ADGM COURTS
محاكم سوق أبوظبي العالمي

In the name of
**His Highness Sheikh Mohamed bin Zayed Al Nahyan**
President of the United Arab Emirates/ Ruler of the Emirate of Abu Dhabi

**COURT OF FIRST INSTANCE**
**COMMERCIAL AND CIVIL DIVISION**
**BETWEEN**

**SOHIR HUSSEIN AL AHMAR**

First Claimant

**RADWAN ANAS RADWAN**

Second Claimant

and

**MESAB LIMITED (A LIMITED LIABILITY COMPANY INCORPORATED IN MASDAR CITY, COMMERCIAL LICENSE NO. MC11461)**

First Defendant

**MESAB LIMITED (LOCAL BRANCH COMPANY, COMMERCIAL LICENSE NO. CN-3885720)**

Second Defendant

# JUDGMENT OF JUSTICE STONE SBS KC

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| **Neutral Citation:** | [2024] ADGMCFI 0011 |
| **Before:** | Justice William Stone SBS KC |
| **Decision Date:** | 29 July 2024 |
| **Decision:** | 1. Judgment is entered against the Defendants in the sum of AED 346,800 in respect of the Claimants' Claim.<br>2. Judgment is entered against the Claimants in the sum of AED 50,498 in respect of the Defendants' Counterclaim.<br>3. The sums awarded in paragraphs 1 and 2 above are to be set off against each other and the balance of AED 296,302 (the "**Balance Sum**") shall be paid to the Claimants by the Defendants within 14 days from the date of the Order.<br>4. The Defendants shall pay the Claimants interest on the Balance Sum at the rate of 5% per annum from the date of this Order until payment.<br>5. The Defendants shall, at their own cost, implement the rectification works itemised in the Defects Report dated 20 April 2024, such works to be commenced by **26 August 2024** unless otherwise agreed with the Claimants, any such agreement to be in writing and signed by the parties.<br>6. The Defendants shall pay the Claimants' costs of and occasioned by these proceedings, such costs to be summarily assessed if not agreed. |
| **Trial Dates:** | 11, 12 and 15 July 2024 |
| **Date of Orders:** | 29 July 2024 |
| **Catchwords:** | Breach of contract. Damages for late delivery of off-plan property. Covid pandemic as force majeure event. Damages for construction defects. |
| **Legislation Cited:** | Cabinet Resolution No. 41 of 2023<br>Federal Civil Transactions Law, Law No. 5 of 1985 (the Civil Code)<br>Cabinet Resolution No. 5 of 2021 |
| **Cases Cited:** | Abu Dhabi Court of Cassation Judgment (Commercial No. 1189/2021)<br>Abu Dhabi Court of Cassation Judgment (Commercial No. 1104/2021)<br>Abu Dhabi Court of Cassation Judgment (Commercial No. 700/2009)<br>Federal Supreme Court (Appeal No. 297 and 300/2003 (Judicial Year 23)) |
| **Case Number:** | ADGMCFI-2023-248 |

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| **Parties and representation:** | **For the Claimants**<br>Mr. Radwan Anas Radwan (self-represented)<br>**For the Defendants**<br>Mr. Bashar Hotari, Chief Operating Officer of the Defendants (self-represented) |

## JUDGMENT

1. This is a case in which the Claimants, who are husband and wife, bring a claim against the Defendants, the developer of a building known as Park View Tower (the "**Tower**"), which is situated on Plot C27 in the Al Shams Development on Al Reem Island, and from whom the Claimants purchased a new off-plan unit in July 2019, Unit 2502 on the 25th floor of the Tower (the "**Unit**").

2. The First Defendant is a limited liability company registered in the Free Zone in Masdar City, Abu Dhabi, under Commercial Licence No. MC11461, and the Second Defendant is a branch of the First Defendant registered under Commercial Licence No CN-3885720 issued by the Abu Dhabi Department of Economic Development for the purpose of conducting the parent company's business within the Emirate. As a matter of UAE/ Abu Dhabi law, a branch has no separate legal personality to its parent, and in this judgment the Defendants are cumulatively referred to as "Mesab", with no distinction drawn between the First and Second Defendants.

3. Proceedings initially were commenced in the Abu Dhabi Courts, but those Courts ruled that this dispute should be heard and determined by ADGM Courts consequent upon the expansion of the geographical territory of the Abu Dhabi Global Market to include Al Reem Island (wherein the Unit is located), pursuant to Cabinet Resolution No. 41 of 2023. Accordingly, the Claimants commenced proceedings in this Court, seeking both financial and non-financial relief arising out of their purchase of the Unit. In turn, Mesab filed a Counterclaim for a specific expense it says remains unpaid.

4. This dispute has spawned a large amount of detail and documentary evidence, but at bottom it constitutes the attempt of the Claimants to recover compensation for extensive delay in delivery of the Unit they had purchased from Mesab, and also in terms of the commensurate dissatisfaction and distress which was caused to them.

5. Neither party has had legal representation during this dispute, nor at the trial. The Claimants' case has been prepared and presented by the Second Claimant, Mr. Radwan Anas Radwan ("**Mr. Radwan**"), whilst Mesab has been represented at this trial by Mr. Bashar Hotari ("**Mr. Hotari**"), Chief Operating Officer of Mesab. The result of the absence of legal representation on both sides was not helpful to either party, although Mr. Radwan has made significant efforts to assist the Court.

6. For the Claimants, a total of seven (7) witnesses of fact have been called, including evidence from both Claimants, and Mesab has called three (3) factual witnesses.

7. The Sale and Purchase Agreement dated 14 July 2019 (the "**SPA**") entered into for the purchase of the Unit contained:

    a. at Clause 20(a) a 'Governing Law and Dispute Resolution' provision which reads, inter alia, that "*[t]he Agreement shall in all respects be governed by and construed, interpreted and take effect in accordance with the laws in force in the Emirate of Abu Dhabi and the federal laws of the UAE applicable in the Emirate of Abu Dhabi.*";

b. at Clause 20(c) a choice of court clause which reads, inter alia, that "*the parties agree to submit to the exclusive jurisdiction of the courts of the Emirate of Abu Dhabi*".

8. By Order dated 5 March 2024, the Court ordered that expert evidence should be provided on specific aspects of Abu Dhabi and UAE federal law as raised by the circumstances of this case: accordingly, an expert report dated 10 June 2024 was filed from Mr. Basil Siddiqi ("**Mr. Siddiqi**") on behalf of the Claimants and from Mr. Faraj Al Faidi ("**Mr. Al Faidi**") dated 19 June 2024 on behalf of Mesab; followed by a Joint Expert Report dated 1 July 2024 (the "**Joint Report**") concluded by both experts.

