Claim No: CA 005/2013 and CA 006/2013

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 APPEAL

BEFORE THE CHIEF JUSTICE MICHAEL HWANG SC, DEPUTY CHIEF JUSTICE SIR JOHN CHADWICK AND H.E. JUSTICE ALI AL MADHANI

BETWEEN

(1) KENNETH DAVID ROHAN	
(2) ANDREW JAMES MOSTYN PUGH	
(3) MICHELLE GEMMA MOSTYN PUGH	
(4) STUART JAMES COX	Claimants/Respondents in CA-005-2013
and**DAMAN REAL ESTATE CAPITAL PARTNERS LIMITED**	Defendant/Appellant

AND BETWEEN

AHMED ZAKI BEYDOUN	Claimant/Respondent in CA-006-2013
and**DAMAN REAL ESTATE CAPITAL PARTNERS LIMITEDASTECO PROPERTY MANAGEMENT LLC**	First Defendant/AppellantSecond Defendant

Hearing: **18 December 2013**

Counsel: Mr Charles Buderi assisted by Mr Hermann Ferre and Ms Serena Montalbano (Curtis, Mallett-Prevost, Colt & Mosle LLP) for the AppellantMr Crispin Winser assisted by Mr Nicholas Carnell and Mr Denis Moriarty (Kennedys Dubai LLP) for the Respondents in CA-005-2013

Mr Ravinder Thukral of Brown Rudnick LLP instructed by Mr Jihad El Haddad (Al Wasl Advocates and Legal Consultants) for the Respondent in CA-006-2013

Judgment: **11 February 2014**

JUDGMENT

Summary of Judgment

The Appellant appealed against Orders made by Justice Sir Anthony Colman in proceedings brought against it by purchasers of residential units in a development known as "The Building by Daman" in the DIFC. As they raised substantially the same issues they were heard together. In each case the purchasers had entered into Sale and Purchase Agreements (SPAs) with the Appellant containing the same provisions. On 28 June 2009, the Appellant's Chief Operating Officer had written to each of the Claimants informing them of a new Anticipated Completion Date (ACD). Some seventeen months later, on 25 November 2010, an email ensued informing the Claimants that due to problems with the previous contractor the ACD had been extended once again, amounting to an overall delay of approximately 33 months.All the respondents subsequently gave notice seeking to terminate their respective SPAs. CFI 025/2012 (now CA 005/2013) came before Justice Sir Anthony Colman who delivered judgment in writing on 4 August 2013. He concluded that the now Appellant had "at no time effectively extended the ACD beyond 31 July 2009". It followed that it was open to the Claimants in those proceedings to exercise their rights to terminate those SPAs on 30 days' notice if, as was the case, the Completion Date had not occurred within 12 months after 31 July 2009. Therefore, the judge held that the SPAs had been validly terminated.

In CFI 032/2012 (now CA 006/2013) the judge accepted a concession made on behalf of the Purchaser that the letter of 28 June 2009 had had the effect of extending the ACD to 31 March 2011. But he rejected the contention that the letter of 25 November 2010 had further extended the ACD to 31 March 2012.The Purchaser's termination notice had been given more than 12 months after 31 March 2011. The Appellant gave notice of its intention to appeal against Justice Sir Anthony Colman's judgments in CFI 025/2012 and CFI 032/2012 on 1 September 2013 and 8 October 2013 respectively.

The underlying issue between the parties, both in CFI 025/2012 and CFI 032/2012 was whether the Claimants were entitled, in reliance on the notices which they served and the provisions of Clause 11.3 of the SPAs, to treat those SPAs as terminated; and to claim against the Appellant, as Seller, damages, compensation and costs incurred as a result of the Seller's failure. That turned on whether the termination notices were given by the Purchasers on dates after the expiry of 12 months of the ACD as defined in those agreements.

The ACD was defined in the SPAs as "July 31 2009, or such later date as may be determined pursuant to Clause 4.1 or Clause 12.1". The period of 12 months from 31 July 2009 expired on 31 July 2010. All of the termination notices had been given on dates after the expiry of 12 months from the ACD unless some date later than 31 July 2009 had been determined pursuant to Clause 4.1 or Clause 12.1.

