Claim No. CFI 001/2017

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

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

IN THE COURT OF FIRST INSTANCE

BEFORE H.E. JUSTICE OMAR AL MUHAIRI

BETWEEN

DIFC INVESTMENTS LLC

Claimant

and

MOHAMMED AKBAR MOHAMMED ZIA

Defendant

Hearing:**17 April 2017**

Counsel: Sharon Lakhan (Global Advocacy and Legal Counsel) for the Claimant

Syed Mujtaba Hussain (Emirates Legal FZE) for the Defendant

Judgment:**15 May 2017**

JUDGMENT OF H.E JUSTICE OMAR AL MUHAIRI

Before the DIFC Courts of First Instance is the Claimant, DIFC Investments LLC, a DIFC entity ("DIFCI" or the "Claimant"). The Defendant is Mohammed Akbar Mohammed Zia (the "Defendant"), an individual who entered into a number of property contracts with the Claimant. The Claimant filed a Part 8 Claim with the Court of First Instance seeking a declaration that the 72 Contracts executed by the Claimant and the Defendant dated 3 May 2015 (the "Contracts") were terminated with effect from 8 July 2015 or, in the alternative, a declaration that the Contracts are hereby terminated by the Court. The Contracts were executed in relation to the intended sale of 72 units from the Claimant to the Defendant in a development called Newbridge Hill 2, located in Motor City, Dubai with the total purchase price of AED 105,134,400.

The Claimant alleged that the Defendant failed to pay the purchase price and thus the Contracts were legally terminated, pursuant to Clause 6 of those Contracts, in July 2015. The Defendant argued that there remains a substantial dispute of fact relevant to this case, namely whether the Defendant made legally significant efforts to make payment on the Contracts, and therefore the Claimant has incorrectly filed a Claim under Part 8 when a Claim under Part 7 is instead required. The parties provided written submissions, made their arguments at a Hearing on 17 April 2017 and provided further written submissions after the Hearing.

Upon review of the parties' oral and written submissions, the Court first found that DIFC Contract Law is applicable to the dispute. As to the issue of the appropriate use of Part 8, the Court ruled that the Claimant need not file under Part 7 as there is no substantial dispute of fact relevant to this specific Claim. Instead, Part 8 procedures are appropriate. Furthermore, the Court found that the Contracts were terminated as of 8 July 2015 pursuant to the DIFC Contract Law. Thus, the Court granted the Claimant's request for a declaration that the Contracts were terminated effective 8 July 2015 and ordered the Defendant to pay the Claimant's legal costs.

Summary of Judgment

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

JUDGMENT

UPON hearing Counsel for the Claimant and Counsel for the Defendant at a hearing on 17 April 2017

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

IT IS HEREBY ORDERED THAT:

1.The Claimant's Claim is granted. The 72 Contracts executed by the Claimant and the Defendant dated 3 May 2015 were terminated with effect from 8 July 2015 pursuant to the DIFC Contract Law.

2. The Defendant shall pay the Claimant's legal costs of the claim. If not agreed, the parties shall furnish details of their costs together with short written submissions within 21 days of the date of this Judgment.

Issued by:

Natasha Bakirci

Assistant Registrar

Date of Issue: 15 May 2017

At: 4pm

REASONING

Parties

1.Before the DIFC Courts of First Instance is the Claimant, DIFC Investments LLC, a DIFC entity ("DIFCI" or the "Claimant").

2. The Defendant is Mohammed Akbar Mohammed Zia (the "Defendant"), an individual who entered into a number of property contracts with the Claimant.

Background and Procedural History

3. On 3 January 2017, the Claimant filed a Part 8 Claim with the DIFC Courts' Court of First Instance seeking a declaration that the 72 Contracts executed by the Claimant and the Defendant dated 3 May 2015 (the "Contracts") were terminated with effect from 8 July 2015 or, in the alternative, a declaration that the Contracts are hereby terminated by the Court.

4. The Contracts were executed on or about 3 May 2015 in relation to the intended sale of 72 units from the Claimant to the Defendant in a development called Newbridge Hill 2, located in Motor City, Dubai with the total purchase price of AED 105,134,400. The Contracts detailed that the Claimant agreed to sell the 72 Properties located in the Newbridge Hill 2 development (the "Properties") and the Defendant agreed to purchase the same. Each of the Contracts executed was substantively the same, except for the title deed numbers, the square footage, and the property number.

