محاكم
DIFC
COURTS

Claim No: CA-006-2015

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF APPEAL

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

BETWEEN

DAMAC PARK TOWERS COMPANY LIMITED

Appellant/Defendant

and

YOUSSEF ISSA WARD

Respondent/Claimant

Hearing:	**8 September 2015**
Counsel:	Rupert Reed QC and Jonathan Chew for the Appellant
	Jeffrey Bacon and Bushra Ahmed for the Respondent
Judgment:	**14 December 2015**

JUDGMENT

Summary of Judgment

On 28 October 2009, the Appellant, Damac Park, and the Respondent, Mr Ward, entered into a series of agreements allowing the Respondent to transfer sums paid on a previous property agreement towards purchase of a unit developed by the Appellant. After executing a series of Waiver Agreements and a Reservation Agreement, the Respondent allegedly failed to make certain instalment payments in accordance with the Reservation Agreement, causing the Appellant to issue a termination notice. After the first termination notice and three payment extensions, the Respondent furnished two post-dated cheques to the Appellant, one of which was dishonored when the Appellant attempted to cash it. The Appellant then terminated the Reservation Agreement for the second time and informed the Respondent that monies previously paid by him would be forfeited. Subsequently, the Respondent filed suit against the Appellant seeking damages and/or restitution based on a claim of wrongful termination of the Reservation Agreement.

The Court of First Instance (CFI) judgment of H.E. Justice Omar Al Muhairi dated 10 May 2015 had granted relief to the Respondent, ordering payment of restitution by the Appellant. The trial judge held that the Reservation Agreement was valid and binding. Pursuant to Articles 52 and 53 of the DIFC Contract Law, the trial judge further held that the instalment payments due under the Reservation Agreement were to be calculated based on the full price of the unit and that the sum credited to the Respondent from the previous failed purchase would operate as a pool of funds applied to discharge the Respondent's payment obligations as they became due. Based on this reading, the Respondent was not in arrears at the time of the Appellant's termination and thus, such termination was a breach of the Reservation Agreement. Further, the trial judge found that the Appellant's failure to timeously issue an Agreement of Sale constituted a separate, material breach of the Reservation Agreement. The Respondent was thus entitled to and did terminate the Reservation Agreement, and could recover payments by him to the Appellant on the ground of restitution.

The Appellant appealed against the CFI judgment, claiming that the trial judge wrongly interpreted the Reservation Agreement. The Appellant claims that the trial judge erred by construing the Reservation Agreement in a manner that permitted the Transferred Sum to be credited towards future payments as they became due. Instead, the Appellant argued that the correct interpretation of the Reservation Agreement was such that the Transferred Sum was immediately applied to reduce the purchase price, and that the instalment payments set out in the Reservation Agreement's payment schedule were based on this reduced price.

The Respondent counters that the trial judge's decision was correct. In any event, two grounds of appeal raised by the Appellant were not advanced at trial and should therefore fail *in limine*. Additionally, as the trial judge found that the Appellant had committed a separate material breach by failing to timeously issue the Agreement of Sale and as the Appellant omitted to specifically appeal this finding, the Appellant cannot succeed in the appeal even if its interpretation of the Reservation Agreement were preferred.

Preliminarily, the Court of Appeal (CA) addressed whether new arguments and points could be raised on appeal. The CA held that a new point could be raised on appeal if its introduction at trial would not have affected the evidence adduced then. The CA allowed the Appellant to raise on appeal two points not advanced at trial, since their introduction then would not have affected the evidence adduced at trial.

