

Extension Notices and Force Majeure

Rohan v. Daman

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Summary

The decisions on the rights of DIFC property purchasers to the termination of their contracts and the refunding of their payment installments, after significant delays in construction projects arising from the financial crisis, are finally coming to hearing and trial in the DIFC Courts.

Sadly, at least for the wider DIFC legal community, the claims and counterclaims in *Dorsey v. Union Properties PJSC* (CFI 05/211) were settled before trial and without any judicial guidance as to the status of the 'reservation forms' that were commonly used to purchase apartments and retail units off plan. To the extent that such forms are valid, it remains to be seen what is implicit in their general terms, for example as to the time in which a sale and purchase agreement is issued, as to the quality and specification of materials and finish, and as to the provision of common facilities.

The DIFC Court has, however, in *Rohan & Ors v. Daman Real Estate Capital Partners Ltd*, 4 August 2013 (CFI 025/2012), now given some detailed guidance in respect of the interpretation of provisions for the extension notices that are routinely issued by developers when a project, for whatever reason, is delayed.

Those provisions have been read stringently by the DIFC Court so as to require clear identification of the particular provision relied upon, the extent of the notified delay and the circumstances of any force majeure event relied upon by the developer. While those findings were specific to the wording of the contracts, that wording was in standard terms not uncommon in Dubai property development.

Extension notices that do not provide sufficient information are liable to be found invalid, so that all buyers may then be entitled, if the unextended completion date has passed, to terminate their contracts, in some cases with an express entitlement to damages.

Moreover, the DIFC Court has shown itself willing not only to construe the terms so as to require certainty as to each party's contractual position, but also to consider, in an appropriate case, implying a term that the purchaser, on the seller's assertion of force majeure, could require the disclosure of the necessary evidence to make good that assertion. The implication of such a term would arguably go beyond the law of force majeure in most Common Law jurisdictions, under which the burden of proof, in any proceedings, is on the party asserting force majeure, but there is no obligation before proceedings to provide supporting documentary or expert evidence.

The basis of this stringent reading of discretionary and force majeure extension provisions appears to be two-fold. First, the DCJ took the view that such contracts, if they are to be effective, clearly require a basis of mutual cooperation. Secondly, there was a strong suggestion that the mere assertion of force majeure in extending completion dates without particulars or cause is an abuse of extension rights.

The facts

The Claimants had between them purchased some 8 apartments in the heady days of late 2007 and early 2008 in the 'Buildings by Daman', the interlocking towers on the far side of the 312th Road opposite the Al Fattan Currency House.

Their purchases were on Daman's standard terms, which included:

- (1) an extension provision, allowing Daman by written notice and in its discretion to extend the completion date by up to 9 months from the contractual 'Anticipated Completion Date' of 31 July 2009 (an "discretionary extension");
- (2) a Force Majeure ("FM") provision, allowing Daman, by notice of a Force Majeure event ("FME") in writing indicating its nature and expected duration or effect, to extend performance for a period equal to the resulting delay, subject to Daman's taking reasonable measures to minimise the effect of the FME (an "FM extension");
- (3) a provision requiring Daman to give 30 days' written notice of completion; and
- (4) a provision entitling the purchaser, if completion had not occurred after 12 months from the Anticipated Completion Date, as extended by a discretionary or FM extension, and on 30 days' written notice, to terminate the contract and to claim for such 'damages, compensation or costs' as it had incurred.

On 28 June 2009, the Defendants sent a letter (the "first letter") informing purchasers that the 'new' Anticipated Completion Date would be after a 'handover process' expected to start some time in Q4 2010 or Q1 2011. The delay was said to be due to three causes, namely contractor related issues, delays and insufficient material supplies which are out of our control'.



Nearly 18 months later, on 25 November 2010, the Defendants sent a further letter (the “second letter”) informing purchasers of the appointment of a new main contractor who had taken over the site in June 2010. Daman ‘currently calculated’ the delay as 33 months, giving completion in Q4 2011 to Q1 2012. It described that delay as an FM delay resulting from unavoidable delays by the previous contractor, referring to the contractual provisions allowing for discretionary and FM extensions.

The Claimants served termination notices in June and October 2011, and issued proceedings in the DIFC Court seeking a declaration as to the validity of termination, restitution of the sums paid by them, loss of rental income or the cost of alternative accommodation, interest and costs.

The issues

A number of issues arose for determination by the Deputy Chief Justice (“DCJ”), then Sir Anthony Colman, namely whether:

- (1) It was necessary, as a condition of its validity, for an extension notice to specify:
 - (i) the particular provision on which it relied;
 - (ii) the extended date, or range of dates, by which completion would occur; and,
 - (iii)(in the case of an FM extension notice) particulars of the circumstances of the FME; and
- (2) The delay in completion was in fact exclusively caused by FM such that Daman was entitled to extend time under the FM extension provision and/or Art 82.3 of the DIFC Contract Law.

The requirements of an extension notice

The Court found that an extension notice, in order to be valid, had to identify the provision on which Daman relied, not least so that the purchaser could know the length of the extension [43] and the date

on which it could subsequently terminate the contract [44]. This effect arose on the construction of the basic provisions for the extension provision, without the need for any implication of terms.

The service of an extension notice giving a range of dates requires completion to be given by the end date of that range, by the DCJ’s analogy with the provision of a date of shipment in a contract for the sale of goods [44] [57].

