 November 2010 came 17 months after the earlier letter and by that time the Defendant had already known for at least a year of the head contractor's continuing failure to comply with the scheduled construction timetable as the evidence of Mr Alami, the Defendant's former project manager, clearly showed.

62. For that reason also I consider that the message of 25 November 2010 was sent many months too late to comply with clause 12.1.

63. Finally with regard to the message of 25 November 2010, whereas it specified that notification of a force majeure event must be in writing, this has to be read consistently with Clause 14, for it is clearly a "notice.. required or permitted under this Agreement". It was therefore required not only to be in writing but also to be "personally delivered or sent by major international courier or by fax". This excluded notice by email.

Was this a condition of the validity of the notice?

64. In my judgment, it clearly was. The wording of clause 14 cannot sensibly be read as simply providing for procedure, non-compliance with which would amount to a breach of the sale and purchase contract remediable only in damages. Such a construction would render the provisions nugatory: it would normally be impossible for loss to be proved as caused by failure to comply with the prescribed notification procedure. The obvious remedy for non-compliance is thus this invalidity of the notice itself. Unless that where the effect, specifying the medium of notification might just as well not be included at all: any form of writing would be sufficient.

65. In my judgment the wording of clause 14 is such that any reasonable party to the Sale Contract would have understood it to mean that, unless a notice strictly complied with the requirements of the clause, that notice would not be valid or effective: see, for example, the remarks of Lord Hoffmann in *Mannai Investment Co. Ltd v Eagle Star [1999] AC749 at p.776B.*

66. Accordingly, I conclude that, for the reasons which I have given, the Defendant at no time effectively extended the Anticipated Completion Date beyond 31 July 2009.

67. It was therefore open to the Claimants to exercise their rights of termination of the Sale Contract on 30 days' notice pursuant to clause 11.3 if Completion had not occurred within 12 months of 31 July 2009. The Claimants were further entitled upon such termination to claim against the Seller any damages, compensation or costs they had incurred as a result of the Seller's breach. By letters dated 6 October 2011 Mr Rohan and Mr and Mrs Pugh and by a letter dated 22 June 2011 Mr Cox sought to terminate the Sale Contract and to claim the return of their deposits. Both these dates being more than 12 months after 31 July 2009 and Completion not having been achieved by the dates of the letters, the Claimants validly terminated their Sale and Purchase Contracts upon the expiration of 30 days from the dates of their respective letters.

68. The Defendant further submits in relation to the message of 25 November 2011 that the Claimants are estopped from arguing that such notice was rendered ineffective because it was sent by email on the grounds that the message was received by then. This argument is advanced on the basis of the decision in *MW Trustees Ltd v Telular Corp* [2011] EH WHC 104 (ch). That was a case involving the tenant's notice to terminate a lease which was accidentally served on a person who before service had ceased to be the landlord. The person upon whom service ought to have been effected was held to be estopped from denying that he was bound by the notice because he had sent a message accepting as notice the letter addressed to the former landlord. He was thereby precluded from going back on that message. The facts of this case are quite different. The only possible basis for any such estoppel in this case would be a representation by the Claimants that they were prepared to treat the 25 November 2010 message as a valid clause 12.1 notice. But no such representation was ever made.

69. Finally, in relation to the termination letters issued on behalf of the Claimants, it is argued that they do not cover any claim for restitution of the deposits and instalments paid to the Defendant. The words of clause 11.3 do not cover restitution and, being an express contractual term, they supersede and displace any entitlement which the Claimant might otherwise have had to claim restitution under DIFC Contract Law No. 6 of 2004.

70. I cannot accept this submission. The words of clause 11.3 are clearly wide enough to cover a claim for restitution of instalments of the purchase price paid under a contract which the Purchaser has properly terminated. The word "compensation" would cover any momentary loss other than damages which would be sustained by a Purchaser upon rightful termination of the contract.

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.

73. Firstly, the meaning and effect of clause 12.1 have to be explained. The substance of this provision is to give the Defendant a qualified right to postpone the Anticipated Completion Date. It is qualified by the existence of a force majeure event or events and by the causative impact of such events on the progress of the works and in particular on the reasonable perception of the date of Completion projecting forward from the date when any clause 12.1 notice is given. However, as I have held in this judgment, the Purchaser is entitled to be given by any such notice more than mere assertion. Clause 12.1 is not a conclusive evidence claim. Specifically, he is entitled to have the force majeure event identified and he is entitled to be told how much delay such event has caused to the works so as to justify the overall extension of the Anticipated Completion Date. But is that all he is entitled to?