5. The total purchase price for all of the Properties was AED 105,134,400 (the "Total Purchase Price"). Pursuant to Clause 3A of the Contracts, the Defendant was required to provide a cumulative security deposit to the Claimant of 10% of the Total Purchase Price by way of cheque in the amount of AED 10,512,960 (the "Security Cheque"). The Defendant was also required to arrange for a one year irrevocable Stand By Letter of Credit (the "SBLC") to be issued to the Claimant for the Total Purchase Price on the date that the relevant No Objection Certificates (the "NOCs") were received from the developer of the Properties, pursuant to Clause 3B of the Contracts. The transfer of the Properties would take place upon the Total Purchase Price being received by the Claimant and all requirements regarding the transfer of the Properties were to be completed by 7 June 2015, as detailed in Clause 2 of the Contracts.

6. Due to delays, it became clear that the procedures would not be completed by the 7 June 2015 deadline. Thus, the parties executed an extension of this deadline to 18 June 2015 by mutual consent.

7. On 13 June 2015 the Defendant issued, via Estrategia Investimentos Bank SA, an SBLC for the Total Purchase Price in the name of his company, Emirates Moon General Trading LLC, rather than in the Claimant company's name. The Defendant also made a request of Mashreq Bank that the SBLC be transferred to DIFCI's account at Emirates NBD. On 14 June 2015, the Claimant received the NOCs and forwarded the same to the Defendant. However, the Claimant was unable to receive the funds associated with the SBLC at this time as Mashreq Bank blocked the transfer of the SBLC to the Claimant.

8. From 29 June 2015 to 7 July 2015, the Defendant sought alternative ways to transfer the funds to the Claimant's account but was not able to do so during this time period.

9. On 7 July 2015, the Defendant sent a letter to the Claimant asking for help to establish a relationship between the Claimant's and the Defendant's banks in order to facilitate payment. The letter also sought additional time to complete the payment.

10. On 8 July 2015, the Claimant sent a termination letter to the Defendant stating that he was in breach of the Contracts and thus the Claimant was entitled to terminate the Contracts and retain the Security Cheque amount (the "Termination Letter"). After this time, the Claimant considered itself no longer bound by the Contracts and such view was reiterated in correspondence to the Defendant dated 11 August 2015, 25 August 2015 and 26 August 2015.

11. During this time and after receipt of the Termination Letter, the Defendant continued to attempt to make payment on the Contracts. In a letter of 12 July 2015 to the Claimant, the Defendant requested an additional 15 days to renew the NOCs and complete payment. However, although the Defendant claims that this extension was granted (see paragraph 33 of the Defendant's Skeleton Arguments) even after he had received the Termination Letter (see paragraph 26 of the First Witness Statement of Mr Mohammad Akbar Mohammad Zia), there is no evidence that the

Claimant consented to this extension request.

12. The Defendant sent another letter to the Claimant dated 22 July 2015 detailing his additional attempts at payment and asking that the Claimant to "finish the formalities with the bank" in order to conclude the deal. The Defendant sent additional letters reiterating these points and objecting to the attempted encashment of the Security Cheque on 2 and 3 August 2015.

13. During this time, the Claimant sought to encash the Security Cheque on or about 3 August 2015, however this cheque was not honoured by the bank and was returned unpaid.

14. The Defendant nonetheless seems to have continued to attempt to make payment, issuing subsequent SBLCs on 14 and 18 August 2015 in the amounts of AED 10,512,960 and AED 107,237,088 respectively and informing the Claimant of the same via letter on 25 August 2015. However, as mentioned above, the Claimant reiterated to the Defendant via letters dated 11 August 2015, 25 August 2015 and 26 August 2015 its position that the Contracts had been terminated on 8 July 2015.

15. On 10 November 2015, the Defendant commenced proceedings in the Dubai Courts against the Claimant seeking an order for the transfer of title for the Properties to his name. This claim was dismissed by the Dubai Courts Court of First Instance for lack of jurisdiction and no appeal was filed.

16. In September 2015, the Claimant filed a criminal complaint against the Defendant for the bounced Security Cheque. The Dubai Courts Court of First Instance convicted the Defendant in this matter and sentenced him to three years in prison. The decision was upheld by the Court of Appeal.

17. The Claimant then chose to file a Part 8 Claim with the DIFC Courts seeking a declaration that the Contracts were terminated with effect from 8 July 2015 and seeking its costs in the dispute. Alternatively, the Claimant seeks a declaration that the Contracts are terminated by order of the Court. The Claimant also "reserves its right to claim compensation and/or damages from the Defendant including for the amount of the Security Deposit Cheque and/or for any other loses arising as a result of the Defendants [sic] breaches of contract."

18. The Claimant served the Claim on the Defendant and the Defendant filed an Acknowledgment of Service including his objections to the use of Part 8 procedures. Subsequent applications by both parties relevant to the service of the Claim and resulting submissions were resolved via the Order of H.E. Justice Omar Al Muhairi dated 12 April 2017 and therefore need not be addressed herein.