The DCJ confirmed that an extension notice must be expressed ‘with sufficient clarity for a reasonable recipient in the position of the Purchaser to understand with confidence what is the latest date which, at the point of time of the notification, the Seller anticipates that the apartment ...will be substantially completed...’ [47].

On the facts of this case, it was sufficiently clear from the first letter both when the purchaser could expect to have received a completion notice [50] and, from the length of the proposed extension and the reference to alleged external causes of delay, that Daman must have been relying on the FM extension provision [53].

However, the first letter failed to meet the specific informational requirements laid down in that provision, in giving no more than ‘a vague description of [the] three apparently distinct causes of delay’ [55]. An extension notice that did not include the requisite particulars was a ‘fundamental misuse’ of Daman’s power of extension, and the purchaser was accordingly entitled to treat that notice as a nullity [56].

As for the second letter, while it referred to both of the extension provisions, it gave no indication of the extent to which reliance was placed on each [58].

Further, the second letter gave no information as to how much of the 33 months of proposed delay had been caused by each of the various FMEs, namely

the failures of the previous contractor, the insufficiency of supplies, certain unspecified causes and the appointment of the new contractor [60].

The DCJ further found that it was implied in the seller’s being required to notify the purchaser ‘if the Seller considers that an [FME] has occurred’ that the seller should notify the purchaser as soon as the seller appreciates that an FME has occurred (or at least within a reasonable time of that appreciation) [61].

On the facts of this case, Daman had known of significant contractor slippage on the construction timetable at least a year before giving notice, so that the second letter was given too late to comply with the FM extension provision [62].

Accordingly, neither letter was a valid extension notice, and the purchasers had been entitled to serve termination notices to effect termination 12 months after the Anticipated Completion Date and thereafter to claim damages, compensation and costs [67].

Proof of Force Majeure

In view of the DCJ’s findings that the two letters were invalid as extension notice and that the purchasers were accordingly entitled to terminate the contract, the Court did not need to decide the issue of whether the delay was in fact caused by FM, but indicated the findings it would have made if it had been necessary to do so.

The Court confirmed that, in the absence of a conclusive evidence provision, an FM extension notice is required to give more than ‘mere assertion’ of FM. Specifically, the notice must identify each FME and delay caused by that FME [73].

However, the Court then went on to question whether the seller should be entitled to rely on the FM extension provision on the basis of its ‘say so’ as to the impact of the alleged FME, leaving the



purchaser with 'an entirely opaque justification for the seller's extension of time'. On this basis, the only way the purchaser could probe that justification would be to threaten or bring litigation, with a view in the first instance to obtaining disclosure of the relevant primary evidence [74]. From this, the DCJ gave his 'provisional view', in the absence of argument on the point, that there was an implied term that the purchaser could require, as a condition of a FM extension, the disclosure of evidence as to the impact of the alleged FME [76]. Such a term could be implied as being necessary, by way of mutual cooperation between the parties, to make the contract work [75]. In any event, the burden of proof as to the existence and causative effect of the alleged FME would rest on the seller [77].

On the facts of this case, the evidence of the Engineer appointed under the head construction contract provided inadequate evidence for the Court to isolate the effect of the alleged FMEs, and Daman had failed to disclose any of the evidence from the arbitration between it and the contractor. Such evidence as was given by Daman's own project manager suggested that the delays had been apparent as early as 2007 and that Daman had unreasonably delayed in changing its contractor.

Procedural considerations

There is a clear statement in the judgment of the DCJ that it was unnecessary for the Court to consider the factual and expert evidence in the case, which had occupied a large part of the time at trial, as to whether the delays were in fact caused by FM.

That suggests that the better procedural approach for the successful claimants might have been to seek summary or 'immediate' judgment under RDC Part 24.

However, the dangers of that approach all too evident from the decision of Justice Tan Sri Siti Norma Yaakob in *Dattani & Ors v. Daman Park Towers Company Ltd*, 11 July 2013 (CFI 008/2013). In that case, the late lamented Kaashif Basit argued on behalf of the claimant purchasers of apartments in Daman's Park Towers in the DIFC that they were entitled to immediate judgment on their claims to the return of all the installments paid by them under apartment contracts with delayed performance. The defendant developer counterclaimed for a declaration that it was entitled to terminate the contracts under a term allowing it to retain an amount of liquidated damages. The Judge found that she could not decide issues as to (i) whether

the claimants had made prompt payments of all earlier installments and (ii) when completion had in fact occurred without oral evidence, and so dismissed the applications for immediate judgment with costs [21]-[22].

Returning to *Rohan v. Daman*, it appears that the DCJ was assisted by some of the oral evidence, for example in finding that Daman's project manager had known of the delays for some time prior to the giving of the FM extension notice. To the extent that parties may wish to rely on specific oral or expert evidence, they may therefore prefer to seek the hearing of preliminary issues as to the sufficiency of an extension notice before the hearing of more involved issues as to the causation of delays by particular alleged FME's. If they do so, then to the extent that the developer may seek to rely on its own oral or expert evidence, and the purchasers wish to test that evidence in cross-examination, they can do so without a full trial.



Click on the link below to read the judgment:
http://difccourts.complinet.com/en/display/display_main.html?rbid=2725&element_id=9323

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Rupert recently won 'Chancery Junior of the Year' at the Chambers Bar Awards 2013, having been short-listed in 2012, and he has been listed as a 'Leader at the Bar' in Chambers Global in both years. He has a broad Chancery Commercial practice, with a particular focus on commercial litigation and arbitration relating to property and finance. He is a French and Arabic speaker and is widely instructed in international matters, often involving clients in the Middle East.

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