Claim No. CA-009-2018

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF APPEAL

BETWEEN

VTJ LIMITED

Appellant

and

MOHAMMED AMMAR AL HASSAN

Respondent

ORDER WITH REASONS OF H.E. JUSTICE OMAR AL MUHAIRI

UPON reviewing the Respondent's Application No. CA-009-2019/1 dated 13 February 2019 seeking permission to apply to reopen its appeal against the Judgment of H.E. Justice Shamlan Al Sawalehi dated 31 May 2018

AND UPON the Judgment of the Court of Appeal dated 6 November 2018

AND IN ACCORDANCE WITH Part 44 of the Rules of the DIFC Courts ("RDC")

IT IS HEREBY ORDERED THAT:

1.Permission to reopen the determination of the original appeal is refused as the requirements in RDC 44.154 have not been met.

2. There shall be no order as to costs.

Issued by:

Ayesha Bin Kalban

Assistant Registrar

Date of Issue: 29 April 2019

At: 9am

SCHEDULE OF REASONS

Summary

1.Before this Court is an application put forth by the Respondent for permission to apply to reopen its appeal against the Judgment of H.E. Justice Shamlan Al Sawalehi dated 31 May 2018 (the "CFI Judgment").

2. The appeal against the CFI Judgment was refused by Justice Sir Jeremey Cooke on 6 November 2018 (the "Appeal Judgment").

3. As per RDC 44.154, this Court can only reopen a final determination of an appeal under very specific grounds:

i) if it necessary to do so in order to avoid real injustice;

ii) if the circumstances are exceptional and make it appropriate to reopen the appeal; and

iii) if there is no alternative effective remedy.

4. On the evidence before this Court, permission to reopen the original appeal is refused.

5. I find that the requirements in RDC 44.154 have not been met by the Respondent. The logical and legal reasoning of my Judgment are set out in full below.

Background

6. The dispute between the parties concerns the claim for a specific performance of an alleged contract for the sale of a residential unit in Parks Tower Development in the DIFC (the "Unit"). The Appellant is an offshore company established pursuant to the regulations of the Jebel Ali Freezone whose registered shareholders and directors are father and son, Mr Tommaso and Mr Angelo Ambrosio, respectively. The Respondent is a Syrian national named Mr Mohd Ammar Al Hassan residing in Dubai who purchased the Unit from Damac Park Towers Company Limited (

"Damac") under an Agreement to Sell dated 29 March 2012 (the "Damac Agreement").

7. It is neither necessary nor required to reproduce the entirety of the dispute details here, however the reproduction of key dates and sums is useful as it provides a chronological overview and context to this case.

8. The original May 2012 agreement with Damac stipulated that a sum of AED 1,410,000 to be paid for the purchase of the Unit, payable by installments, expressed in percentages of the total price. Payments were due for a period commencing from the execution of the agreement (i.e. 29 May 2012); thereafter in 4 further installments on fixed dates, the last of which was 15 September 2012.

9. As evidenced by the paperwork filed with the Court, full payment for the Unit was made, although not in accordance with the dates set out in the Damac Agreement, due to various delays in the completion of the building and the payments. Consequently, penalties accrued but these were duly paid on 22 April 2013, as evidenced by the Damac Payment Clearance Certificate of that date.

10. On the Appellant's account, three weeks following the conclusion of the Damac Agreement, the parties entered into a Memorandum of Understanding (MOU) dated 19 April 2012. This MOU, according to the Appellant, set out payments with slightly higher percentages, varying by 2 and 6 weeks as set out in the Damac Agreement, and with a higher total sum for the Unit of AED 1,867,750. It is the Appellant's case that there were no other units in the sought-after development at that time, and thus the Defendant was willing to take the profit of the sub-sale.

11. On the Respondent's case, the MOU is a fabrication and the signature thereto is a forgery. The Respondent maintained in his pleadings and at trial that he knew nothing of any sub-sale. The Defendant denied the entirety of the claim that an MOU existed between the parties, and 6 months after the proceedings commenced in the DIFC Courts filed a criminal complaint against the Appellant for such fabrication and forgery. However, the Dubai Police rejected the case as there was no original version of any MOU filed. Nevertheless, the Respondent maintains that all payments for the Unit were made to Damac on his behalf, as evidenced by Alyans/Ciro which referred to him as the purchaser, and that he knew nothing about third-party cheques used to pay Damac.

12. Though the history of the dispute between the parties is certainly more complex than that reproduced above, this brief overview gives an essence of the substance of the issues before the Court at the original Appeal hearing.