On the substantive issues in dispute, the CA first considered how the Respondent's payment obligations under the Reservation Agreement should be construed. The CA held that, where the contractual text was ambiguous and capable of more than one interpretation, the courts should prefer the more commercial interpretation. Applying this approach, the CA observed that, in foregoing forfeiture of payments previously made by the Respondent, the Appellant entered into a compromise requiring purchase of the unit while permitting the Respondent to credit sums paid previously towards the purchase price. The object of the compromissory arrangement was to secure cash flow, in the light of the Respondent's poor credit history. The CA held that the Appellant's interpretation better accorded with the commercial object of the transaction since it imposed on the Appellant the least commercial risk and allowed it to secure cash flow quickly. The parties' subsequent conduct was consistent with and reinforced the Appellant's interpretation of the Reservation Agreement. Having accepted the Appellant's interpretation of the Reservation Agreement, the CA held that the Respondent was in breach of the Reservation Agreement by failing to make timely payments, and the Appellant was therefore entitled to terminate the Reservation Agreement.

A further issue was whether, as the trial judge held, the Appellant committed a separate, material breach of the Reservation Agreement by failing to issue an Agreement of Sale. The Respondent argued that the appeal must fail even if the Appellant's interpretation of the Reservation Agreement were preferred, since the Appellant failed to appeal against the trial judge's findings on the absence of an Agreement of Sale and would be bound by those findings. The CA held that it was not so constrained and could consider any point material to the appeal to ensure that the ends of justice were met, even if the point was not specifically argued or raised by either party. The CA held that Clause 9 of the Reservation Agreement required the issuance of an Agreement of Sale "in due course", which obliged the Appellant to issue an Agreement of Sale within a reasonable time. The CA disagreed with the trial judge's finding that a reasonable time meant within six months from the date of the Reservation Agreement or by the time the first payment was due. Rather, in the circumstances of the case, a reasonable time for issuing the Agreement of Sale was at or any time before completion. Given that the Appellant had lawfully terminated the Reservation Agreement before completion and was subsequently discharged of its duties under the Reservation Agreement, it could not be in breach of its obligation to issue an Agreement of Sale within a reasonable time pursuant to Clause 9. The CA further held that, even if there were a breach of Clause 9, such a breach would not amount to a repudiatory breach as it would not have deprived the Respondent of substantially the whole benefit of the Reservation Agreement.

Finally, the CA addressed the issue of damages and restitution. It held that, under DIFC Law, restitution would only be available to the Respondent if he lawfully terminated the contract. Where the basis of restitution is unjust enrichment of the party against whom restitution is sought, the presence of an unjust factor was decisive. While the Appellant was enriched, there was no unjust factor operating to invalidate that enrichment. The Appellant was legally entitled to receive the payments from the Respondent and was entitled to retain such payments in accordance with the terms of the Reservation Agreement. Thus, the CA allowed the appeal and ordered the Respondent to pay the Appellant the costs of the appeal and the lower court.

ORDER

UPON hearing Counsel for the Appellant and Counsel for the Respondents on 8 September 2015

AND UPON reading the submissions and evidence filed and recorded on the Court file

IT IS HEREBY ORDERED THAT:

1. The Appellant's appeal is allowed.

2. The parties shall file written submissions on costs, if any, within 14 days from the date of this order.

Issued by:
Amna Al Owais
Deputy Registrar
Date of Issue: 14 December 2015
At: 4pm

CHIEF JUSTICE MICHAEL HWANG S.C.:

1. This is an appeal from the judgment of H.E. Justice Omar Al Muhairi dated 10 May 2015 (the "**Order**") granting the reliefs sought by the Respondent, Mr Youssef Issa Ward ("**Mr Ward**"), against the Appellant, Damac Park Towers Company Limited ("**Damac Park**").

2. Damac Park is a real estate asset management company licensed in the Jebel Ali Freezone, and specializes in the development of real property in the Middle-East.

3. Mr Ward is a Canadian National.

I. BACKGROUND FACTS

4. In 2007, Mr Ward entered into various contracts with Damac Star Properties LLC ("**Damac Star**"), a company within the Damac group of companies (which includes Damac Park), to purchase seven properties developed under the Executive Bay Project (the "**Executive Bay Properties**"). These were the Executive Bay Agreements ("**EBAs**"), under which Mr Ward was to make regular instalment payments of the purchase price for the Executive Bay Properties.