Clause 4.1 of the SPAs reserved to the Seller the right, in its sole discretion, unilaterally and for any reason, to extend the ACD by up to 9 months by giving written notice to the Purchaser. Sir Anthony Colman had been right to conclude that the Seller's letter of 28 June 2009 could not be treated as a valid exercise of the right to extend under Clause 4.1. First, there had been no reference in the letter to Clause 4.1 specifically. Second, there had been no reference in the letter of 28 June 2009 to the unilateral exercise in the Seller's sole discretion of a right to extend the ACD. Moreover, the purported period of extension, some 15 to 21 months, was not a period for which the ACD could be extended pursuant to that right (which was limited to a maximum period of 9 months). Nor, for similar reasons, did the Seller's letter of 25 November 2010 satisfy the requirements of Clause 4.1.

Clause 12.1 of the SPAs had the effect of protecting the Seller from the consequences of a default, or breach of obligation, to the extent that performance of its obligations had been prevented or delayed by an event of Force Majeure. But, properly understood the clause did not entitle the Appellant to extend the ACD by the service of a notice. So the Appellant could not rely on its letters of 28 June 2009 and 25 November 2010 as extending the ACD. A notice served under the second sentence of Clause 12.1 would not alter the ACD in the absence of an actual (and not simply an anticipated) delay which had been caused by a Force Majeure event.

For the above reasons, the appeals were dismissed.

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

Sir John Chadwick, Deputy Chief Justice:

1. These are appeals from Orders made by Justice Sir Anthony Colman in proceedings brought against the Appellant, Daman Real Estate Capital Partners Limited, by purchasers of residential units in a development known as "The Building by Daman" in the Dubai International Financial Centre. The appeals raise substantially the same issues and were heard together.

2. In each case the purchaser entered into a Sale and Purchase Agreement which contained the following terms (so far as material):

"**2. Purchase and Sale**

Subject to the terms and conditions contained in this Agreement, Seller [Daman Real Estate Capital Partners Limited] hereby sells the Property to Purchaser, and Purchaser hereby purchases the Property [identified on page 2 of the Agreement] from Seller.

3. Purchase Price and Payment

3.1 The Purchase Price of the Property shall be as indicated on page 2 of this Agreement. The Purchase Price shall be paid by Purchaser to Seller without any deduction of set off of any sort, in accordance with the payment schedule set forth on page 2 of this Agreement (referred to hereinafter as the 'Payment Schedule').

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4. Completion Date; Possession and Occupation

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. . . .

4.2 Seller shall give Purchaser not less than thirty (30) day's 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 completed."

...

11. Default and Termination

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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.

12. Force Majeure

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 available to it to minimise 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.

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14. Notices

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. . . ."

The terms "Anticipated Completion Date", "Completion Date" and "Force Majeure" are defined in Schedule C to the Agreement:

> **"Anticipated Completion Date"** means July 31, 2009, or such later date as may be determined pursuant to Clause 4.1 or Clause 12.1"
>
> .
>
> "**Completion Date** means 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.
>
> .
>
> **"Force Majeure"** means any event or circumstance which is beyond the reasonable control of Seller, and which was 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 satisfaction of those conditions, Force Majeure included (inter alia, and without limitation):

> ".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;."



3. On 28 June 2009 Mahdhar Al Tamimi, the Chief Operating Officer of the Appellant, wrote to each of the Claimants:

> "Subject: New Anticipated Completion Date for the Buildings by Daman
>
> .
>
> Daman Real Estate Capital 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.
>
> ."



4. That letter was followed, some seventeen months later, by an e-mail sent on 25 November 2010:

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

We will of course be in contact with you closer to the actual completion date."



5. By a letter dated 22 June 2011 the fourth named Claimant in proceedings CFI 025/2012, Stuart James Cox, gave notice purporting to terminate the Sale and Purchase agreement under which he had purchased an apartment in the development. By letters dated 8 October 2011 the first, second and third named Claimants in those proceedings, Kenneth David Rohan, Andrew James Mostyn Pugh and Michelle Gemma Mostyn Pugh, gave notice purporting to terminate the agreements under which they had, respectively, purchased apartments in the development. By a letter dated 9 July 2012 the Claimant in proceedings CFI 032/2012, Ahmed Zaki Beydoun, gave notice seeking to terminate the Sale and Purchase Agreement under which he had purchased an apartment in the development.



