

[Part 1] Judgment handed down in the case of Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC CA 016/2022

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The DIFC Court of Appeal has recently released judgment in the case of *Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC* CA 016/2022 (12 May 2022), in which Alexander Burrell of 39 Essex Chambers, instructed by Rishabh Jogani of MRP Advisory FZ-LLC, represented the Appellant contractor.

[Link to judgment - Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC \[2022\] DIFC CA 016 | DIFC Courts](#)

The DIFC Court of Appeal proceedings followed what was the first major judgment in a construction case before the DIFC Court's TCD which deals with a DIFC governing law clause, and sets DIFC law precedent on a range of issues frequently encountered in construction disputes. Alexander also represented the contractor as defendant in the TCD proceedings.

At first instance, the primary issue in dispute concerned delay. The TCD found the employer was responsible for 306 out of 325 days of the delay, and dismissed the majority of the employer's claims, including its most significant claim for loss of opportunity. However, the TCD refused to award the contractor EOT, as it found the contractor had not sufficiently complied with various condition precedents requiring notice/issuance of a claim. As such, the employer was awarded full LDs.

In the appeal, the contractor, contesting a sum around AED 5-6m, appealed on five grounds related to the findings regarding LDs, and the employer cross-appealed, contesting a sum around AED 18-19m, also appealing on five grounds, including that the TCD had misinterpreted a clause permitting the employer to pursue general damages for delay.

The DIFC Court of Appeal, whilst finding in favour of one of the contractor's grounds relating to the interpretation of the contract's notice requirements, ultimately dismissed the appeal, and largely dismissed the employer's cross-appeal, allowing a partial appeal on one smaller ground, though this finding did not significantly differ to the TCD's judgment.

The judgment considers various interesting points of construction and contract law, including:

1. Consideration of the 42-day requirement to submit a fully detailed claim under Clause 20.1 of the FIDIC 1999 conditions.
2. Whether clauses providing that a failure to comply with notice requirements, resulting in binding determinations, are valid, having regard to Article 123 of the DIFC Contract Law, prohibiting agreements to reduce limitation to under one year.
3. Consideration of *Obrascon v HM's AG for Gibraltar* [2014] EWHC 1028 (TCC), regarding the time period for when a delay notice is required to be sent under Clause 20.1.

4. Whether a failure to comply with notification conditions precedent to EOT bring in the prevention principle (cf. *Gaymark v Walter Construction Group* (1999) N.T.S.C 143), the Court found they don't.
5. Consideration of the principle of good faith, enshrined in DIFC law (Article 58(c) of DIFC Contract Law), and discretion afforded by Article 122(2) of DIFC Contract Law (permitting LDs to be reduced if they are grossly excessive to the harm resulting from the non-performance).
6. Consideration of clauses which purportedly allow pursuit of LDs, and general damages, for delay.
7. Consideration of claims for legal costs incurred in other jurisdictions.

A further article considering some of the above points in more detail will be issued in due course.

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