**The Primary Facts**

9. The primary facts are in short compass, and for the most part are objectively verifiable and not a matter of dispute.

10. On 14 July 2019, the Claimants entered into the SPA with Mesab to purchase the Unit for a total price of AED 1,923,289. This is recorded in a Reservation Form of that same date, the signing of which preceded the formal SPA. The Second Claimant, Mr. Radwan, is the only party listed as "*Purchaser*" under the SPA. However, the First Claimant, Ms. Al Ahmar, signed the Reservation Form and was listed as an "*Additional Purchaser*" therein. She also appears to have initialed each page of the SPA, and subsequent registration of the Title Deed named both Claimants as joint owners of the Unit. In light of this, and given that at trial Mesab did not cross-examine Ms. Al Ahmar on her signature of these documents or in any way challenge her standing to claim damages under the SPA in these proceedings, I am satisfied, and so find, that both Claimants were parties to the SPA.

11. The payment schedule was for a 10% instalment of the purchase price to be paid in advance, with the remaining 90% (a balance of AED 1,730,960.10) to be paid upon handover of the Unit (the "**Balance Instalment**").

12. The initial financial obligations were fulfilled by the Claimants: the initial instalment of 10% of the purchase price was paid by personal cheque dated 31 May 2019 in the amount of AED 192,328.90, together with Municipality Fees amounting to AED 38,465.78, some six weeks in advance of signing the SPA, as a result of which Mesab issued a 'No Objection' letter to the Abu Dhabi Municipality, and subsequently registered the SPA with the Municipality on 24 July 2019.

13. The Estimated Construction Completion Date was specified in the SPA as 30 September 2019. This date suited the Claimants' plans: Mr. Radwan explained to the Court that the main objective of purchasing this Unit was to lease it out for five years to cover instalment repayments to the financing bank, and thereafter, when his children had grown up, to reside in the Unit after completion of payment; accordingly the intention was to self-finance at least 50% of the Unit price, and to set up high instalment repayments to ensure completion within his desired five year period.

14. I accept this evidence: Mr. Radwan struck me as an honest, precise and punctilious man who gave truthful factual evidence throughout the trial. In the event, however, Mr. Radwan's hopes and intentions regarding this Unit did not materialise, and he says that by reason of Mesab's delay in handing over the Unit, he was forced to change his plans, which in due course has led him to seek redress before this Court for the damage he says he and his wife have suffered consequent upon this property transaction.

15. The milestone Estimated Construction Completion Date (referred to in evidence by Mr. Radwan as the "*Handover Date*") was not met. When 30 September 2019 arrived, Mr. Radwan contacted Mesab in order to facilitate the handover procedures relating to the Unit, only to discover that neither the Unit nor the building itself were complete and ready for handover.

16. Mr. Radwan's evidence is that he made several visits to the offices of Mesab to inquire as to the reason for the delayed handover, and to inquire about a date for inspection of the Unit, but no

information was forthcoming until 6 May 2020. On that date, Mesab sent a general letter to buyers announcing that the Tower was "*99% finished*" but that final approval from government agencies had been impacted by the Covid pandemic, that their consultant predicted a handover date "*no later than July 31, 2020*" and that "*we can't apologise enough*" for the "*difficult situation*" that Tower clients had been placed in.

17. In the event, the revised date of 31 July 2020 came and went, and thereafter Mr. Radwan engaged in protracted correspondence with Mesab in the period August 2020 to February 2021 wherein he expressed his frustration with the ongoing delays and Mesab's failure to comply with the contractual obligation to hand over the Unit, and demanded compensation for the damages caused due to the delayed handover.

18. During the period spanning late January 2021 to late November 2022, Mesab sent a variety of emails, either to Mr. Radwan or to the Tower's clientele, which contained differing handover dates: an email dated 4 July 2022 was said to constitute first notice for completion of handover formalities, whilst on 15 August 2022 an email to buyers in the Tower announced that the handover date had been set for 15 October 2022, this latter email doubling as notification that Mesab had designated a company known as Royal Avenue to liaise with Tower clients and deal with the handing over of units; this date subsequently was modified to 1 December 2022 "*due to technical considerations*" by an email from Royal Avenue dated 26 September 2022, and further modified to 1 January 2023 "*due to ongoing snagging process*" by another Royal Avenue email dated 22 November 2022. This constant slippage was met with complaints from Mr. Radwan and further demands for compensation for this continuous delay.

19. The postponement sequence did not end there: on 22 December 2022, Royal Avenue sent a further email to unit buyers in the Tower to the effect that the snagging works had not been completed and that "*the previously scheduled date on 1-1-23 has been postponed until further notice*".

20. No new handover date was fixed. However, at the beginning of February 2023, Mr. Radwan was contacted by phone by Mesab, notifying the Claimants of the readiness of the Unit for handover, and requesting payment of the Balance Instalment in order to initiate transfer of ownership in the Unit, and to set a date for inspection.

21. Mr. Radwan says, and the Court accepts, that he greeted this news with relief, and immediately moved to complete his bank financing procedures, notwithstanding that by this stage the applicable interest rates on his financing had doubled to 7% from the initial level of 3.5%. Accordingly, he arranged for an ADIB bank cheque post-dated to 10 February 2023 for the Balance Instalment to be sent to Mesab, at the same time as requesting an immediate transfer of ownership and commencement of the handover procedures for the Unit.

22. The Balance Instalment (rounded up to the dollar) corresponded with the "*Final Outstanding*" sum specified in the Statement of Account dated 26 December 2022 issued by Mesab and thus, so far as Mr. Radwan was concerned, payment of this sum represented full and final payment for the Unit he had purchased.

23. Mesab thereafter issued a 'No Objection' letter to the Abu Dhabi Municipality on 10 February 2023, and commenced the formal procedures to transfer ownership of the Unit to the Claimants: a Title Deed of the same date was issued in the Claimants' names on the same date, and also a Mortgage Registration Certificate indicating a mortgage value of AED 850,000 in favour of ADIB, the Claimants' mortgagee bank.

24. After issuance of the Title Deed, Mr. Radwan sent several inquiries as to an inspection date for the Unit, and this date was fixed for 6 March 2023. This inspection revealed snagging problems in the Unit, which Mesab said would be addressed within one week. However a final inspection was not forthcoming, nor was a formal handover of the Unit, notwithstanding full payment by the Claimants and issuance of the Title Deed.

25. On 20 May 2023, the Claimants received a general email from Royal Avenue on behalf of Mesab announcing that the snagging work in the Tower had been completed, but that occupancy and move-in to the units required obtaining an Occupancy Certificate. It was stated that moving in to the units would not take place before issuance of that Certificate, and that owners would be notified once this was issued.

26. This news was greeted with dismay by Mr. Radwan. He says, and I accept, that this development shocked him and plunged his family into serious financial crisis, since they were not only paying bank instalments on the ADIB mortgage loan for a Unit now formally in the name of himself and his wife, but at the same time, the Claimants were also paying rent for the property they were residing in prior to moving into the Unit, with the result that on one salary there were insufficient funds to cover family expenses.