19. The parties provided submissions in support of their arguments and appeared for a Hearing before me on 17 April 2017. Upon my direction, both parties provided post-Hearing submissions regarding the applicable law and applicable language governing the Contracts and this dispute.

The Parties' Arguments

The Claim

20. In the Particulars of Claim, the Claimant contends that the local and federal law applicable in the Emirate of Dubai should govern this dispute. Further, the Claimant argues that the DIFC Courts have jurisdiction over this dispute pursuant to Article 5(A)(1)(a) of Dubai Law No. 12 of 2004, as amended (hereafter the "judicial authority law").

21. The Claimant's main contention is that the Defendant failed to pay the Total Purchase Price for the Properties in the timeline required by the Contracts. Therefore, as this was a breach of the Contracts, the Claimant was entitled to terminate the Contracts pursuant to Clause 6 of the Contracts and it did so via letter on 8 July 2015.

The Defendant's Submissions

22. The Defendant filed his Acknowledgment of Service on 9 February 2017, indicating his intent to defend all of the Claim and to seek a different remedy from that set out in the Claim. The Defendant seeks dismissal of the Claim under Part 8 as there is a substantial dispute regarding the facts of the case, an award of damages to the Defendant for the filing of frivolous proceedings before the DIFC Courts and deliberately concealing information relevant to the case, an award of all legal costs and expenses incurred by the Defendant in defending this claim and an award for any other relief that the Court shall deem fit. It its post-Hearing submission, the Defendant also asks for a declaration that the Claimant wrongfully presented the Security Cheque.

Use of RDC Part 8 Procedure

23. The Defendant indicated in his Acknowledgment of Service and supporting documents his intention to argue that Part 8 procedures should not be used in this case, stating that there is a substantial dispute as to the facts of the case. The Defendant alleges that the Claimant has unlawfully attempted to terminate the Contracts pursuant to Clause 6 of the Contracts as the Defendant took all actions and necessary steps to ensure that the terms of the Contracts were honoured. In spite of the Defendant's best efforts, the payment was not made on time due to circumstances beyond the Defendant's control.

24. However, the Defendant continues, being aware of the circumstances, the Claimant proceeded to unlawfully deposit the Security Cheque and the Claimant wrongfully obtained a criminal judgment against the Defendant.

25. The Defendant argues that his version of events regarding his attempted payment via SBLC to the Claimant is markedly different from the facts presented by the Claimant. The Defendant alleges that it was the Claimant's failure to cooperate with the bank that prevented timely payment. Thus, these disputes as to fact require a Part 7 Claim to be filed in order that the Defendant be allowed to submit a full Defence including evidence. In order to decide whether the Claimant has validly terminated the Contracts, the Court must assess whether the Defendant did all he could do to make payment. This is a substantial dispute of fact.

26. The Defendant argues that Part 8 procedures also prejudice him as he will not be able to file a Defence or Counterclaim and will not be able to present proper evidence of the Claimant's breach. The Defendant argues that he will not be able to initiate a claim in the DIFC Courts for wrongful encashment of the Security Cheque and that the Claimant will use any declaration received to bring another claim for damages against the Defendant. Furthermore, the Defendant argues that the Claimant has not made full and frank disclosure and has, in fact, misled the Court.

27. Finally, the Defendant argued that Part 8 procedures are inappropriate here as the Claimant has sought purely declaratory relief rather than the consequential relief that would be owed pursuant to the Claimant's arguments. The Defendant argues that the Claimant's failure to claim the Security Deposit amount was in order to avoid a higher court fee and further, no suit for mere declaration can lie without consequential relief also being claimed. The Claimant's intent is clearly to bring another claim for damages, evidenced by its explicit reservation of the right to do so, and thus this Part 8 Claim is an abuse of process. Allowing this claim will prejudice the Defendant against bringing another claim regarding the wrongful encashment of the Security Cheque.

28. In response, the Claimant argues that "there is no substantial dispute of fact relevant to the question of whether the Contracts were or should be terminated." It remains undisputed that the Contracts have not been performed and Part 8 procedures are therefore appropriate for the dispute at hand.

29. The Claimant argues that the Defendant identifies no substantial dispute of fact relevant to the remedy sought. Failure of the SBLCs and/or the relevant banks to enable the Claimant to receive payment, regardless of the reason for such failure, means that the Defendant has not fulfilled his obligations pursuant to the Contracts; he was free to explore and accomplish another method of payment and the reason for his failure to pay is irrelevant to this dispute at hand.

30. The Claimant argues that Part 8 procedures do not require that there be no dispute of fact, only no substantial dispute of fact. Smaller disputes of fact that can be dealt with at a short hearing without disclosure are appropriate for Part 8 claims. The Claimant argues that any dispute of fact that the Court deems relevant to this case would fall below this threshold and the case would remain appropriate for adjudication under Part 8 procedures.