74. The striking feature of the operation of clause 12.1 is that, at least on the face of it, the Defendant is entitled to invoke the power to extend the Anticipated Completion Date on the basis of its say so as to the impact on the progress of the works of the alleged event of force majeure. That would seem to leave the purchaser with an entirely opaque justification for the seller's extension of time. In that case the Purchaser could only review the Seller's entitlement to extend time by commencing litigation and relying on the disclosure of the Seller's documents for in such case the Seller would ordinarily be the exclusive depository of all the relevant information and documentation. To the extent that the existence and temporal impact of force majeure events have been in issue in the present case that is the basis upon which the litigation has been conducted. In particular, counsel for the Claimants has not argued that there is an implied term of the Sale and Purchase contract that, upon the Seller's seeking to rely on Force Majeure to justify an extension of time under clause 12.1, the Purchaser is entitled to require as a condition of such extension the disclosure of primary evidence of the impact of the alleged force majeure event on the progress of the works.

75. The only basis for implying such a term would be that it would be necessary to make the contract work, there being a general principle that there is a mutual obligation to co-operate if in the mutual contemplation of the parties such co-operation could be necessary to make the contract work: see *Mona Oil Equipment & Supply Co. Ltd v Rhodesia Railway* [1949] 2 All E.R. 1014. Given that it is for the Seller to prove at least in the course of litigation that a force majeure event caused all the delay and that it could not reasonably have been prevented by the Seller, there is much to be said for the view that the mutual contemplation of the parties would be that the Seller could disclose such primary documentary evidence as it had in support of a Clause 12.1 notice.

76. However, although my provisional view is that such a term could be implied, I would not have decided this case on that ground had it been necessary to do so, in view of the fact that the point was not argued.

77. 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 effect 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.

78. In seeking to discharge the burden of proof the Defendant relied on three main sources of evidence.

79. First was the calculation by the Engineer, who had been appointed under the head construction contract between the Defendant and the head contractor, of the number of days of extension of time to which the contractor was entitled under the terms of the head construction contract as against the number of days delay claimed by the head contractor. The Defendant deployed the number of days thereby disallowed to the contractor as evidence of the number of days delay caused otherwise than by the fault or conduct of the Defendant and therefore of force majeure delay. There were, however, certain features of this evidence which called it into question.

80. First, although in the ordinary way an engineer appointed under the standard terms of the Red Book (FIDIC 4th Edition 1987 (reprinted 1992)), which otherwise applied to the construction contract, the Engineer was to act as an independent assessor on applications for extensions of time, in this construction contract it was expressly provided by an amendment to clause 2.1(b) that the engineer's awards of extensions of time had to be approved by the Defendant. This provision clearly potentially prejudiced the reliability and impartiality of the Engineer's words of extension of time. Absent evidence to the contrary, they must be presumed to have been approved by the Defendant.

81. Secondly, the Engineer's awards were issued without the underlying calculation of permissible delay. Since that calculation apparently involved considerations of the effect of non-contractor-generated concurrent delay on the net period of contractor-generated delay, it was essential that the underlying calculations should be in evidence in order to ascertain whether the Engineer's conclusions were accurate.

82. Thirdly, there is an on-going arbitration between the Defendant and the original head contractor, Oger Dubai, about which there was virtually no evidence save that it involved the head contractor challenging the Engineer's determination of the permissible extensions of time. The Defendant has not disclosed any of the documents or evidence in that arbitration. Clearly, the accuracy of the Engineer's determinations is at large as between the Defendant and Oger Dubai. Indeed, the arbitration award would not be binding as between the Claimants and the Defendant.

83. The second main source of evidence of force majeure delay relied on by the Defendant was the oral evidence of their Project Manager, Mr Al Alami. He proved to be surprisingly ignorant of the issues in the arbitration and of the calculation and analyses which underlay the Engineer's determinations. He said that he had relied on the Engineer to arrive at the right conclusions.

84. One of the most significant features of Mr Al Alami's evidence was his assessment of the incidence of accumulating delay in the course of construction. This is important in the context of the force majeure clause because, although eventually, on 14January 2010, the Engineer issued a certificate of default under clause 63.1 of the construction contract to the effect that the head contractor had failed to proceed with the works with due diligence and had failed to comply with the time for completion, on 27 January 2010 the Defendant terminated the construction contract and

began to take steps to substitute another head contractor, it had, according to Mr Al Alami, became apparent from April 2007 that delays had begun to accumulate to the effect that the Project was not going to be completed by the original Anticipated Completion Date. That raises an issue as to whether it was incumbent on the Defendant to replace the original head contractor before January 2010, a matter which was of no relevance to this Engineer's delay calculations. As early as 20 January 2009 the Engineer had certified that there was a serious lack of progress and that the rate of progress achieved had been and continued to be too slow to comply with the time for completion in the construction contract. Indeed, by 31 December 2009, some five months after the original Anticipated Completion Date, the project was still only about 40 per cent complete.