6. Proceedings CFI 025/2012 were commenced by the issue of a claim form on 2 June 2012. The relief claimed in those proceedings included declarations that the respective Sale and Purchase Agreements were terminated pursuant to Clause 11.3 (or, in the alternative, pursuant to Articles 86 and 87 of the DIFC Contract Law (DIFC Law No. 6 of 2004)); restitution of monies paid by the Claimants to the Defendant as instalments of purchase price under those agreements; and loss of rental income (or, in the alternative, the cost of alternative accommodation). Proceedings CFI 032/2012 were commenced by the issue of a claim form on 2 September 2012. In those proceedings the Claimant sought an order "to terminate and cancel" his Sale and Purchase Agreement; an order for the refund of all monies which he had paid to the Defendant thereunder; and an order for payment of compensation and damages.



7. Proceedings CFI 025/2012 came before Justice Sir Anthony Colman for trial on 12 and 13 February 2013. He delivered judgment in writing on 4 August 2013. After setting out the contractual provisions, the underlying facts and the submissions made to him by the parties, he concluded (at paragraph 66 of that judgment) that the Seller had "at no time effectively extended the Anticipated Completion Date beyond 31 July 2009". The effect of that conclusion, as the judge pointed out at paragraph 67 of his judgment, was that it was open to the Claimants in those proceedings, pursuant to Clause 11.3 of their respective Sale and Purchase Agreements, to exercise their rights to terminate those agreements on 30 days' notice if - as was the case - the Completion Date had not occurred within 12 months after 31 July 2009. So, as the judge held, the Sale and Purchase Agreements were validly terminated upon the expiration of 30 days from, respectively, the letter of 22 June 2011 (in the case of Mr Cox) and the letters of 6 November 2011 (in the case of the other Claimants, Mr Rohan and Mr and Mrs Pugh).



8. The reasons which led the judge to the conclusion that neither the notice contained in the Seller's letter of 28 June 2009 nor the notice contained in its letter of 25 October 2010 were effective to extend the Anticipated Completion Date beyond 31 July 2009 are set out in paragraphs 43 to 65 of his judgment in proceedings CFI 025/2012. They may be summarised as follows:

(1) Although the Anticipated Completion Date of 31 July 2009 could be extended under the provisions in Clauses 4.1 or 12.1 of the Sale and Purchase Agreement, it was necessary, if the Seller sought to rely upon those provisions, for it to give notice that it intended to do so: as the judge put it:

> "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".

He went on (at paragraph 43 of his judgment) to explain that:

> "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 the contract prescribed by Clause 11.3 depends on 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 or 12.1 must be a condition of the validity of the notice."

(2) Although identification of the Anticipated Completion Date by reference to a range of dates was permissible - in that the relevant date would be taken as the last date within the range - it was necessary, both under Clause 4.1 and Clause 12.1, to indicate "specifically and unequivocally" by the notice that completion of the particular apartment which was the subject of the Sale and Purchase Agreement would take place on the date identified: paragraph 45 of the judgment. As the judge explained, at paragraph 47 of the judgment:

> ".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 time of the notification the Seller anticipates that the apartment, the subject of the contract, will be substantially completed and 'otherwise ready for occupation'".



(3) The letter of 28 June 2009 was a sufficiently clear indication to the Purchaser of each apartment that he (or they) could expect a notice under Clause 4.2 - specifying the Completion Date - at the latest 30 days before 31 March 2011: paragraphs 48 to 50 of the judgment.



(4) Nevertheless, the letter of 28 June 2009 failed sufficiently to indicate an intention to rely on Clause 4.1 of the Sale and Purchase Agreement: it must be understood "as an attempt to extend the Anticipated Completion Date on the basis only of Clause 12.1" (paragraph 53 of the judgment).