13. Three fundamental questions for resolution which arose for the trail were as follows:

i) Was the MOU, allegedly signed by the Respondent in the presence of Ciro, genuine?

ii) For whom was Ciro/Alyans acting when making payments to Damac?

iii) Who had provided funds to Ciro for onward transmission to Damac?

These questions were addressed at trial, where Counsel for both parties had the opportunity to put their respective parties' case forth.

The CFI Judgment

14. The CFI Judgment dismissed the claim as the learned Judge found that the Appellant (then Claimant) had made no convincing case that it indeed was responsible for the payments made by Ciro to Damac. The burden of proof rested upon the Appellant and it had not proved its claim. The learned judge stated that because the payments were not in keeping with those set out in the MOU, the validity of the MOU was indeed subject to question.

15. The learned Judge was not convinced by either parties' submissions, and furthermore was not convinced that any MOU was a valid binding agreement. He accepted that "there was some understanding that the Claimant would buy the Unit from the Defendant and that Alyans Real Estate would act as the agent in this transaction" but stated he was not persuaded by Mr Ciro Arianna's evidence as nothing in writing before the Court showed that the payments had been made to Damac on behalf of the Appellant as opposed to the Respondent.

Appeal Judgment

16. Upon reviewing the Appellant's Appeal Notice seeking permission to appeal the aforementioned the CFI Judgment, and after considering submissions put forth at the hearing on 28 September 2018, on 6 November 2018 the Court of Appeal ordered the following:

i) that the Appellant (then Claimant) had complied with all its obligations under the MOU and that it is the sole legal beneficial owner of the Unit; and

ii) that the Respondent does not have any interest in the Unit.

17. Upon examining the entirety of the evidence, the Court of Appeal found that there was no such evidence before the Court to justify the CFI finding of fraud. It is stated at paragraph 8 of the Appeal Judgment: "[i]t is [.] trite law that fraud must be distinctly and distinctly proved and in the absence of such proof, it is not open to the Judge to make a finding of fraud". Furthermore, at paragraph 18 of the Appeal Judgment, the learned Judge finds that whilst there was clearly a shortage of documentary evidence, `[t]he paucity of documents does not assist the Court but does not detract from his evidence, and there are enough documents to show the essence of the version of events put forward by Ciro' (my emphasis) to come to the conclusion that the Respondent's version of events is not plausible, and the Claimant is correct.

18. Furthermore, at paragraph 25 of the Appeal Judgment, Justice Sir Jeremey Cooke found:

"the evidence that was presented, in our judgment, can only lead to one conclusion. To deny the claim and the counterclaim of the basis of absence of proof is wholly unsatisfactory and a last resort for a court whose function is to determine, on a balance of probabilities, where the truth lies, on the evidence put before it. A close examination of the evidence that was adducted leads to the conclusion that the MOU was binding, that it was varied to provide for direct payments to Damac by the Claimant and that such payments were in fact made. In those

circumstances, the judge's conclusions were against the weight of the evidence and the appeal must succeed."

19. Therefore, the Court of Appeal ruled in favor of the Claimant. The requirements for the appeal were indeed met, as the Claimant had shown that the decision of the learned judge in the CFI Judgment was wrong, and that, notwithstanding the lack of evidence before the Court, that in fact the Defendant's version of events was improbable, whilst the Claimant's case was correct.

20. After re-considering the CFI Judgment and indeed in re-reading and reviewing the case file, my judgment remains the same. My findings stay in line of that with the Court of Appeal. Ultimately, enough documents were put before the Court which showed the essence of the version of events put forward by Ciro. From meticulous examination of the evidence once can we can see that the MOU was binding, that it was varied to provide for direct payments to Damac, and that such payments were in fact made. In those circumstances, the learned judge's conclusions were indeed against the weight of the evidence.

The Proposed Appeal

21. On the 13 February 2019, the Defendant filed an Application Notice seeking permission to re-open the Appeal. Pursuant to RDC 44.154 the Respondent states the following grounds;

i) "The final judgement of the Court of Appeal if enforced would occasion real injustice to the Applicant/Respondent within the meaning of RDC 44.154";

ii) "The circumstances surrounding the MOU and this application are so exceptional to make it appropriate to open this appeal";

iii) "No alternative remedy available".