5. The EBAs provided that, should Mr Ward fail to make timely payment of instalment payments due under the EBAs, Damac Star would be entitled to terminate the EBAs and forfeit all sums paid by Mr Ward. Subsequently, Mr Ward fell into arrears on instalments due under the EBAs. Thereafter, Damac Star was entitled to terminate the EBAs and forfeit the sums paid in accordance with the EBAs.

6. On 28 October 2009, Mr Ward and Damac Star entered into a compromise arrangement which entailed Mr Ward purchasing Plot No. DFO/1A/111 (the "**Unit**"), a commercial property in the Park Towers Development in the DIFC developed by Damac Park, at the price of AED 4,544,000 (the "**Full Unit Price**"), in place of the Executive Bay Properties. As part of the arrangement, all sums paid by Mr Ward to Damac Star under the EBAs would not be forfeited (as Damac Star was entitled to do so) under the EBAs but would, instead, be credited towards his purchase of the Unit. By this date, the total amount paid by Mr Ward under the EBAs totalled AED 1,279,890 (the "**Transferred Sum**"). Accordingly, Mr Ward would only have to provide a further sum of AED 3,264,110 (the "**Reduced Unit Price**") to complete his purchase of the Unit. To this end, Mr Ward executed the following agreements on 28 October 2009.

7. First, Mr Ward, Damac Star and Damac Park executed seven Waiver, Release and Undertaking Letters (the "**Waiver Agreements**"), one for each of the seven Executive Bay Properties. The Waiver Agreements purported to provide for the credit of the Transferred Sum towards the Unit Price by providing as follows:

> "I/We hereby acknowledge and accept the Termination and agree that [DAMAC] shall credit an amount equal to Paid Purchase Price-1 against [the Unit Price], provided I/we fulfil all my/our obligations as set out within the URC including having made full payment of the amount equal to [the Unit Price] less the Paid Purchase Price-1."

8. Second, Mr Ward also contracted with Damac Park to purchase the Unit under an Office Unit Reservation Form (the "**Reservation Agreement**"). The Reservation Agreement described the "Office Unit Price" as AED 4,544,000 and set out a payment schedule at Clause 3 (the "**Payment Schedule**"), which is reproduced below:

> "3. My/Our signing the Agreement of Sale for this office unit within one week of being provide for execution and subsequent payments as per the payment schedule below:

Deposit	0%	
1ST INSTALMENT	0%	
2ND INSTALMENT	25%	Within 180 Days of Sale Date
3RD INSTALMENT	30%	Within 210 Days of Sale Date
4TH INSTALMENT	45%	On Completion

At the hearing, Mr Rupert Reed, the Counsel for Damac Park, clarified that the reference to "210 Days" in Payment Schedule was the result of a typographical error and should have read "270 Days" instead. Mr Jeffrey Bacon, Counsel for Mr Ward, did not contend otherwise.

9. Clause 4 of the Reservation Agreement further provides:

> "In case the payments above are not realized... [Damac Park] shall also have an option to terminate the reservation, and in order to mitigate [Damac Park's] damages arising out of termination of this reservation, sell or otherwise dispose of the unit as it deems fit without any further reference to me/us. In such an event, all monies paid by me/us, including the money in terms of clause (1) and (3) above, is also subject to forfeiture in full and shall not be refunded back to me/us."

10. Although the Reservation Agreement envisaged the conclusion of an Agreement of Sale between Mr Ward and Damac Park, no Agreement of Sale was subsequently issued by Damac Park to Mr Ward for execution.

11. Eventually, Damac Park began dispatching notices to Mr Ward to demand payment of the second instalment which was allegedly outstanding since April 2010. On 13 June 2010, Damac Park issued a letter to Mr Ward informing him that payment of the second instalment of AED 816,027.50 under the Reservation Agreement was due. On 16 June 2010 and 22 June 2010, Damac Park sent to Mr Ward emails reiterating that the second instalment under the Reservation Agreement was due and outstanding since 26 April 2010. Damac Park alleges that a Statement of Account was attached to the email dated 22 June 2010, but Mr Ward's position is that the Statement of Account was not attached to any of these emails or letters.