(5) Clause 12.1 was "very specific about the information which was required to be provided in any notification of an event of Force Majeure". The Purchaser was to be notified in writing "indicating the nature and expected duration or effect on Seller's performance of a Force Majeure event in question". That meant that, if there were reliance on more than one event of Force Majeure, the Seller was obliged to indicate the nature of such event, the expected duration of the event (if continuing) and (if finished) what effect it had in increasing delay in the Seller's performance. In the letter of 28 June 2009 the Seller had provided "a vague description of three apparently distinct causes of delay", without any indication whether any of those causes was continuing, for how long it had continued or of the amount of delay attributable to that cause. That was "a wholly insufficient attempt to invoke Clause 12.1": paragraph 56 of the judgment. The Purchaser was 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.



(6) If the letter of 25 November 2010 was otherwise capable of satisfying the requirements of Clauses 4.1 and 12.1, its effect would be to substitute 31 March 2012 - the last day of the range Q4 2011 to Q1 2012 stated therein - as the new Anticipated Completion Date. But, as with the letter of 28 June 2009, it was impossible to tell how much of the period of 33 months of overall delay was relied upon as caused by a Force Majeure event and how much of that delay was an extension under the Seller's power under Clause 4.1: paragraphs 58 to 60 of the judgment. Further, the letter of 25 November 2010 was sent "many months too late" to comply with Clause 12.1: given that the letter of 28 June 2009 was an ineffective notification under Clause 12.1, the seller had delayed well beyond what was a reasonable time in informing the Purchasers of the Force Majeure event: paragraphs 61 and 62 of the judgment.
(7) In any event, the letter of 25 November 2010 was not "personally delivered, sent by major international courier or by fax" as required by Clause 14 of the Sale and Purchase Agreements: it was sent by e-mail. The notice failed to comply strictly with the requirements of the agreement and so was not valid or effective: paragraphs 64 and 65 of the judgment.



9. Proceedings CFI 032/2012 came before the judge for trial on 15 and 16 May 2013: that is to say, before he had handed down his judgment in proceedings CFI 025/2013. He delivered judgment in proceedings CFI 032/2012 on 25 September 2013. As was to be expected, therefore, he relied, in the later judgment, on much of the reasoning set out in the earlier judgment. In particular, he incorporated in the later judgment paragraphs 54 to 56, 61 and 63 to 65 of the earlier judgment.



10. At paragraph 13 of his judgment in proceedings CFI 032/2012 the judge pointed out that the Purchaser's termination letter of 9 July 2012 was given after the end of the period of 12 months from the latest date (30 days before 31 March 2011) which could have been an extended Anticipated Completion Date if the Seller's notice of 28 June 2009 had been valid and effective under Clause 4.1 or Clause 12.1. He said this:

> "13. In relation to that notice of termination [the letter of 9 July 2012], it will be observed that, whereas it was given more than 12 months after the end of the period of anticipated completion given in the Defendant's letter of 28 June 2009, it was given less than 12 months after the end of the period of anticipated completion given in the Defendant's letter of 25 November 2010. Thus, with regard to the wording of Clause 11.3 of the SPA.,if the original Anticipated Completion Date (ACD) (31 July 2009) and the replacement ACD given in the letter of 28 June 2009 had not been effectively replaced by the 25 November 2010 letter, the notice of termination would be valid, at least in terms of timing, whereas if the 25 November 2010 letter effected a valid extension of the ACD, the letter of 9 July 2012 would not comply with the terms of Clause 11.3 and would therefore not effect a valid contractual notice of termination."

It followed that, in proceedings CFI 032/2012 - unlike the position in the earlier proceedings CFI 025/2012 - it was unnecessary for the judge to address the question whether the Seller's letter of 28 June 2009 had the effect of extending the Anticipated Completion Date from 31 July 2009 to 31 March 2011 (or, more precisely, to a date 30 days before 31 March 2011). Whether or not the letter of 28 June 2009 had that effect, unless the Anticipated Completion Date was extended by the Seller's letter of 25 November 2010 the Purchaser's termination letter, given on 9 July 2012, was given more than 12 months after the Anticipated Completion Date.