22. The three main grounds are elaborated in full within the 15 pages of the Defendant's Application; in short, they are as follows:

Ground 1

It is the Respondent's case that if the Appeal Judgment was enforced it would occasion real gross injustice. "The judgement of the Court of Appeal dated 06th November 2018 clearly disentitles the Applicant from any interest whatsoever in Unit DFR/P4/30 on the basis of the purported MOU dated 19th April 2012. The said MOU is undoubtedly forged or at least questionable." The Defendant continues to put forward the case that it is a victim of forgery and the MOU is entirely fabricated. An Expert Report is provided by the Respondent by Arab Lab for Technical Inspection supporting this claim, alongside further discussion of the testimony of Mr Ciro Arianna. The entirety of this first ground of appeal revolves solely around the alleged injustice suffered, and the apparent new evidence of the Expert Report.

Ground 2

The second ground of appeal, on the Respondent's account, is that the circumstances surrounding the MOU are so exceptional it is deemed necessary and indeed appropriate to re-open the Appeal. In reference to this second ground of appeal, the Respondent highlights alleged inconsistencies in Mr Ciro Arianna's submissions to the Court, as well as underscoring the alleged inconsistences within the witness statement of Mr Tomassos Ambrosio. It is the Respondent's case, as per paragraph 32, that `[t]he question needs to be asked [.] whether Ciro Arianna was acting fairly in the best interests of the respective parties'. The Defendant states that new evidence has come to light; that there were in fact at least three other Units available for sale within the Park Towers Development area, and that this signals the invalidity of the account of Mr Ciro Arianna. The Respondent further refers to the lack of email correspondence presenting by Mr Ciro Arianna to the Court, and the absence of `evidentiary proof of funds ever transferred from the C/A to Ciro Arianna', as per paragraph 35 of the appeal document.

Ground 3

The third and final ground of appeal refers simply to the alleged lack of an alternative ground for appeal. The Respondent makes reference to two previous Real Estate cases in the DIFC whereby permission to re-open an Appeal was granted. As per 40 of the Respondent's application, in these previous cases the Court held that it would indeed be a real justice if the then Appellant were not granted permission to re-open the case, as they were not entitled to any other way in which to seek an alternative remedy.

23. In sum, and as per paragraph 41 of the Respondent thus seeks permission of this Court of Appeal to grant permission to re-open the Appeal in order `to avoid real gross injustice'.

Discussion

24. I do not find it necessary to deal with each of the above mentioned Grounds of Appeal in turn as I find they are simply not substantive enough; there is no fresh evidence before the Court which has come to light, the circumstances of the case are not in any way exceptional, and no such gross injustice has occurred. In any event, the Respondent has waited until 13 February 2019 to seek to re-open a case that was heard on 24 September 2018 and concluded with the Appeal Judgment of 6 November 2018. There is no explanation or evidence before this Court which justifies such a delay, and it is well within the scope of my authority to exercise my dismissal of this application on the timing alone.

25. Even if the Respondent had filed this application within a reasonable timeframe, the high hurdles of RDC 44.154 have not been surmounted. This Court can only reopen a final determination of an appeal under specific grounds:

i) if it necessary to do so in order to avoid real injustice;

ii) if the circumstances are exceptional and make it appropriate to reopen the appeal; and

iii) if there is no alternative effective remedy.

26. On the application to seek permission to re-open this appeal put forth by the Respondent, I do not find that the prospective appeal would not have had a real likelihood of success. Namely, there is no fresh evidence before the Court which puts forth a convincing case that, if the case were to be re-opened, the learned judges would come to a different conclusion that the decision already reached. I do not find the Expert Report nor the Witness Statements submitted by the Respondent as evidence wholly credible or at all convincing. Furthermore, I do not find the Respondent's discussion and re-assessment of the Appellant's submissions to have large inconsistencies or untruths, as asserted by the Respondent.

27. Following on from this finding, the original decision reached by the Court of Appeal was in no way unjust or wrong. In the absence of any other compelling reason before the Court to grant permission, the decision to deny permission to appeal is the only logical conclusion I can make in such circumstances.

28. For the reasons cited above, I find the Respondent has not presented a persuasive argument and the documents filed are by no means substantive enough to reach the high hurdle in terms of what is required to re-open this case; I re-iterate and submit that the Respondent has failed to surmount the high hurdle that must be reached to re-open this case.

CONCLUSION

29. For the reasons set out in this judgment, I hereby refuse permission to apply to reopen case CA-009-2018 and find that both parties must act in accordance with the Appeal Judgment.

IT IS HEREBY DECLARED THAT:

30. The Defendant does not have any interest in the Unit.

31. The Applicant is the sole and legal beneficial owner of the Unit.

32. Compliance with the Appeal Judgment dated 6 November 2018 is required by law.

33. Pursuant to RDC 44. 164 there is no right of appeal or review from this Judgment, which is final.