31. As to the argument that the Claimant cannot seek only a declaration, but must also seek consequential relief, the Claimant points to Article 37 of the DIFC Law No. 7 of 2005 on Damages and Remedies which states that "The Court may make binding declarations on points of law or fact whether or not any other remedy is claimed." A declaration in this case has a useful purpose for the Claimant in rectifying any uncertainty in ownership of the Properties.

32. As to the claimed prejudice felt by the Defendant in the use of Part 8 procedures, the Claimant contends that there is nothing to prevent the Defendant from bringing a claim as to the other issues mentioned in his submissions, especially as regards any *mala fide* intent of the Claimant, wrongful encashment of the Security Cheque, or wrongful/frivolous proceedings in any court. However, it is clear that the Claimant has not misled the Court and the Defendant's claims for damages have no basis.

33. The Claimant argues that there is no limitation of Defence or Counterclaim on the Defendant. The Defendant has not presented what portion of the Part 7 procedures he would seek to use in order to further make his case and avoid alleged prejudice.

34. Finally, the Claimant contends that should the Court find that the use of Part 8 procedures is inappropriate in this case, the consequence of such a finding would be "to continue as if the claimant had not used the Part 8 procedure" pursuant to RDC 8.4. The Court should not dismiss the claim, as the Defendant requests.

Termination of the Contracts

35. The Claimant argues that the only material facts relevant to adjudication of this dispute are that the parties entered into the 72 Contracts, Clause 2 of the Contracts required transfer of title upon receipt of the Total Purchase Price, and the Defendant did not and has not paid the Total Purchase Price to the Claimant. Thus, the Contracts were not performed. These limited material facts are not disputed.

36. The Claimant claims that, based on the above material facts, the DIFC Courts should declare that the Contracts were cancelled with effect as of 8 July 2015 or the Contracts shall be cancelled by Court order.

37. The Claimant cites Clause 6 of the Contracts, which states:

> `In the event that the "buyer" fails to pay the payments as agreed date in clause (3) or fails to complete the transfer on the agreed dated due to his own act or omissions, then the "seller" has the right to terminate this contract, and he shall be entitled to retain the deposit, as long as the termination of the contraction was due to violation of the agreed terms, unless they agree amicably to different terms or dates.'

38. The Claimant's main argument is that, upon interpretation of the above-mentioned Clause 6, it is clear that the Claimant's right to terminate the Contracts is based on either the Defendant's failure to pay or a failure to complete transfer due to his own act or omission. Thus, the phrase "due to his own act or omission" only modifies the failure to transfer criteria in Clause 6. These are two separate criteria for termination of the Contracts and the Defendant's undisputed failure to pay the Total Purchase Price qualifies the Claimant to terminate the Contracts pursuant to Clause 6.

39. The Claimant also argues that even if there is no contractual basis for the Claimant to terminate the Contracts, they can be terminated upon Court order, pursuant to the UAE Civil Code.

40. The Defendant takes a different view of the proper interpretation of Clause 6 of the Contracts, stating that the phrase "due to his own act or omission" modifies both of the criteria for termination: non-payment and non-transfer. The Defendant goes on to state that termination of the Contracts pursuant to Clause 6 must be due to a "violation" of the agreed terms by the Defendant, i.e. an act or omission which is intentional and deliberate.

41. The Defendant argues that the Claimant admits that the Defendant's non-payment was not a result of any "act or omission" of the Defendant.

This being the case, the Defendant has not breached the Contracts and in fact did all he could to make payment pursuant to the Contracts.

Applicable Law and Language

42. At the Hearing, I asked the parties to make post-Hearing submissions regarding their arguments towards the appropriate and applicable law to govern the Contracts and the prevailing language in which the Court should assess the Contracts.

43. The Claimant pointed to Clause 17 of the Contracts, which states "This contract is governed by and shall be construed in accordance with the local and federal laws applicable within the Emirate of Dubai." The Claimant argued that this clause makes clear that it is UAE and Dubai Law, not DIFC Law, that will be applicable to the Contracts.

44. The Claimant argues that Article 3 of Federal Law No. 8 of 2004, which states that the DIFC "shall also be subject to all Federal laws, with the exception of Federal civil and commercial laws," supports this argument as the Contracts do not relate to "Financial Activities" as defined in Law No. 8 of 2004.

45. Furthermore, the Claimant argues that Articles 8, 14 and 15 of the DIFC Law No. 10 of 2005 relating to the Application of the DIFC Laws support its arguments. As the Contracts pertain to the sale and purchase of real property located outside of the DIFC, such contract relating to the transfer of interests in that property must be governed by the laws of onshore Dubai, including the UAE Civil Code, rather than DIFC Law.