11. In those circumstances the concession made on behalf of the Claimant, Mr Beydoun, and recorded by the judge at paragraph 20 of his judgment in proceedings CFI 032/2012 - that "the 28 June 2009 letter did indeed extend the ACD to the end of the first quarter of 2011 on the basis that it was a hybrid notice, relying on both Clause 4.1 and Clause 12.1, the extension time being equally split between the two facilities..." - was of no materiality: the position was the same whether or not the letter of 28 June 2009 had the effect which the Seller asserted and the Purchaser conceded. It is unnecessary, therefore, for this Court to address the question whether the Purchaser (as respondent to the Seller's appeal) should be permitted to withdraw the concession made at the trial. The better view, as it seems to me, is that the judge was wrong to accept the concession, given his decision in the earlier proceedings that, as a matter of law, the letter of 28 June 2009 could not have had the effect which the Purchaser was content to concede.

12. At paragraph 24 of his judgment in proceedings CFI 032/2012 the judge rejected the Purchaser's submission that continuing and additional contractor delay, upon which the Seller's letter of 25 November 2010 appeared to rely, could not be treated as an additional Force Majeure event or series of events, following the earlier delay which had been relied upon in the earlier letter of 28 June 2009. But, at paragraph 26 of the judgment, he said this:

> "26. The letter of 25 November 2010 expressly describes those delay[s] which were the subject of the [28] June letter as 'Force Majeure delays' and indicates that such delays, by which it means the causes of such delays, continued after [28] June 2009. Those sources of delay, as stated in that letter were 'contractor related issues', unspecified causes and 'insufficient material supplies'. The letter of 28 June 2009 did not indicate how much delay was caused by which of these apparent Force Majeure events and did not indicate to what extent, if any, the Defendant was relying upon a Clause 4.1 extension. Nor did the 25 November 2010 letter. Although the latter states that the aggregate delay is 33 months, it is impossible to tell from the text how much of that time is attributable to Force Majeure events or to any one such event: the invocation of Clause 4.1 without stating whether it is relied on for the whole or part of the nine months available making it impossible to deduce how much extension in time is claimed under Clause 12.1."

And, after setting out (at paragraph 27) paragraphs 54 to 56 of his earlier judgment, the judge went on:

> "28. The defects with regard to the invocation of the Clause 12.1 ACD extension facility in the letter of 28 June 2009 identified in that [earlier] judgment were compounded in the present case by the letter of 25 November 2010. That results from its invocation of both Clause 4.1 and Clause 12.1 without any indication of the amount of extension time respectively deployed under Clause 4.1 and Clause 12.1. The letter therefore failed to inform the Claimant:
>
> (i) What periods of delay up to 28 June 2009 were attributable to which of the Force Majeure events referred to in the letter of that date;
>
> (ii) Which of such Force Majeure events had continued or recommenced after the letter of 28 June 2009 and how much delay had already been caused by each;
>
> (iii) Which of such Force Majeure events were continuing on 25 November 2010 and which were anticipated to cause additional delay after that date so as to justify extending the first replacement latest ACD (31 March 2011) by a second latest replacement ACD (31 March 2012) some 12 months later.
>
> For these reasons, in my judgment, the letter of 25 November 2010 was not sufficiently explicit to amount to a valid notice of extension of the ACD under either or both of Clause 12.1 and Clause 4.1. The Claimant did nothing to waive that invalidity in the present case."

He affirmed that conclusion at paragraph 33 of his judgment in proceedings CFI 032/2012:

> "33. It follows with regard to the Parties' submissions and specific concession as to the wording of the letters of 28 June 2009 and 25 November 2010, I hold that the ACD was extended to 31 March 2011 but was not extended to 31 March 2012."

As I have already explained - and as the judge pointed out at paragraph 13 of his judgment in proceedings CFI 032/2012 - his finding that the ACD was extended to 31 March 2011 (based on a concession which, as he thought had been wrongly made) was of no assistance to the Seller: in that the Purchaser's termination notice, in that case, had been given more than 12 months after 31 March 2011.