27. Mr. Radwan was also very concerned about the numerous fundamental defects that existed in the Unit, which had been discovered after repeated visits: there are before the Court emails from him to Mesab, in particular a lengthy email of 12 May 2023, detailing the Claimants' various concerns in this regard, this followed by a further email of 27 May 2023 complaining of the absence of remedial action, and requesting a timetable for urgent resolution.

28. On 10 July 2023, Mr. Radwan and his family eventually were permitted by Mesab to move into their Unit prior to issuance of the Occupancy Certificate. Mr. Radwan says that this was done in an attempt to stem the Claimants' ongoing financial losses, although in order to achieve this he was asked to sign a Disclaimer Letter of the same date (the "**Disclaimer Letter**") acknowledging that Mesab bore no responsibility "*for any financial claims for any damages that may occur as a result of… staying in the [Unit] before the issuance of the occupancy certificate by the relevant authority*".

29. Mr. Radwan says that moving into the Unit early was not without difficulty, since prior to issuance of the Occupancy Certificate it was impossible to connect the gas supply: in fact, the Occupancy Certificate was granted for the building only on 12 October 2023.

30. On 4 September 2023, Mr. Radwan sent a final notice to Mesab saying that since Mesab was ignoring his attempts to meet to discuss an amicable solution to his claims, he would initiate court procedures, but again this was ignored. On 19 September 2023 he issued proceedings before the Abu Dhabi Commercial Courts (Third Small Commercial Circuit No. 2653/2023). On 7 November 2023, the Abu Dhabi Court ruled that it lacked jurisdiction to deal with the claims and referred the case to this Court.

**The Parties' Respective Cases**

31. In principle, the Claimants' case as outlined in the Claim filed on 22 December 2023 is relatively straightforward: it is said that Mesab is liable for its egregious delay in delivery of the Unit, in breach of its contractual obligations under the SPA, and that as a consequence the Claimants have suffered financial loss under differing heads of claim to be assessed on the principles variously propounded in Articles 246, 282, 292 and 296 of the Federal Civil Transactions Law, Law No. 5 of 1985 (the "**Civil Code**"). The total amount now claimed under the various claims propounded by the Claimants amounts to AED 901,349.

32. In its Defence filed on 19 January 2024, Mesab refutes any liability for delay in completion of the building and any monetary liability to the Claimants.

33. Some points raised in the Defence are demurrable on their face and warrant no further attention. For example, it is alleged that the Claimants failed to provide supporting evidence for the claims, which is an extraordinary statement given the proliferation of documents collated and presented to this Court by the Claimants.

34. The Court discerns no merit in the contention that the Claimants implicitly consented to the delay and extension of the delivery date of the Unit by reason of the Claimants' choice to occupy the

apartment before the issuance of the Occupancy Certificate: this contention is amply contradicted by the significant number of emails of strident complaint sent by Mr. Radwan to Mesab. Nor does the Court accept Mesab's submission that the Claimants waived their rights to compensation for delay and to pursue claims for building defects in the Unit by signing the Disclaimer Letter of 10 July 2023. This letter only included a waiver of claims limited to damages that may occur as a result of staying in the Unit before the issuance of the Occupancy Certificate. Clearly, Mr. Radwan's claims to compensation for delayed handover and defects were not as a result of early occupancy and were not waived by the Disclaimer Letter.

35. Lastly, the contention that the Claimants did not fulfill the prerequisite of giving notice before claiming compensation pursuant to section 387 of the Civil Code suffers the twin defect of not being relied upon in argument at the trial and of flying in the face of the facts and of the contemporary documentation.

36. In the event, in answer to the Claimants' delay allegations, the Defence relied on four substantive matters.

A. *Exemption from Liability Clause*

37. Schedule 5 to the SPA is entitled "Adherence Deed". Its purpose, set out in Clause 2, is to provide for the Purchaser's inspection and acceptance of the Unit in accordance with agreed plans and specifications and free of defects, with Clause 3 providing for release and discharge by the Purchaser of the Seller "*from all claims, damages and causes of action of every kind, nature and character, known or unknown, fixed or contingent, which the Purchaser may now or in the future have arising from or in connection with the [Unit]*". This is followed by Clause 4, which provides that such acceptance, release and discharge is "*without prejudice to the provisions contained in the [SPA] regarding rectification of any defects in the [Unit] by the Seller following Completion*", this being a reference to the Defects Liability Period (Clause 4.2, Schedule 4) which is defined to be one year from the date of the final certificate of completion issued by the Abu Dhabi Municipality.

38. Mesab purports to elevate Clause 3 of the Adherence Deed to an all-purpose exemption clause including exemption from any type of claim and including, in this case, the Claimants' damages claims as now pursued. The Claimants, on the other hand, say that Clause 3 simply provides for acceptance and release in terms of the specifications and condition of the Unit as delivered, and in no sense is intended to cover damages for delay and for moral damage such as are pursued in this case. For the Claimants' part, Mr. Radwan also submits, and the learned Court Interpreter has agreed, that correctly translated from the Arabic script, the opening words of Clause 3 should read "*[t]he Purchaser thereby fully agrees…"* with the word "*thereby*" replacing the "*hereby*"", which is used in the English text, "*thereby*" reinforcing his submission regarding the contextual import of this clause.

39. The Court agrees (and so finds) that this is not an 'all-purpose' exemption clause as Mesab now argues and does not preclude the present action by the Claimants. The Court also concurs with the view expressed by Mr. Siddiqi at page 8 of the Joint Report, to the effect that the Adherence Deed does not exempt Mesab from liability for delay in completing and handing over the Unit. It follows that this blanket defence is rejected.

B. *Contractual term permitting extension*

40. Mesab says that the SPA itself provides for an extension of the contractual period for construction and delivery of the Unit. In this context, Mesab references Clause 3(d) of the SPA. Clause 3 deals with "Completion and Handover". Clause 3(a) states that it is agreed by the Seller and the Purchaser that the Unit will be completed on the Anticipated Completion Date, which in this case is contractually specified to be 30 September 2019. Clause 3(b) contains acknowledgment by the Purchaser to pay the balance of the Purchase Price on the Completion Date, whilst Clause 3(d) states that "*[t]he Purchaser agrees that the Seller has the right to extend the Anticipated*

*Completion Date without cause for a period or periods of up to a total of twelve (12) months. Such extension notified to the Purchaser by written notice*".

41. Mr. Hotari submitted that Clause 3(d) must be taken into account when considering whether Mesab was in contractual default due to their delay in delivery of the Unit, and whether it is justifiable for the Claimants to bring a claim for damages from 30 September 2019. For the Claimants' part, Mr. Radwan submits that there was no notice issued by Mesab in terms of such purported contractual extension of the Completion Date, and thus this argument must fail.