46. Additionally, DIFC Law No. 3 of 2004 regarding the Application of Civil and Commercial Laws in the DIFC supports this argument in Articles 7 and 8, which make clear that parties in the DIFC are free to adopt the civil and commercial laws of other jurisdictions. Pursuant to the waterfall provision found in Article 10 of DIFC Law No. 3 of 2004, the parties' choice of UAE local and Federal Law must be honoured.

47. However, the Claimant argues, should DIFC Law be found to be the applicable law, the Claimant was still entitled to terminate the Contracts due to the Defendant's breach, pursuant to Article 86 of the DIFC Contract Law No. 6 of 2004 as non-payment would qualify as a "fundamental non-performance" under the terms of that provision.

48. The Defendant disagreed with the Claimant's position on the application of UAE Federal Law and instead argued that the DIFC Courts are required to apply the DIFC Law No. 6 of 2004 (the "DIFC Contract Law") to the current case. The Defendant cited a number of previous DIFC Courts cases which state that the UAE Federal Civil Code is not applicable within the DIFC. Therefore, any relief granted in this case must be pursuant to the DIFC Contract Law, rather than the UAE Civil Code.

49. The Defendant submits that if, as the Claimant argues, the UAE Civil Code applies pursuant to Articles 14 and 15 of the DIFC Law No. 10 of 2005, then the Dubai Courts are the appropriate courts to adjudicate this dispute. However, the Defendant argues that the parties have opted-in to the jurisdiction of the DIFC Courts and as this case requires the examination of the Contracts, it must be based upon the DIFC Contract Law.

50. In its post-Hearing submission, the Defendant stated that he "reserves its right to raise the issue that, if the Court where the property is situated has jurisdiction to determine matters relating to such property, then the Claimant cannot bring a claim under Part 8 and/or under Part 7 before the DIFC Courts, on account of lack of jurisdiction."

51. The Defendant did not address the argument that the parties have chosen UAE Federal Law in the governing law Clause of the Contracts. Instead, the Defendant argued that pursuant to Articles 77, 78, 80, 82 and 86 of the DIFC Contract Law, the Claimant cannot succeed.

52. As to the applicable language of the Contracts, the Claimant acknowledges that the Contracts were prepared in both Arabic and English by the Government of Dubai Lands Department. Thus, the original and official language of the Contracts is Arabic, supported by Clause 19 of the Contracts, which reads "In case of discrepancy occurs between Arabic and English texts with regards to the interpretation of this contract or the scope of its application, the Arabic text shall prevail." This Clause 19 makes it clear that the intention of the parties was for the Arabic version of the Contracts to prevail. The Claimant argues that this finding is supported under both UAE Federal Law and DIFC Law, whichever shall be deemed to apply to the Contracts.

53. The Defendant points out that both parties have relied upon the English version of the Contracts in these proceedings. Furthermore, the Defendant points out that the Claimant has not relied upon any alleged "variance" between the Arabic and English versions of the Contracts and as such, any potential variance is not material to the dispute. In fact, there is no variance between the Arabic and English versions of Clause 6 of the Contracts and thus this issue need not be assessed by the Court. As both parties have thus far relied upon the English version of Clause 6 and as there is no pleading of variance between the Arabic and English versions of the Clause, the DIFC Courts should interpret the Clause using the English version.

Discussion

Jurisdiction

54. The Claimant has argued that the DIFC Courts have jurisdiction over this dispute pursuant to Article 5(A)(1)(a) of the Judicial Authority Law as the Claimant is a DIFC Establishment. The Defendant has not sought to dispute this point or otherwise contest the jurisdiction of the DIFC Courts.

55. However, the Defendant did state in his post-Hearing submissions that he "reserves its right to raise the issue that, if the Court where the property is situated has jurisdiction to determine matters relating to such property, then the Claimant cannot bring a claim under Part 8 and/or under Part 7 before the DIFC Courts, on account of lack of jurisdiction."

56. Regardless, the Defendant has not contested jurisdiction and therefore no assessment of the same is necessary at this time.

Applicable Law and Language

57. The Contracts relevant to this dispute state at Clause 17 that "This Contract is governed by and shall be construed in accordance with the local and federal laws applicable within the Emirate of Dubai." While the Claimant argues that this Clause refers to Dubai law and UAE Federal Law, the Defendant contends that DIFC Law should instead apply to this dispute. I agree with the Defendant that DIFC Law is applicable to this dispute for the following reasons.

58. First, Part 3 of the DIFC Law Relating to the Application of DIFC Laws (DIFC Law No. 10 of 2005, as amended) is instructive. Articles 8 and 9 of that law state:

> "8. Governing law
>
> The existence, validity, effect, interpretation and performance of a contract, or any term thereof, including any requirements as to formality, shall be determined by the law which governs it.
>
> 9. Effectiveness of express choice of governing law
>
> An express choice of a governing law in a contract shall be effective against all persons affected thereby."