13. On 1 September 2013 the Seller gave notice of its intention to appeal against the judgment of Justice Sir Anthony Colman in proceedings CFI 025/2012. The grounds of appeal, attached to that notice, asserted (so far as material) that the judge's conclusion, at paragraph 66 of his judgment in those proceedings, that the Seller "at no time effectively extended the Anticipated Completion Date beyond 31 July 2009" - and his further conclusion, at paragraph 67 of that judgment, that it was therefore open to the Purchasers to exercise their rights of termination of their Sale and Purchase Agreements on 30 days' notice pursuant to Clause 11.3 "if completion had not occurred within 12 months of 31 July 2009" - were wrong; in that those conclusions were based "on an incorrect interpretation of crucial provisions of the SPAs, most particularly Clauses 4, 12 and 14 as well as the definition and significance of the term 'Force Majeure' as established in the SPAs". In particular, it is said:

(1) That the judge erred in holding (at paragraph 56 of his judgment) that the Seller's letter of 28 June 2009 ("the First Extension Notice") was a "fundamental misuse of the power of extension under Clause 12.1" because the description of the claimed Force Majeure event, on which the extension was primarily based, was too vague and because that notice ought to have provided particulars of the events relied upon (sub-paragraph 3(e) of the grounds of appeal): in that those holdings were not supported "either by the clear terms of the contractual provisions in question (which require no more than that the Appellant provide an indication of the nature and expected duration and effect of the force majeure event on its performance) or by relevant judicial precedent.".

(2) That, with regard to the Seller's letter of 25 November 2010 ("the Second Extension Notice"), the judge erred in law and in fact in holding that the notice was sent too late to meet the requirement of Clause 12.1; and in holding that the notice was invalid because it did not specifically state how much of the overall delay was due to Force Majeure and how much was due to the discretionary power of the Appellant to extend the Anticipated Completion Date for up to 9 months (sub-paragraph 3(g) of the grounds of appeal). It is said that the intent of the notice was clear and could not have been misunderstood by any reasonable person.

(3) That, with regard to both the First Extension Notice and the Second Extension Notice, the judge erred "by misinterpreting Clause 12

of the SPA to include a requirement that any notice sent by the Appellant to advise the Claimants that a contractually-defined Force Majeure event consisting of 'contractor delay' has occurred separate out and treat each distinct aspect of such contractor delay as a separate Force Majeure event for purposes of notification" (sub-paragraph 3(h) of the grounds of appeal).



14. Notice of intention to appeal from the judgment in proceedings CFI 032/2012 was given on 8 October 2013. The grounds of appeal, attached to that notice, raised (so far as material) substantially the same contentions as those raised in the appeal in proceedings CFI 025/2012. Those contentions were developed in the skeleton arguments filed on behalf of the Appellant in the two appeals; and at the oral hearing of those appeals.



15. In addressing these appeals it is important to keep in mind that it is common ground that, at the dates when the Claimants, as Purchasers, gave notices to terminate their Sale and Purchase Agreements, the first named Defendant/Appellant, as Seller, had not given to the respondents, as Purchasers, notice under Clause 4.2 of those agreements to determine a Completion Date: that is to say, a date upon which the construction and fit-out of the apartment purchased would be substantially completed and the apartment would be otherwise ready for occupation. The underlying issue between the parties, both in proceedings CFI 025/2012 and in proceedings CFI 032/2012, is whether the Claimants are entitled, in reliance on the notices which they served and the provisions of Clause 11.3 of the Sale and Purchase Agreements, to treat those agreements as terminated; and to claim against the first named Defendant/Appellant, as Seller, damages, compensation and costs incurred as a result of the Seller's failure to do so. That turns on whether the termination notices were given by the Purchasers on dates after the expiry of 12 months of the Anticipated Completion Date as defined in those agreements.



16. The Anticipated Completion Date was defined in the Sale and Purchase Agreements as "July 31, 2009, or such later date as may be determined pursuant to Clause 4.1 or Clause 12.1". The period of 12 months from 31 July 2009 expired on 31 July 2010. The first of the termination notices was given on 22 June 2011: the other termination notices were given on 8 October 2011 and 9 July 2012. It follows that the termination notices were given on dates after the expiry of 12 months from the Anticipated Completion Date unless some date later than 31 July 2009 was determined pursuant to Clause 4.1 or Clause 12.1.



