

Dubai's 'real' deal

Is a clearer picture of the Dubai real estate sector's legislative mire developing? *Arabian Business* analyses how the emirate's regulations will take shape in the future.

BY ED ATTWOOD

WHEN EVEN THE LAWYERS ARE ADVISING you against legal action, you know it has to be a last resort. While in Western countries, the recourse to law might perhaps be the first port of call for real estate investors who feel they have been let down by their developer partners, the message in Dubai to purchasers is, increasingly, negotiate wherever possible.

But despite making massive progress in the last couple of years, real estate legislation is still relatively embryonic in the UAE, and the system certainly differs in a number of significant ways from those established in the Western economies.

There are three strategies that developers can use to deal with projects that are so heavily burdened with defaulting purchasers that continuing to build is unfeasible, says law firm Clyde & Co.

Termination is often the first response, but while that may free up stock and can allow the developer to retain a portion of the purchase monies, it also doesn't usually result in any additional cashflow.

"The best that a developer can hope for is that it will be able to consolidate those remaining purchasers and by doing so will certainly reduce its development obligations — ie by transferring those developments out to another project, or perhaps phase the project over a period of time," explains Will

Grinter, a Dubai-based Clyde & Co associate. Grinter believes that under those circumstances, termination might not be the best approach. Another option is enforcing the performance of obligations by the purchaser, which has the advantage of propelling the purchaser towards the negotiating table in order to search for a way forward.

"Law 9 is the one that everyone focuses on — it's the procedure to be followed and the amount of money that a developer can retain if a purchaser falls into arrears and the developer then cancels the contract," says Andrew Yule, an associate with Afridi & Angell. "Under that law the purchaser himself won't have the right to terminate the contract, that's for the developer to terminate.

Law 9 leaves the purchaser in the situation where he has to go to court to have the contract cancelled or to reach some agreement with the developer to have the contract cancelled."

And it's that process of negotiation that is the third option open to developers and purchasers, and according to Clyde & Co, it's by far the most effective way of moving forward. Negotiation can mean offering amendments to payment terms in the form of discounts or revised payment plans linked to construction progress, or consolidating purchases into smaller areas or into different projects. "The fundamental point is that negotiators are trying to reach an outcome







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— it’s a quicker solution, potentially less expensive than a termination strategy and it can result in additional cashflow,” Grinter continues.

The big developers, such as Nakheel, Emaar, Pearl and Union Properties are already adopting this strategy, in conjunction with Dubai’s Land Department and Real Estate Regulatory Authority (RERA). “Developers can offer a unit in a finished building instead of one in a building that will never be built,” says Craig Plumb, the regional head of research for real estate consultants Jones Lang LaSalle. “So if a developer has ten projects, and only ten percent of them are sold, they can put all of that ten percent of payments into one project and leave the other nine until demand returns.”

The prevailing view appears to be that property investors should accept revised offers from developers rather than hang on for original real estate projects to make progress. “My advice to them would be that if a developer is offering them revised payment terms or an alternative property in another development that’s in a more advanced stage of completion, take it,” Richard Bell, another associate with Clyde & Co, believes.

“Because you’ll either get a property, or if

“Developers can offer a unit in a finished building instead of one in a building that will never be built”

you don’t, you are in no worse a position than you are now.”

But while that seems to be a pretty easy way out of the mire — assuming the purchaser is happy with what is being offered — it’s important for developers to be aware of the potential difficulties associated with interim registration.

If a purchaser agrees to move over to another property, he or she will need to be de-registered from his original choice and then registered again for the new unit.

“There are murmurs from the Land Department that they will actually treat this process as a sale back to the developer first and then a new sale in the second project,” says Grinter. While the motives for such a move are clear — it’s a nifty little revenue earner for the Land Department — from a cost perspective for the developer and the purchaser, it could prove hugely detrimental. So while it’s hard to tell what approach the government agency will take on this issue, it’s certainly something that both parties will need to bear in mind. Furthermore, there is also no mechanism currently that requires a purchaser to move, so a developer’s strategy is reliant on purchasers’ willingness. From a planning perspective, developers need to have a plan to deal with what they might see as stubborn purchasers who may not want to look at the bigger picture.

The registration issue has also thrown up an added concern in the form of the Mizin case judgement, which was initially greeted with great enthusiasm by purchasers. In March last year, Dubai’s Court of First Instance ruled that Tatweer developer Mizin

should hand back AED7.4m to a purchaser based on its reading of Law 13 of 2008 — commonly referred to as the pre-registration law. That piece of legislation effectively dictated that all real estate contracts should be entered onto an interim register within 60 days of the law coming into force otherwise they would be considered null and void. Due to computer issues at the Land Department, however, the majority of Dubai contracts weren’t registered until after that period — as was at the time suggested by the Land Department itself. So when the court ruled that in the Mizin case that the sale contract was void due to not being registered within the 60-day period, it understandably caused a degree of consternation within the developer community.