59. The above-mentioned provisions of the DIFC Law Relating to the Application of DIFC Laws, in combination with Clause 17 of the Contracts, determine that DIFC Law shall govern the Contracts and this dispute. The Claimant would reiterate two of its own arguments against this finding, both of which I will address.

60. First, the Claimant argues that the phrase "local and federal laws applicable within the Emirate of Dubai" contained within Clause 17 refers to on-shore UAE and Dubai law, not DIFC Law. The Claimant states that "The law stated to govern the Contracts is UAE local and Federal Law, as applicable in Dubai which by its nature is not DIFC law, DIFC laws being Dubai laws." However, this is unconvincing considering that DIFC Law is local law applicable within the Emirate of Dubai, specifically within the DIFC.

61. While the Claimant is correct that parties would be free to select UAE Civil and Commercial law to govern its commercial contracts, this is not what has happened here. The parties have selected a governing law of the "local and federal laws applicable within the Emirate of Dubai" which includes DIFC Law. Furthermore, the Claimant is a DIFC entity which has chosen to bring its case in the DIFC Courts.

62. Second, the Claimant seems to argue that Articles 14 and 15 of the DIFC Law Relating to the Application of DIFC Laws would overrule the selection of DIFC Law pursuant to Clause 17 of the Contracts. Articles 14 and 15 state:

> "14. Law governing rights in property
>
> Subject to Article 16, the law of the jurisdiction where property is located governs:
>
> (a) the classification of the property as real property or personal property; and
>
> (b) the validity and extent of interests in the property.
>
> 15. Law governing validity of transfer of property
>
> (1) Subject to Article 16, the law of the jurisdiction where property is located governs:
>
> (a) ��the validity of transfer of property;
>
> (b) ��the effect on the proprietary rights of the parties thereto and of those claiming under them in respect thereof. . . "

63. The Claimant argues that the above cited provisions require that the law of the jurisdiction where the Properties are located governs this dispute. The Claimant argues that Articles 14 and 15 require that "any contract relating to the transfer of interests in [property located in onshore Dubai] must necessarily be governed by the laws of onshore Dubai and the UAE, including the UAE Civil Code."

64. However, this is an expansive reading of Articles 14 and 15. This case deals with neither the "classification of property as real property or personal property" nor the "validity and extent of interests in the property" as the Claimant seeks only a declaration as to the termination of the Contracts, not a declaration as to any interests in the Property. While the termination of the Contracts may seem intertwined with an assessment of the "validity and extent" of the Defendant's interests in the Properties, it is not the Claimant or the Defendant's position that the Defendant has any legal interest in the Properties and no assessment of any interests in the Properties is necessary to adjudicate this dispute.

65. Furthermore, there is no question of the validity of a transfer of the Properties as it is agreed that the Properties have yet to be and will not be transferred and there is no issue of proprietary rights relevant to the case. Thus, for the reasoning detailed above, the applicable law to the Contracts and this dispute is DIFC Law, more specifically the DIFC Contract Law.

66. As to the applicable prevailing language relevant to the Contracts, the Defendant's point that neither party asserts a discrepancy between the Arabic and English versions of the Contracts is well-taken. After being given additional time to file submissions regarding the prevailing language, neither party has pleaded a discrepancy. As no discrepancy is pleaded, I will continue to assess the Contracts in English, which is the version that both parties have relied upon thus far in their submissions.

Use of RDC Part 8 Procedure

67. According to Rule 8.1 of the Rules of the DIFC Courts ("RDC"):

> "8.1 A Claimant may use Part 8 procedure where:

(1) he seeks the Court's decision on a question which is unlikely to involve a substantial dispute of fact; or

(2) a Rule or Practice Direction in relation to a specified type of proceedings requires or permits the use of Part 8 procedure."

68. The Claimant contends that there is no substantial dispute of fact relevant to a determination in this case while the Defendant alleges that Part 8 procedures are inappropriate in this case for a number of reasons, mainly considering that the Defendant believes there to be a substantial dispute of fact necessary for determination in order to properly adjudicate the dispute. However, I disagree with the Defendant's assessment that there is a "substantial dispute of fact" involved in this case.

69. The relevant facts as detailed in the section entitled "Background and Procedural History" above are agreed by the parties in their submissions, except for the Defendant's claim that his request for an extension of time detailed in his letter of 12 July 2015 was granted (see Defendant's Skeleton Arguments, paragraph 33). However, the Defendant provides no evidence that this extension was mutually agreed between the parties and thus, this discrepancy is a minor one that can easily be dismissed as per the Claimant's letters of 8 July 2015, 11 August 2015, 25 August 2015 and 26 August 2015 detailing that the Contracts would be treated as terminated by the Claimant. No extension beyond 18 June 2015 was explicitly granted.