42. True it is that there was no such specific notice, although from early May 2020 Mesab was constantly sending out notices as to delay, and by email to its clients dated 6 May 2020 Mesab stated that although the Tower was 99% finished, outstanding completion formalities were being compromised by the Covid pandemic.

43. The Court does not consider that in the particular circumstances of this case the substantive contractual right for a 12-month extension should be abrogated simply by the absence of notice formalities, or specific wording referencing Clause 3(d), and so holds. It follows that the commencement date for the Claimants' delay claim does not commence as from 30 September 2019 as the Claimants contend.

C. *The Covid pandemic: Force Majeure*

44. The worldwide Covid pandemic struck the UAE from March 2020. The Court's attention has been drawn by Mr. Al Faidi, to the fact that the UAE Cabinet issued a Resolution dated 10 January 2021 (Cabinet Resolution No. 5 of 2021) declaring an "*emergency financial crisis*" during the period 1 April 2020 to 31 July 2021: this was said to be in accordance with the Federal Decree Law No. (9) of 2016 on bankruptcy and its amendments, but there is no reason to think that this proscription did not extend beyond the issue of bankruptcy.

45. What is clear is that there was a period of over a year when, as with those other parts of the world similarly afflicted, there was pandemic-induced lockdown in the UAE, and little commercial activity. However, the issue of Covid, and its effect, sharply divides the parties in this case.

46. Mesab says that the Covid pandemic amounted to force majeure and prevented them from proceeding with completion of the Tower, and thus it is entitled to the protection of Clause 15 of the SPA, which is entitled "*Force Majeure Events and Delay Events*". This Clause provides that if the Anticipated Completion Date is delayed due to any reason beyond the Seller's control including any Force Majeure or Delay Event, the Seller may notify the Purchaser of such delay as soon as practicable, and as a consequence the Purchaser "*releases and discharges the Seller*" from those consequences. Further and in particular Clause 15(b) provides that "*[t]he obligations of the Seller under the Agreement shall be suspended and postponed until the date the Force Majeure Event or Delay Event no longer exists*" whilst Clause 15(d) provides that upon the occurrence of a Force Majeure or a Delay Event "*[t]he Parties… shall take all reasonable measures to minimize the effect of such event and to continue to perform their obligations under the Agreement*".

47. The Claimants say that the Covid pandemic did not amount to force majeure as a matter of UAE federal law, since Covid clearly was not the sole cause of the delay that occurred, citing in this regard case law from the Abu Dhabi Court of Cassation Judgment (Commercial No. 1189/2021) referencing Article 273(1) of the Civil Code, which requires an unforeseen event to be the "*sole cause of non-performance to render the obligation's fulfillment impossible*".

48. Whether in the circumstances of this case Covid can be classified as a Force Majeure Event strikes the Court as an arid debate: whether it was force majeure strictly so-called, the Covid pandemic most certainly was a 'delay event' writ large, and the existence of Covid and the knock-on effects on the workforce and commercial activity was instrumental in an Emirate-wide suspension of work activity in Abu Dhabi, just as it was in the UAE, and for that matter in a significant part of the rest of the world.

49. This fact is amply demonstrated in contemporary correspondence: for example, a letter from Mesab dated 5 August 2020 signed by the General Manager, Tarek Alan, sought to explain the reasons for delay in the construction of the Tower, and noted that the project completion was 98.72% by the end of February 2020, that:

> "*…the primary reason for the project's delay at this stage is the Coronavirus (COVID-19) pandemic…*
>
> *…individuals involved in the project, such as engineers, workers, the main contractor, subcontractors, and the consulting office, were infected. Many recovered, but one person was lost due to the virus. Consequently the project site was evacuated, work was done remotely, the building was sanitised, safety instructions were provided to the safety office, and a new working mechanism was established in the new circumstances…*
>
> *Abu Dhabi imposed a lockdown and extended it twice, and to date, Abu Dhabi remains closed. Subcontractors residing in other cities cannot reach the project.*
>
> *Additionally, workers… undergo periodic testing, making it difficult for them to access the project…*
>
> *Remote communication with banks, government departments, and construction inspections began to take much longer… the Coronavirus pandemic is the main reason for the delay at this time*."

This account also was reflected in a letter from the Tower's main contractor, Teejan, (the "**Main Contractor**") dated 5 August 2020, recounting that due to movement restrictions on workers imposed by the Abu Dhabi Municipality, most contractors were unable to attend the worksite to complete the construction activities.

50. Although Covid was not the only delay event that ultimately occurred, it was a significant contributory factor in delayed completion of the Tower, and the Court so finds.

51. In the course of oral argument for the Claimants, and notwithstanding his insistence that Covid was not a Force Majeure Event, Mr. Radwan made much of Mesab's letter to buyers of units in the Tower dated 6 May 2020 stating that the Tower "*is 99% finished*" but that "*because most government agencies are impacted by the Covid pandemic, it has been very difficult to get inspections scheduled*". He argues that if this statement was true, then completion and handover of the Unit should have taken place very soon upon lifting of the Covid restrictions, but that nevertheless it still took a significant further period before the Claimants were able to move into the Unit.

D. *Main Contractor/ Sub-Contractor problems*

52. In addition to the obvious delay arising from Covid, Mesab says that it is entitled to rely in defence to the delay claim on problems which were encountered with the Main Contractor and its subcontractors.

53. Evidence of this is contained in a letter from Avant Garde (the architects and engineers for the Tower), dated 18 June 2020 addressed to the Director of Developers Affairs in the Abu Dhabi Municipality referencing: (i) the sub-contractor's delay in completing the tasks assigned to them; (ii) the Main Contractor's delay in disbursing dues to the subcontractor; and (iii) the Main Contractor's failure to adhere to timelines and commitments, including failing to provide enough skilled labor and the necessary technical staff to complete the Tower on time. A subsequent letter, for some reason dated 22 March 2024, sent from the Managing Director of Avant Garde to the CEO of Mesab, listed the "*major issues that are related to the force majeure circumstances*" which caused delay, and lists three matters: (i) the Corona pandemic, which was said to have caused major disruption in work progress, (ii) the "*financial fallbacks and inability to continue the works*" of Teejan, and (iii) "*labour strikes due to non-payment of salaries*".

54. As to this March 2024 letter, Mr. Radwan submits, probably justifiably, that it was written for the express purpose of this litigation.

55. In any event, it is unclear why Mesab considers that defects in work practices by the Main Contractor and its sub-contractor respectively should provide Mesab with an excuse for delay, or why such problems are nothing to do with them, as has been suggested.