17. Clause 4.1 of the Sale and Purchase Agreements reserved to the Seller the right, in its sole discretion, unilaterally and for any reason, to extend the Anticipated Completion Date by up to 9 months by giving written notice to the Purchaser. It is clear that the right reserved (or power conferred) by Clause 4.1 is exercised by the giving of the notice and at the time when it is given. It is clear, also, that the purpose of requiring written notice to be given to the Purchaser is that the Purchaser should know that the right (or power) to extend the Anticipated Completion Date is being exercised by the Seller. In my view it is necessary, for that purpose, that the notice is in terms which inform the Purchaser (i) that it was given in exercise of the right reserved or power conferred by Clause 4.1 and (ii) of the period for which the Anticipated Completion Date has been extended pursuant to the exercise of that right or power.



18. The Seller's letter of 28 June 2009 does not satisfy those requirements. There is nothing in that letter that informs the Purchaser that the Anticipated Completion Date is being extended for a period of 9 months (or for any lesser period) pursuant to Clause 4.1 of the Sale and Purchase Agreement. Not only is there no reference in the letter to Clause 4.1 (or to the unilateral exercise, in its sole discretion, of a right to extend the Anticipated Completion Date), but the period of extension - some 15 to 21 months - is not a period for which the Anticipated Completion Date could be extended pursuant to that right. In my view Justice Sir Anthony Colman was plainly correct (for the reasons which he gave at paragraph 53 of his judgment in proceedings CFI 025/2012) to conclude that the Seller's letter of 28 June 2009 could not be treated as a valid exercise of the right to extend under Clause 4.1.



19. Nor, in my view, does the Seller's letter of 25 November 2010 satisfy those requirements. It is true, of course, that the fourth paragraph of that letter contains the statement that "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*)"; but there is nothing to indicate that the letter is sent in the exercise of the right reserved by Clause 4.1, rather than as a notice pursuant to Clause 12.1. In particular, (i) the reference to "contractual terms and conditions [which] take account of this situation [described in the earlier paragraphs of the letter] and allow us to extend the.[Anticipated Completion Date]" tends to suggest that the Seller is not purporting to exercise a right to extend unilaterally and in its sole discretion, but is relying on Force Majeure; and (ii) the period of extension (some 33 months) is not a period for which the Anticipated Completion Date could be extended pursuant to the Seller's right of extension under Clause 4.1. Further, if nevertheless, the letter were construed as an attempt to exercise the right to extend under Clause 4.1, it would fail to satisfy the second of the requirements which I have identified: there is nothing in the letter which informs the Purchaser that the period for which the Anticipated Completion Date is being extended pursuant to the right reserved by Clause 4.1 of the Sale and Purchase Agreements is a period of 9 months (or any lesser period). In so far as Justice Sir Anthony Colman took the view that the Seller's letter of 25 November 2010 could not be treated as a valid exercise of the right to extend under Clause 4.1 - see his observations in paragraphs 26 and 28 of his judgment in proceedings CFI 032/2012 - I think he was correct.

20. I turn, therefore, to the provisions of Clause 12.1 of the Sale and Purchase Agreements. It comprises three distinct parts; corresponding

to the three sentences which it contains:

> "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 minimise 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."



21. The first of those parts is concerned to protect the Seller from the consequences of a default, or breach of obligation, to the extent that performance of its obligations is prevented or delayed by an event of Force Majeure. It could, I think, be relied upon as a (partial) defence to a claim for damages, compensation or costs in a case where the Purchaser had properly terminated his Sale and Purchase Agreement by notice under Clause 11.3 of the Sale and Purchase Agreement: that is to say, in circumstances where, notwithstanding the extension of the Anticipated Completion Date for a period equal to the delay in performance caused by the event of Force Majeure (pursuant to the third part of the clause), the Completion Date did not occur within the 12 months of the extended Anticipated Completion Date. In such a case, absent the first part of Clause 12.1, the claim to damages, compensation and costs could be expected to cover the whole period of delay (whether or not caused by Force Majeure): the effect of the first part of the clause is to exclude liability for damages, compensation and costs in respect of so much of that period as is attributable to Force Majeure.