70. In my assessment, there are three issues of a purely legal nature that must be determined in this case. First and second, as detailed above, are the applicable law and language to govern the Contracts at issue in the case. Third, there is the question of whether the Contracts can be or were validly terminated upon an assessment of law and an application of the agreed upon facts detailed above in "Background and Procedural History." There is no substantial dispute of fact relevant to the dispute.

71. Whether the Defendant made "best efforts" to complete payment, whether the Claimant prevented payment after 18 June 2015, or whether the Claimant wrongfully deposited the Security Cheque are not relevant to the dispute at hand.

72. The Defendant's other arguments against the use of Part 8 procedures cannot succeed. The Defendant argues that Part 8 procedures prejudice him as he will not be able to file a Defence or Counterclaim, he will not be able to present proper evidence of the Claimant's breach, and he will not be able to initiate a claim in the DIFC Courts for wrongful encashment of the Security Cheque. The Defendant provides no support for these claims. While RDC 8.6(1) does state that the defendant in a Part 8 claim "is not required to file a defence" there is no prohibition on the filing of a Defence and the Defendant has neither filed an application for clarity on this point nor attempted to file a Defence.

73. RDC 8.37 states that "Where Part 8 procedure is used, Part 21 (counterclaims and other additional claims) applies except that a party may not make an additional claim (as defined by Rule 21.2) without the Court's permission." The Defendant is therefore not prevented from bringing a Counterclaim in a Part 8 Claim and has not attempted to do so. While the Defendant has requested an award of damages for the Claimant's alleged frivolous proceedings and alleged withholding of material facts, he has not filed any claims regarding the alleged wrongful encashment of the Security Cheque and I can see nothing preventing the Defendant from having done so in these proceedings or otherwise, should he desire. The Defendant's informal request for a declaration that the Security Cheque was wrongfully encashed (see paragraph 38 of the Defendant's Submission Relating to the Applicable Law and the Prevailing Language of Contract) was not filed via formal Counterclaim and therefore shall not be addressed in this Judgment.

74. Furthermore, all of the filings made by the Defendant have been accepted into the Court file and the Defendant has not detailed how he has been prevented from presenting proper evidence or what further evidence he requires to make his case.

75. As to the Defendant's argument regarding abuse of process, that the Claimant clearly intends to use any declaration received in this case to bring a subsequent claim against him, this is hypothetical. Any application of *res judicata* to findings made in this case is an issue properly addressed in any subsequent proceedings brought by either party relevant to the same facts.

76. Furthermore, the Defendant argues that the Claimant has not made full and frank disclosure and has, in fact, misled the Court and should be subject to damages for the same. I find that the Defendant has provided no convincing evidence in support of this claim.

77. Therefore, I find that the Defendant's objections to the use of Part 8 procedure in this case fail and the case shall proceed for adjudication based on the written and oral submissions of the parties received thus far.

Termination of the Contracts

78. To reiterate, Clause 6 of the Contracts states:

> `In the event that the "buyer" fails to pay the payments as agreed date in clause (3) or fails to complete the transfer on the agreed dated due to his own act or omissions, then the "seller" has the right to terminate this contract, and he shall be entitled to retain the deposit, as long as the termination of the contraction was due to violation of the agreed terms, unless they agree amicably to different terms or dates.'

79. The main issue of termination pursuant to Clause 6 of the Contracts comes down to a difference of interpretation. The Claimant alleges that the modifying phrase "due to his own act or omission" only applies to the criteria relevant to transfer rather than the first criteria relevant to non-payment. The Defendant alleges that the modifying phrase applies equally to both criteria and further alleges that his non-payment is not due to his own act or omission but was beyond his control.

80. Given the applicability of the DIFC Contract Law and given that the Claimant seeks only a declaration that the Contracts were terminated either on 8 July 2015 or now, I find it unnecessary to resolve the parties' disagreement on the interpretation of Clause 6. Instead, I find that the Contracts were terminated on 8 July 2015 pursuant to Articles 77, 80, 81, 82, 83, 86, 87 and 89 of the DIFC Contract Law.

81. Article 77 of the DIFC Contract Law defines "Non-performance" as a "failure by a party to perform any one or more of its obligations under the contract, including defective performance or late performance." I find that the Defendant's failure to make payment by the extended due date of 18 June 2015 qualifies as "non-performance" under the DIFC Contract Law, regardless of the reason for his failure to perform. The Defendant

argues that "mere non-performance without any fault on part of the Defendant does not amount to a `breach' within the meaning of the DIFC Contract Law" however, the DIFC Contract Law is written in terms of "non-performance" rather than "breach." There is no need to determine whether there is a breach, only whether there is non-performance as defined by Article 77. In this case, the Defendant's failure to pay qualifies as non-performance.