56. It is Mesab alone which has a contractual relationship with the Main Contractor, and if and in so far as problems arose in the performance of Mesab's contract with the Claimants under the SPA, then, in blunt terms, this is Mesab's problem, and as such does not constitute a defence for Mesab in a suit brought by the Claimants. Accordingly, if damages are consequentially awarded in favour of the Claimants for Mesab's breach of the SPA, then these must be borne by Mesab which, if necessary, can seek an indemnity against the Main Contractor, its own contracting partner. It follows that this line of defence by Mesab is rejected.

57. Having found that the arguments on behalf of Mesab have succeeded on the issues identified in sections B and C above, the Court now turns to the monetary claims as advanced by the Claimants.

**Claimants' Claims for Monetary Relief**

58. In bringing these claims, the Claimants rely upon Articles 246, 282, 292 and 296 of the Civil Code. In particular:

    a. Article 246 provides that a contract shall be implemented according to its provisions, and in a manner consistent with the requirements of good faith, and shall extend to its essentials in accordance with the law, custom and the nature of the transaction; whilst

    b. Article 292 stipulates that compensation for breach must include not only harm actually suffered as a consequence of the breach, but also loss of profit provided that it is the natural result of the harmful act. A harmful act includes a breach of contract or a tort that results in damage being caused. Under UAE law, all harm caused must be made good, and this principle applies to breach of contract (as one category of harmful act) and to tort (in cases where no contract exists).

59. In his written argument filed on behalf of the Claimants, Mr. Radwan cited Abu Dhabi Court of Cassation cases which speak to the principles to be applied in the assessment of damages under the Civil Code. Two cases are of particular assistance in the contractual context:

    a. In Abu Dhabi Court of Cassation Judgment (Commercial No. 1104/2021), the Court observed that:

> "*The right to compensation arises when there is a violation of a legitimate right or financial interest of the affected party in their person or their money. Contractual liability is based on its three pillars of fault, damage, and a causal relationship between them… The compensation is estimated in all cases according to the damage incurred by the affected party and the profits lost due to the harmful act, provided that this is the result of the harmful action… Rectification of damage requires compensating the affected party for the loss suffered and profits lost…*".

    b. Whilst in Abu Dhabi Court of Cassation Judgment (Commercial No. 700/2009) the Court noted that:

> "*Under Articles 282, 292 and 293 of the Civil Code, any default causing harm to a third party, whether by a positive act or a shortcoming, will oblige the doer thereof to make compensation. Compensation will include actual losses as well as loss of earnings. It is also settled law that moral damage is everything that affects the honour, feelings or dignity of the aggrieved party, including mental*

*suffering. A finding of default giving rise to a liability for compensation, and the attribution thereof, are matters of fact within the independent discretion of the trial court without review in that regard from the court of cassation, provided that it bases its judgment on sound grounds having their proven basis in the papers…"*

60. As to the issue of foreseeability, the Claimants' expert, Mr. Siddiqi, to whose expert evidence I accord the greater weight, states that for breach of contract only damages that were foreseeable at the time of contracting are recoverable together with loss of profit and moral damage which is the natural result of the breach. In this context Mr. Siddiqi cited a judgment of the Federal Supreme Court (Appeal No. 297 and 300/2003 (Judicial Year 23)) as follows:

> *"The criterion for an award of material or moral damages in the scope of contractual liability is that there must be proof that the damage was direct and foreseeable… [w]hat is meant by foreseeable damage in this regard is damage that could not have been foreseeable by the ordinary man in such external circumstances as those in which the obligor found himself".*

In addition, Mr. Siddiqi quoted from the official commentary of the Civil Code published by the Federal UAE Ministry of Justice (known as the "Explanatory Memorandum"), which at page 118 reads:

> *"Compensation includes all damage and loss of earnings sustained by the obligee, provided that that is a natural result of non-performance or delay in performance of the obligation. Damage is regarded as a natural result if it was not within the power of the obligee by making reasonable efforts to avert it. In general, in the case of obligations that have their origins in contracts, the obligor who has not committed any fraud or gross error is obliged to pay compensation only for the damage that could have been ordinarily foreseen at the time the contract was made."*

61. The Claimants advance three specific monetary claims for contractual breach.

A. *Compensation for loss of use of the Unit due to delayed delivery*

62. This claim is for AED 612,000, which sum results from the calculation of potential lost rent for the Unit at the rate of AED 13,500 per month, multiplied by 45 months 10 days, which period is the time between the contractual date between the Estimated Construction Completion Date (referred to by Mr. Radwan as the "*Handover Date*") of 30 September 2019 and the date upon which the Claimants gained physical possession of the Unit, namely 10 July 2023.

63. In terms of this computation, the Court accepts the evidence of two rental price quotations and an actual rental contract prayed in aid by the Claimants, and thus adopts the postulate of a potential monthly rent of AED 13,500 for a Unit of this size and situation in the Tower.

64. It is certainly foreseeable that the Claimants may have wished to lease out the Unit purchased, but in light of the conclusions reached earlier in this Judgment (at paragraphs 40-51 above) relating to the contractual term permitting extension and the Covid pandemic, the multiplier adopted by the Claimants of 45 months 10 days cannot be substantiated and is rejected.

65. The view of the Court is that the appropriate period for a claim of delay amounting to contractual breach should commence from 1 August 2021 (being the date immediately following the concluding date of 31 July 2021 in the UAE Cabinet Resolution referenced at paragraph 44 above, and thus the date from which Mesab's delay should properly be measured) and (as the Claimants accept) should conclude on 9 July 2023, which is the day preceding their physical possession of the Unit. On this basis, therefore, the relevant computation would be AED 13,500 (the anticipated rental) multiplied by 23 months 9 days, which produces a rounded figure of AED 314,500.

66. However, that is not the end of the story. Such figure of AED 314,500 (or indeed the Claimants' postulate of AED 612,000) is no more than a hypothetical figure, since of course the Claimants had an expectation only, and at no time did they have a rental contract in hand. It seems to me that what the Claimants actually have lost is the loss of the chance of leasing out the Unit in line with the Claimants' original intentions, and it follows that the potential rental sum must be subject to a discount to reflect this fact.

67. On this aspect there is no evidence or argument forthcoming from either side, and in the circumstances the Court must simply do its best. After some reflection the Court considers that the loss of the chance afforded to the Claimants should be valued at 60% of the sum of AED 314,500, namely AED 188,700, and it is this sum that the Court now awards the Claimants under this head of claim.

B. *Bank Interest and Investment Loss*

68. The cumulative claim under this head posits differing factual situations, and the extent to which there is or may be overlap in the elements of this claim is not always clear.

*(i) Bank interest imposed in the period 10 February 2023 – 10 July 2023*

69. The Claimants seek an award of the sum of AED 23,500 representing bank interest imposed on them between the date of the property transfer to their names, 10 February 2023 (from which date the Claimants secured a bank loan) until the date the Claimants were allowed physical access to their Unit on 10 July 2023.