22. If the first part of Clause 12.1 stood alone, it might be argued that a Purchaser was entitled to terminate his Sale and Purchase Agreement under Clause 11.3 if the Completion Date had not occurred within 12 months of the Anticipated Completion Date (as extended pursuant to Clause 4.1) notwithstanding that the delay in completion was attributable to an event of Force Majeure. It could be said, in such a case, that the right to terminate under Clause 11.3 was not conditional upon fault, or breach of obligation, on the part of the Seller: it arose when, as a matter of fact, the Completion Date had not occurred within the specified period of 12 months, whether or not that delay was caused by the fault of the Seller: so the first part of Clause 12 provided the Seller with no protection from termination under Clause 11.3. But that argument is met by the third part of Clause 12.1: and the reference to Clause 12.1 in the parenthesis in Clause 11.3. The Anticipated Completion Date is extended by a period of time equal to the delay in performance by the Seller caused by the Force Majeure event. So, if when the Purchaser would otherwise be entitled to terminate his Sale and Purchase Agreement by notice under Clause 11.3 (having regard to any extension of the Anticipated Completion Date from 31 July 2009 pursuant to Clause 4.1) the Seller is able to demonstrate that there has been delay in performance caused by a Force Majeure event, the Seller can rely on the actual period of such delay as extending the Anticipated Completion Date; and assert that the time for the service of a termination notice has not been reached.

23. Properly understood, it is clear, I think, that the extension of the Anticipated Completion Date which the third part of Clause 12.1 requires is not dependent on the contents of a notice. As I have said, the third part of Clause 12.1 provides that "the Anticipated Completion Date is extended by a period of time equal to the delay in performance by the Seller caused by the Force Majeure event". Whether or not the Anticipated Completion Date is extended (and by what period) depends on whether there has been a delay in performance by the Seller caused by a Force Majeure event; and, if so, what has been the period of that delay. The relevant question is "what is the position at the date that the Purchaser serves a termination notice?"; not, "what period of delay (or anticipated delay) has been stated in a notice served by the Seller?".



24. What, then, is the purpose of the second part of Clause 12.1? That part of the clause requires that, if the Seller considers that an event of Force Majeure has occurred, it shall notify the Purchaser "indicating the nature and expected duration or effect on the Seller's performance of the Force Majeure in question.". But there is nothing in Clause 12.1 which supports the conclusion that failure to serve a notice prevents the Seller from relying on Force Majeure under either the first or the third part of that clause; and nothing which supports the conclusion that the service of a notice enables the Seller to rely on Force Majeure to an extent greater than the extent of the delay which that event does actually cause. There is an important distinction between the reference in the second part of the clause to "the nature and expected duration or effect on the Seller's performance of the Force Majeure event in question" and the requirement, in the third part of the clause, that the Anticipated Completion Date shall be extended "for a period of time equal to the delay in the performance of the Seller caused by the Force Majeure event". The distinction is between anticipated delay and actual delay.



25. It follows, in my view, that it was not intended that a notice served under the second part of Clause 12.1 would, of itself, have the effect of extending the Anticipated Completion Date; or of determining the period of any extension under the third part of that clause. That was not the purpose of requiring the service of a notice. Rather, it was appreciated that it was important that a Purchaser should be put on notice that his rights to serve a termination notice might be effected by delay caused by Force Majeure - and a consequent extension of the Anticipated Completion Date pursuant to the third part of Clause 12.1 - so that he would not be caught by surprise if, when he did serve a termination notice, the Seller took the point that it was premature.

26. For those reasons - which differ in part from the reasons which attracted the trial judge and (I acknowledge) from the reasons advanced on behalf of the Purchasers at the hearing of these appeals - I would uphold the judge's conclusion that the Appellant is not entitled to rely on the letters of 28 June 2009 or 25 November 2010 as a defence to the claims in these proceedings.

27. I understand the other members of the Court to take the same view. Accordingly these appeals are dismissed. The parties may make representations as to the costs of the appeals, and of any ancillary applications, if they so choose.

Michael Hwang SC, Chief Justice

28. I have had the benefit of seeing Deputy Chief Justice Sir John Chadwick's judgment in draft. I agree with his conclusions and reasoning, and have nothing to add.

H.E. Justice Ali Al Madhani

29. I also agree with the conclusions and the reasoning in the judgment of Deputy Chief Justice Sir John Chadwick and have nothing to add.

Issued by:

Mark Beer

Registrar

Date of Issue: 11 February 2014

At: 4pm