82. The Defendant argues that the Claimant was required to serve notice upon the Defendant and offer a curing period to remedy any non-performance. This is an expanded reading of the requirements of the DIFC Contract Law. Articles 80, 86, 87 and 89 of the DIFC Contract Law state:

"80. Cure by non-performing party

(1) The non-performaing party may, at its own expense, cure any non-performance, provided that:

(a) without undue delay, it gives notice indicating the proposed manner and timing of the cure;

(b) cure is appropriate in the circumstances;

(c) the aggrieved party has no legitimate interest in refusing cure; and

(d) cure is effected promptly.

(2) The right to cure is not precluded by notice of termination.

. . .

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.

. . .

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 nto 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 non-conforming performance.

. . .

89. Effects of termination in general

(1) Termination of the contact releases both parties from their obligation to effect and to receive future performance.

(2) Termination does not preclude a claim for damages for non-performance.

(3) Termination does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination."

83. Pursuant to Article 80, the Defendant "may" cure his non-performance, provided that the "cure is appropriate in the circumstances" and provided that the Claimant "has no legitimate interest in refusing cure." However, the Contracts contemplate a sale and transfer on a specific date, which could only be extended by mutual consent of the parties. This is the essence of the Contracts. The Claimant no longer wanted to extend the date and thus, any additional time for cure would be inappropriate in the circumstances. The Claimant had a legitimate interest in seeking to prevent further delay and to stick to the expressed terms of the Contracts requiring performance on a certain day. Thus, Article 80 is not applicable in the circumstances.

84.Under Article 86, the Defendant's failure to pay by the agreed date amounts to a "fundamental non-performance" considering that the essence of the Contracts was to receive payment in exchange for the Properties. Strict compliance with the payment and transfer terms, unless mutually agreed otherwise, was the entire point of the Contracts to effect sale. Therefore, as the Defendant's non-payment qualified as a "fundamental non-performance" under Article 86(2), the Claimant was entitled to terminate the Contracts pursuant to Article 86(1).

85. Furthermore, pursuant to Article 87, the Claimant sent notice of its intention to terminate the Contracts on 8 July 2015. This is not disputed by either party. The First Witness Statement of the Defendant, Mohammad Akbar Mohammad Zia, at paragraph 26 states that he received "a letter from the Claimant on 8 July 2015" which informed that the Claimant was "exercising [its] right as per Clause 6 of the Contracts to terminate the Contracts and encash the Security Cheque that was currently held with the broker." While I make no comment at this time as to whether the Claimant has properly exercised any right under Clause 6 of the Contracts, the 8 July 2015 Termination Letter acts as valid notice of termination under Article 87. It was sent promptly and it was admittedly received. Furthermore, it was reiterated in the Claimant's further correspondence.

86. Thus, pursuant to Articles 86 and 87, the Claimant validly terminated the Contracts on 8 July 2015 as a result of the Defendant's fundamental non-performance, regardless of whether such non-performance was of his own act or omission or not.

87. The Defendant's brief mention that the acts of the bank "frustrated" the Contracts has not been fully pleaded. However, I will assess whether the acts of the bank in blocking transfer of the SBLC to the Claimant's name before the agreed upon due date acted as a "force majeure." Article 82 of the DIFC Contract Law states:

> "82. Force majeure
>
> (1) Except with respect to a mere obligation to pay, non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
>
> (2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on performance of the contract.
>
> (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.
>
> (4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due."

88. Significantly, the section applicable to force majeure starts with the phrase "Except with respect to a mere obligation to pay." Although Clause 3B includes specific terms as to method of payment, it amounts to a mere obligation to pay by a specific date. Furthermore, even if the bank's actions count as a force majeure, the Claimant is entitled under Article 82(4) of the DIFC Contract Law to exercise its right to terminate the contract, should it have one, and it did pursuant to Articles 86 and 87.

89. Therefore, regardless of whether the acts of the bank amounted to force majeure, regardless of whether the Defendant's failure to pay was due to his own act or omission, and regardless of the proper interpretation of Clause 6 of the Contracts, the Claimant was entitled to terminate the Contracts pursuant to the DIFC Contract Law and did so accordingly.

Costs

90. The Defendant shall pay the Claimant's legal costs of the claim. If not agreed, the parties shall furnish details of their costs together with short written submissions within 21 days of the date of this Judgment.

Issued by:

Natasha Bakirci

Assistant Registrar

Date of Issue: 15 May 2017

At: 4pm