70. Mr. Radwan says (and I accept) that due to higher interest rates then prevailing, he and his wife made maximum efforts to pay a significant part of the capital payment due for the Unit, leaving an amount of AED 850,000 which required to be financed by bank loan. The problem at this stage was that at that time that the Claimants were required to pay the second instalment to Mesab, interest rates had risen from about 3.5% to 7%, so that for the five months the Claimants were unable to access the Unit, they paid an average of AED 4,500 monthly in interest without any benefit or gain. Thus, Mr. Radwan says, the Claimants are entitled to recoup this monthly sum for the four-month period in question.

71. The Court is not unsympathetic in principle, but on these facts is not persuaded that this is the correct estimate of the Claimants' loss. The Claimants were asked to pay the outstanding amount remaining on the Unit and duly did so, but it seems to me that the correct measure of this loss is not the interest paid during this five month period – which they had to pay anyway upon taking out the loan to pay the outstanding capital sum for the Unit – but is the amount of the rental payments the Claimants had to pay on the property they were forced to remain in for those five months during which the Claimants had title to the Unit but were unable to move in.

72. No evidence was before the Court as to the rental costs incurred in living in the rental property, the only evidence in this regard being the difficulty the Claimants were placed in with their landlord for having to remain in that property for longer than had been anticipated: Mr. Radwan's evidence was that at one stage he was extremely concerned that he and his family might have been evicted and lose the rental deposit, although this did not in fact happen.

73. Absent such evidence as to such rental cost, the Court makes no compensatory award under this head.

*(ii) Higher prevailing interest rates consequent on delay*

74. The Court understands that in substance the Claimants seek compensation in the amount of AED 150,000 for the substantial differential in the applicable interest rate at the time when they say the Unit should have been delivered, namely end September 2019 when banks were charging a profit rate of 3.25%, and that this should be compared with the prevailing 7% interest rate imposed by the financing bank at the date of the Unit transfer in February 2023.

75. Thus, Mr. Radwan says, had the Unit been available when it should have been, and financing the balance of the price had attracted the lower rate, the Claimants would have been able to meet their "*five year plan*" in terms of paying off the Unit, but that as matters stand now, given the enhanced interest rate level on the funds borrowed, it is now going to take them eight years to pay off the Unit. Mr. Radwan's evidence is that instead of paying monthly interest on the sum borrowed which would have amounted to AED 2,300, the mortgagee bank's current interest charges are close to double that figure, namely AED 4,700. He therefore seeks the differential extrapolated over five years, which was the period for which he took out the financing loan of AED 850,000 to complete purchase of his Unit.

76. At first blush this looks persuasive, although given that the Court now has held (at paragraph 65 above) that there was no contractual breach until 1 August 2021, the baseline interest rate posited for the Claimants' loss calculation may not be as accurate as they would wish given there is no information before the Court as to the retail interest rate level prevailing as at August 2021: all that is available on the papers is a mortgage proposal sent to Mr. Radwan bearing the date 24 February 2021 quoting the rate for a five year period as 3.49%. Mr. Radwan also has exhibited to his 29 April 2024 witness statement a statement from ADIB, his mortgagee bank, covering the period 21 December 2022 to 31 March 2024 and relating to his AED 850,000 loan: this specifies a current profit rate of 7.17%, which amounts to a monthly payment of AED 13,099.11, and which rate exceeds that which he says was the 7% rate as at the date of the Unit transfer.

77. Interest rates can move in both directions, and the Court also has no idea of whether there is scope under the mortgage contract (which is not exhibited but which appears from the bank statement to have been executed on 21 December 2022, presumably for payment required in February 2023) for early or partial redemption. More important, it is unclear whether the mortgage contract provides for a fixed or floating interest rate, although the single statement exhibited from the mortgagee bank citing a current rate of 7.17% would suggest the latter, and attempting to forecast interest rate trends in the current financial environment is far from an exact science.

78. Nevertheless, at the end of the day the Court is satisfied that, as Mr. Radwan submits, consequent on the delayed delivery of the Unit, the Claimants have been and will continue to be disadvantaged in terms of applicable interest rates, and should be compensated. Doing the best that it can, the Court has concluded that on the balance of probabilities that the Claimants will be required to pay a minimum of AED 1,500 per month in excess interest over a five year period consequent upon the delay, which amounts to AED 90,000, and it is this compensatory sum which is awarded under this head of claim.

*(iii) Loss of investment earnings*

79. This is a claim in the sum of AED 31,349 which the Claimants say represents lost earnings from investments Mr. Radwan would have made, had he not been required to pay the balance of the purchase price for the Unit in February 2023. The Claimants' case is that had they had access to that part of the purchase price which (over and above the mortgage sum of AED 850,000) had been paid in cash from personal assets (and which had necessitated selling Mr. Radwan's share portfolio in the Abu Dhabi and Dubai financial markets), then the Claimants could have used that money in the five month period from 10 February 2023 to 10 September 2023 either to maintain or add to investments or to earn interest on that cash at the prevailing rates.

80. Mr. Radwan says that particularly egregious on the part of Mesab in requiring full payment for the Unit in February 2023 was that Mesab was well aware that it was incapable of handing over possession of the Unit at that time, but nevertheless Mesab deceived the Claimants into payment of the Balance Instalment, only for the Claimants then to find that the Unit could not be handed over for an additional five months.

81. Mr. Radwan puts this part of the claim upon two bases: first, that he could have used the cash element of the price in the numerous opportunities then available in the financial markets; and second, that in any event this amount could have been used as an interest-earning bank deposit.

82. The Court is uninterested in what may be claimed could have been achieved in the financial markets, nor indeed how Mr. Radwan's existing share portfolio would have fared had this not been liquidated: shares can go down as well as up.

83. What is more tenable is the argument that as a result of Mesab's actions that Mr. Radwan parted with cash for a period of five months when clearly he did not need to do so. Given that the Balance Instalment paid to Mesab in order to obtain title to the Unit was AED 1,730,960, and that of that amount the bank loan was AED 850,000, the cash differential supplied from Mr. Radwan's funds was in the order of AED 880,960.

84. As to a deposit interest rate, Mr. Radwan takes the prevailing lending figure of 7%, but in the view of the Court this is ambitious; banks are not charities, and a significant part of their income in an era of high interest rates derives from the spread between lending and deposit rates. Accordingly, a more realistic deposit rate is 5% per annum, which when applied to the principal sum of 880,960 for a period of 5 months between 10 February 2023 and 10 July 2023 produces a rounded figure of AED 18,100. It is this sum which the Court awards the Claimants under this head of claim.

C. *Compensation for Partial Use of the Unit*

85. The Claimants seek AED 10,000 as compensation for partial use of the Unit when Mr. Radwan and his family took possession on 10 July 2023 in terms of the non-provision of the central gas connection and not operating recreational facilities for the building.