But recent research seems to suggest that the Mizin decision was not as cut-and-dried as first thought. One of the biggest difficulties with the Dubai courts system is that judgements on particular cases are often not made public for a period of two years, and if a case is settled confidentially out of court, they may never be known. “The general consensus now is that the sales contract [from the Mizin case] wasn’t registered at all at the time the judgement was given,” explains Clyde & Co’s Bell, who has spent some time looking into the case. “And if that was the case, it would be in accordance with the law. But all sales contracts for the Mizin project in Dubailand have now been registered and it will be interesting to see whether the Court of First Instance’s judgment on Mizin will be overturned, particularly light of the Court of Cessation [Dubai’s highest]’s

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more favourable recent decisions on this point.”

So can developers breathe a sigh of relief? The lesson to learn from Mizin is that if your sales contracts aren’t on the interim register, get them registered immediately, or the consequences could be harsh. But there are still no guarantees on what a court will decide; unlike in the UK, for example, Dubai courts aren’t bound to follow the decisions in previous cases. Bell says that the Land Department has made public statements that will allow sale contracts that were signed before the law came into force to be registered even now — some eighteen months down the line. “If the courts applied a rule that any contract registered outside the 60-day period was null and void, that would have an extraordinary effect — dealing the property market a huge blow when it’s hard enough as it is right now,” he remarks.

One of the most significant developments in the first months of 2010 was the Barclays Bank foreclosure of a property on The Palm. This has again garnered significant interest as it could offer a fast-track option for the banking community to regain control of an asset, particularly in cases where the previous owner has clearly already left the country. Previously, it was tough to get a quick judgment even on an undisputed debt, but a piece of mortgage legislation does allow for a summary judgement type remedy for mortgage lenders. “It’s quite simple — if a mortgagor defaults on a mortgage a notice of default is issued and if the mortgage payments aren’t brought up to date in 30 days, that mortgage lender can apply to have the property sold at auction,” explains Bell. “If the sale proceeds aren’t enough to cover the indebtedness, the lender has the right to pursue the mortgagor for the balance.”

But again, that’s not the whole story. While there are undoubtedly a lot of cases where homeowners have fled the country, banks and mortgage lenders have some very good reasons not to flood the market with repossessed units. “It’s bad publicity and can be seen to be heavyhanded,” says Bell.” The lawyer adds that a rash of repossessions



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could well depress the market even more, driving prices even lower.

Furthermore, it’s also unclear how the auctions procedure will work, and whether it would even be worth carrying out an auction for, say, a property in a development that hasn’t even been completed yet. It may well be that financiers will wait until the project reaches a more advanced stage of completion and has some value before a decision is made to sell it. “The general consensus is that it’s a remedy of last resort, but people are happy that it’s been tested and found to be effective,” Bell points out.

Looking forward, a number of new laws are expected in the next year or so. While it’s hard to know exactly what form this legislation will take, some in the legal profession feel that the Land Department is taking on board the perception that the current regulations are too developer-friendly, and will look to level the playing field somewhat. “New laws might cover late completion, and penalties for significant late completion by developer, and it would also be useful for those laws to clarify developer rights to extend anticipated completion dates,” says Clyde & Co’s Grinter. “What is a legitimate reason for delay and what is not? There’s nothing of that nature at the moment — it’s entirely contractual.”

Another potential change in the pipeline may well solve the ongoing concerns of resi-

dents in particular developments across Dubai — that of the service charge. The introduction of strata regulations could clarify the role and operation of owners’ associations. “These regulations will be of interest to purchasers as these owners associations will be the entities that bill the purchasers’ service charge for the maintenance of common areas in a development — purchasers will be keen to know what role they are entitled to play in their owners association and their owners association’s decision-making process,” explains Afridi & Angell’s Yule.

What seems obvious right now is that the Dubai real estate sector is in something of a state of limbo. The next year or so should reveal exactly which projects will be completed and which will be dropped; any new laws should then be able to address that new position. So while there is a degree of opacity at the moment as to how property regulations will be handled in the future, it should be remembered that the Dubai property sector has had to learn a lot from a standing start.

“When I first arrived in the region, there was very little law governing the area — basically none,” Clyde & Co’s Bell observes. “But to its credit, the UAE government has tried to catch up. There are some growing pains at the moment, but hopefully we’ll see some clarity as time goes on.” **AB**