85. The third source of evidence relied upon to make good the Defendant's case on force majeure was that of its expert witness, Mr Powell. However, he was constrained to accept that, on the basis of the very limited number of documents disclosed by the Defendant, it was impossible to analyse the delays to completion and to apportion responsibility as between the Defendant and Oger Dubai. In this he agreed with Mr Moffat, the expert witness called by the Claimants. Nonetheless, his evidence showed that it was in principle unreliable to assume that the extensions granted by the Engineer to the contractor could necessarily accurately be used as the measure of extension of the Anticipated Completion Date. Mr Powell's suggestion that the two extension periods could be equated was, as he accepted, a pragmatic solution preferable to involving the relationship between the developer and the purchaser in highly complex delay calculations configured with the terms of the Sale and Purchase Contract force majeure clause.

86. The Engineer's determinations of extensions of time are certainly not contractually binding on the Claimants in the absence of any conclusive evidence clause in the Sale and Purchase Contract. Their real defects are 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 due to lack of underlying primary evidence.

87. Even if one assumes that they are accurate as far as they go, 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 Oger Dubai. The submission that the Defendant waited too long before doing so plays a key part in the Claimants' attack on the validity of the clause 12.1 notices.

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 of 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 as against the Claimants the period of extension time relied upon in its two clause 12.1 notices.

Conclusion as to Liability

89. Accordingly I have no doubt that the Claimants were entitled to give notices of termination of the Sale and Purchase Contract under clause 11.3 when they did.

90. I further hold that basic principles of restitution as reflected in the words of Clause 11.3 entitle the Claimants to recover in full all payments made to the Defendant by way of instalments under the Sale and Purchase Agreements. The amounts are: Mr Rohan: AED 3,649,512.11, Mr & Mrs Pugh: AED 3,663,216.80 and Mr Cox: AED 1,236,137.60.

Damages and Interest

91. The foundation of the Claimants' damages claim is loss of rental income/cost of alternative accommodation from one year after the original Anticipated Completion Date to the date of judgment. The Claimants accept that this is a basis of claim which "overlaps" with their claim for interest on their instalments of the purchase price from the date of payment of their instalments to judgment. The claim for damages assumes that upon the expiration of one year after the original Anticipated Completion Date, the Defendant was in breach by failure to deliver a completed apartment and seeks to compensate the Claimant Purchaser for loss of the apartments as from that date.

92. In my judgment the appropriate course in this case is not to divide the time so as to compensate the Claimants for loss of use of the apartments from the date of termination of their contracts and to give judgment for interest on instalments paid up to such date but rather for there to be judgment for the re-payment of the whole of the instalments paid to the Defendant and to award interest on that amount calculated by reference to the extent and period of time during which each Claimant was without its money from the date of payment up to the date of judgment. The rate of interest should be 8 per cent per annum simple charged for the period of time that each sum was in the hands of the Defendant. This is set out in an appendix to this judgment. This shows the amount of interest to which each of the Claimants is entitled, namely: Mr Rohan AED 1,549,388.99, Mr & Mrs Pugh: AED 1,606,118.49 and Mr Cox: AED 519,110.06.

93. That, however, might not wholly compensate the Claimants for their reasonable losses for loss of use of the apartments and to the extent that the amount of the loss of rental income from the date of termination exceeded the amount of interest awarded by this judgment. Credit would have to be given against recoverable damages for interest awarded on the instalment during that period. Unfortunately, I am unable to arrive with confidence at an accurate calculation of any such amount, if indeed, interest does not fully compensate the Claimants. I shall therefore adjourn quantification of damages pending further written submissions. The parties should provide to the Court written submissions as to the quantification of damages. These submissions should be confined to the extent, if any, by which loss of rental income for the period from the date of termination of their contracts until 31 July 2013 exceeds the interest awarded on the amount of the period instalments during the same period. Reasonable damages will also include incidental costs thrown away. Reference to such costs is made in paragraph 87.2 of the Claimant's Closing Submissions but no details have been inserted. If the Claimants wish to pursue these claims they must refer to the evidence of them.

94. There will however be immediate judgment for each of the Claimants for the amounts specifically identified in paragraphs 90 and 92 of this judgment.

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Issued by:**Natasha Bakirci**Assistant RegistrarDate of Issue: 4 August 2013At: 4pm