86. This strikes me as an ambitious. Having been successful in persuading Mesab to permit physical entry into the Unit before the grant of the Occupancy Certificate, Mr. Radwan (on behalf of himself, and his wife) signed the Disclaimer Letter, and agreed to waive any financial claims that may arise as a result of their early occupancy of the Unit. In light of the Disclaimer Letter, it is difficult to understand how the Claimants could now seek such compensation for non-provision of services that were not available at the time of their early occupancy. This claim is rejected.

D. *Compensation for defects*

87. The Claimants seek the sum of AED 50,000 as compensation for the substantial defects in the fabric and finishing of the Unit, which Mr. Radwan says was supposed to have high quality finishing specifications, together with compensation for serious air conditioning issues which caused damage to the décor and to his furniture: he cites numerous emails of complaint the Claimants sent to Mesab, and also in this context a Report issued by a firm called ACHY-TECTURE, dated 13 November 2023, which details, with photos, 39 defects of one type or another, all characterised (in yellow code) as "*Medium minor defects*".

88. I have no doubt that there are defects in the Unit as thus characterised, but not only is there no attempt to break down the costs of repair of these defects – the sum of AED 50,000 appears to be some form of 'umbrella' estimate originating from an unknown source – but the issue of defects, and their repair, is the subject of a separate claim for injunctive relief, and as such does not appear to the Court to be suitable for an independent monetary claim which may involve double recovery, and in any event is not properly costed.

89. It follows therefore that no monetary award is made for this element of the Claimants' claim.

E. *Moral Damages*

90. This involves a claim for AED 25,000 for moral and physical damages arising from the disputes that occurred between Mr. Radwan and the lessor of the apartment in which he and his family were residing before being able to take possession of their Unit. Due to the delays which occurred in handing over the Unit, Mr. Radwan says that the Claimants were compelled to obtain repeated extensions from the apartment owner, who threatened to confiscate their rental deposit

(although Mr. Radwan said in evidence that ultimately such confiscation did not occur). Mr. Radwan's evidence was that this had led to great strain on himself and his family.

91. The issue of moral damage is defined in Article 293 of the Civil Code:

> *"(1) The right to have damage made good shall include moral damage, and an infringement of the liberty, dignity, honour, reputation, social standing or financial condition of another shall be regarded as being moral damage."*

92. In response to questions from the Court, Mr. Siddiqi emphasised that this head of damage covered the intangible element of a dispute and resultant mental anxiety and inconvenience, and that this may be reflected in a damages award.

93. It also appears from a reading of the text of relevant judgments, that the quantum of damage under this head is essentially regarded as a matter for the trial court on the basis of the evidence and the case papers, provided always, as the Abu Dhabi Court of Cassation has observed (see paragraph 59(b) above), that the case "*has a proven basis on the papers*".

94. In the circumstances of the present dispute, which are revealed in detail on case papers, I have no doubt that in the course of their dealings with Mesab, the Claimants suffered considerable mental anxiety and anguish as the saga of the sale and purchase the Unit unfolded over a period of four years between July 2019 and July 2023, that this continued in the months subsequent to taking possession when the unsatisfactory state of the fixtures and fittings and issues with water ingress and air conditioning became apparent. I am satisfied that such mental strain was not limited to the problems incurred with repeatedly extending their apartment lease over landlord objections prior to moving into their Unit.

95. Accordingly, under the head of moral damages, this Court awards the Claimants the sum of AED 50,000.

F. *Other claim*

96. In the course of Mr. Radwan's final submissions, he advised that the Claimants wished to make an additional claim in the sum of AED 7,000 for damage which Mr. Radwan said had been caused to the decoration in the Unit by workers engaged in restoring defects in an adjacent apartment in the Tower.

97. This is a claim which post-dates the issue of the present case and is nowhere mentioned in the case papers assembled by Mr. Radwan. There is no evidence in support of this late claim, and this claim also is rejected.

G. *Summary*

98. In summary, the Claimants' monetary claims in this case succeed in the amount of AED 346,800 (being the sum of AED 188,700, AED 90,000, AED 18,100, and AED 50,000). In the view of the Court such award is consonant with the provisions of the Civil Code governing the award of compensatory damages, and in particular the principle of the "*three pillars*" underpinning contractual liability referenced by the Abu Dhabi Court of Cassation (see paragraph 59(a) above).

99. In making this damages award, the Court further notes that it rejects Mesab's contention, advanced by Mr. Al Faidi in the Joint Report (at page 7) that "*the established engineering custom in the Emirate of Abu Dhabi stipulates that the compensation due to the claimant shall not exceed ten percent (10%) of the contract value*", and that this should apply in the present case.

100. The Court prefers, and has adopted, the view of Mr. Siddiqi in the Joint Report (at page 7) that:

> "*The 10% 'engineering custom' in the Emirate of Abu Dhabi referred to by the Defendant's expert does not apply to the claims for damages under the SPA. The 10%*

*limit on liquidated damages for delay applies only to construction contracts, if such a provision is included in the construction contract. There is no such rule that applies to contracts for sale of an apartment. The Claimants' expert draws the Court's attention to the judgment attached as Annexure F to the Claimants' expert report, under which the Dubai Court of Cassation awarded the purchaser of a villa an amount in excess of 35% of the purchase price of the villa as damages for delay*."

**Non-Financial Relief**

101. In addition to the claims for monetary compensation, the Claimants also seek Orders obligating Mesab to repair the defects in the Unit, and also to launch and operate all recreational facilities in the Tower.

102. The latter claim has been overtaken by events, the evidence being that these recreational facilities now are in operation.

103. However, the issue of the repair of defects continues to loom large and (very obviously given witness demeanour) continues to raise the temperature of this dispute. Since taking possession of the Unit, Mr. Radwan has made a number of complaints about the problems he encountered with the Unit's fixtures and fittings – see, for example, his long and strident email (with 10 attachments) dated 14 September 2023 to Mesab complaining about a multitude of matters necessitating resolution. Mr. Radwan's evidence is that the majority of the issues still remain unresolved.

104. The Court has given no weight to the letter, prayed in aid by one of the three factual witnesses called by Mesab, which Mr. Radwan was asked to sign dated 8 April 2023 suggesting that the Unit was free of defects. The Court accepts Mr. Radwan's evidence that this was prior to taking possession of the Unit and at a time when he and his family were desperate to move in because of the difficulties they were experiencing with their then landlord, who was threatening to evict them: in effect, this was the price exacted for early access.

105. In any event, the subsequent actions of Mesab indicate that it is and has been well aware of the defects raised by the Claimants: during the trial, this aspect of the case attracted noticeable aggression on both sides, and Mr. Hotari submitted that he was of the view that the remedial action sought by Mr. Radwan was excessive and "*endless*", particularly in terms of replacement of 60% of the floor tiles, but that "*in good faith*" Mesab nevertheless was prepared to proceed with rectification works.

106. It is undisputed that under the SPA there is a 12-month Defects Liability Period, and there appears already to have been a number of efforts, albeit unsuccessful, to repair the defects of which complaint is made. Prior to the commencement of this trial, Mr. Radwan also complained about a Defects Report dated 20 April 2024 (the "**Defects Report**") which, he said, was made on behalf of Mesab and which contained a rectification plan for addressing and remedying the defects, but said that notwithstanding his several requests for sight of this Report, Mesab had refused to disclose it.

107. In the event, at the Court's request, the Defects Report, which clearly was discoverable, was produced by Mr. Hotari on 12 July 2024, at the second day of this trial, and appears to be a comprehensive document. After examining it, the Claimants' position was that in substance there was little difference between the content of this report, and the report dated 13 May 2024 prepared by the engineer the Claimants had retained in this regard. The content of that engineer's report is contained in the witness statement of Mr. Humam Omar Zaytoun, which evidence the Court accepts.

108. Although Mr. Hotari has stated that Mesab is prepared to proceed with the rectification works, and the Court hopes that it can take his sentiments at face value, the fact remains that this has been a long-standing (and highly emotive) issue, and in the circumstances the Court takes the view that the appropriate way forward is to order Mesab to proceed with the rectification work

detailed in the Defects Report, and that such work is to be commenced within 28 days of the date of this Judgment, or upon such other date as is agreed with the Claimants.

**Mesab's Counterclaim**

109. The Counterclaim filed by Mesab seeks to recover the sum of AED 55,748.64, the breakdown of which consists of "*Connection Fees*" of the main utilities (electricity, air conditioning and telecommunication) to the Tower, and which are set out in the witness statement of Mr. Mohammed Jamal, the Tower community manager. As the Court understands it, these fees relate to the connection of these utilities to the building structure itself, and are to be distinguished from the connection fees which each unit owner paid to the individual utility provider.

110. These charges have not been fully explained by Mesab, nor has the Court sighted any underlying receipts demonstrating payment by Mesab to the utility providers. It is asserted that these Connection Fees apply to all owners of units in the Tower without exception, and apparently the contributions of each unit are pro-rated according to area, so that the charged amount varies according to the size of each individual unit.

111. In common with the other Tower residents called on behalf of the Claimants, Mr. Radwan takes a very dim view of this Counterclaim, variously terming it "*vindictive and malicious*" and as an "*afterthought*" and protesting that it was unfair to conceal an amount of this size, which was levied in addition to the purchase price of the Unit. This view was mirrored in evidence by other owners who were called to give evidence and whose unanimous view was that if this charge was going to be levied, it should have been included in the purchase price, and that they had been given no idea of the prospective size of such a claim. Mr. Radwan also submits that it was notable that in cross-examination Mr. Jamal said that he never had seen any payment receipt to the effect that these fees had been paid by Mesab.

112. In the context of this claim, Mesab relied upon Clauses 7 and 12 of the SPA. Clause 7 provides for the Purchaser to reimburse the Seller "*for the proportional connection fees… to the following entities i. ADDC (Electricity and Water) ii. PAL (District Cooling) iii. UTT (Etisalat)"* and Clause 12(b) provides that the Purchaser shall be liable for "*all connection fees and annual maintenance and service fees to the Master Developer in consideration for the Master Developer providing the information and communication services to the Building*". Clause 12(c) states that the Seller has contracted with UTT (an Etisalat company) for the purpose of installing security cameras, smart home system, storage and security room system and that *"the Purchaser shall reimburse Seller for the proportionate fees associated with this contract*".

113. It follows that within the SPA there is a contractual basis for these charges, albeit the oddity (which has not been adequately explained) is that these charges are being levied after the completion of the building and not earlier, when it might have been expected that expenses of this type would have been recouped when the final accounting took place between the parties. The invoice denoting the sum outstanding sent to Mr. Radwan by Mesab dated 26 December 2022, and against which the Closing Balance of AED 1,730,960.10 was paid, makes no mention of such outstanding Connection Fees, the pro-rated amount of which must have been known at that time by Mesab.

114. However, and notwithstanding the Court's reservations, on the present state of the evidence and on the balance of probabilities, the Court is not inclined to reject Mesab's Counterclaim, or at least the substantial part of the sum relating to Connection Fees paid to the utility providers: to do otherwise would be to cast doubt upon the intrinsic veracity of this claim, and even Mr. Radwan was not prepared to go this far.

115. The exception is that part of the sum claimed relating to Administration Fees in the sum of AED 5,250. This figure derives from Clause 1.3 of the SPA wherein the Purchaser agrees to pay the Seller an administration fee capped at AED 5,000 prior to that which is termed the Initial Registration of the Purchaser. This is no doubt an advance charge covering administration fees when the Purchaser enters into a Reservation Form prior to formally signing the SPA. It is this

fee which appears within the sum now claimed by Mesab in the Counterclaim, albeit there appears to have been added to that a sum of AED 250 attributed to VAT.

116. Mr. Radwan maintains that the Claimants have paid this fee, at least in discounted form. During the trial Mr. Radwan produced a document (added to the case papers as Exhibit C-1), which was an Administration Fee receipt dated 15 July 2019 issued by for payment of the sum of AED 1,050 and referencing Unit 2502, which payment followed the signing of the Reservation Form and SPA a day earlier on 14 July 2019. Notwithstanding the suggestion from Mr. Hotari (who conducted Mesab's case but did not give evidence) that any discount given to the Claimants was done without authority, the Court nevertheless accepts Mr. Radwan's evidence: it is highly probable that a property agent involved with marketing the new Tower would have offered such a discount to prospective buyers, and that this is what occurred in Mr. Radwan's case.

117. Albeit with some hesitation, the Court grants the Counterclaim in the rounded amount of AED 50,498.

**Conclusion**

118. In light of the foregoing, the result of these proceedings may be summarised as follows:

a. After netting off the respective awards between the parties, being AED 346,800 in respect of the Claimants' Claims, and AED 50,498 in respect of the Defendants' Counterclaim, Judgment is to be entered against the Defendants in the sum of AED 296,302, such sum to bear simple interest at the rate of 5% per annum from the date of Judgment herein until payment.

b. At their own cost, the Defendants are to implement the rectification works itemised in their Defects Report dated 20 April 2024, such works to be commenced within 28 days of the date of this Judgment, unless otherwise agreed with the Claimants, with any such agreement to be recorded in writing and signed by both parties.

c. The Claimants are to have the costs of and occasioned by these proceedings, such costs to be summarily determined in default of agreement.

Issued by:

**Linda Fitz-Alan**
**Registrar, ADGM Courts**
**29 July 2024**