12. By 15 July 2010, Damac Park received no response from Mr Ward. It proceeded to issue a Notice of Termination to Mr Ward that day (the "**First Termination Notice**"), declaring that Mr Ward had failed to comply with his payment obligations under the Reservation Agreement and notifying him that the Reservation Agreement would be terminated if Mr Ward failed to pay the outstanding sums within 14 days of the First Termination Notice. Damac Park's position is that, by 25 July 2010, the third instalment under the Reservation Agreement (in the amount of AED 979,233) had also fallen due.

13. On 4 August 2010, Mr Ward emailed Damac Park (using the same email address to which Damac Park had sent its emails of 16 June 2010 and 22 June 2010), proposing to hold a meeting with Damac Park to discuss and resolve all issues arising from the First Termination Notice. The meeting was held on 15 August 2010 and, on that day, Damac Park emailed Mr Ward to confirm in writing that Damac Park had granted Mr Ward an extension of time to settle the total amount of AED 1,795,260.50 then owing to Damac Park "in 4 equal instalments starting from 10 Sep 2010 till 10 Dec 2010 for an amount of AED 448,815 each" (the "**First Extension**").

14. On 30 August 2010, Mr Ward requested from, and was granted by, Damac Park a further extension of time such that the payment dates for the outstanding sum owed would take place from 28 September 2010 to 28 December 2010 instead (the "**Second Extension**"). Mr Ward did not make payment of the first instalment by 28 September 2010.

15. On 6 October 2010, Mr Ward requested from, and was granted by, Damac Park a further extension of time so that the payment date for the first two instalments on the outstanding sum was 27 October 2010, and on condition that he also provide a post-dated cheque for each of the remaining two instalments (the "**Third Extension**").

16. On 19 October 2010, Mr Ward provided to Damac Park Cheque No. 00130 dated 31 October 2010 ("**Cheque 130**") for the sum of AED 1,346,445 and Cheque No. 00129 dated 28 February 2011 ("**Cheque 129**") for the sum of AED 448,815. Damac Park successfully encashed Cheque 130 on 31 October 2010. No further payments were made by Mr Ward to Damac Park thereafter.

17. On 22 March 2011, Damac Park issued a second Notice of Termination to Mr Ward (the "**Second Termination Notice**"), with contents similar to the First Termination Notice. Mr Ward's position is that he never received the Second Termination Notice. On 28 March 2011 and 5 April 2011, Damac Park attempted to encash Cheque 129, but Cheque 129 was dishonoured on each occasion.

18. Subsequently, Damac Park cancelled Mr Ward's reservation of the Unit. Damac Park then informed Mr Ward that he was no longer entitled to the Unit and that all sums paid by him would be forfeited.

19. On 2 December 2014, Mr Ward commenced a suit against Damac Park in the DIFC Courts seeking compensation by way of damages and/or restitution (the "**Suit**").

20. The thrust of Mr Ward's case is that Damac Park's termination of the Reservation Agreement was wrongful because, on a proper construction of the Reservation Agreement, Mr Ward was not in arrears of payment at the time Damac Park purported to terminate the Reservation Agreement. On that basis, he sought a return of the monies paid to Damac Park.

II. THE JUDGMENT BELOW

21. At the Court of First Instance, Justice Omar heard the Suit and issued the Order after resolving the following issues that were before him.

    (a) Whether the Reservation Agreement was a binding contract.

    (b) What was the meaning of "Sale Date" in the Reservation Agreement.

(c) What was the effect of the Transferred Sum on Mr Ward's payment obligations under the Reservation Agreement.

(d) Whether Damac Park had breached the Reservation Agreement by issuing the First Termination Notice and Second Termination Notice.

(e) Whether Damac Park had breached the Reservation Agreement by failing to issue the Agreement of Sale to Mr Ward timeously.

(f) What relief ought to be granted to Mr Ward if Damac Park had materially breached the Reservation Agreement.

22. Before setting out the trial judge's findings on the issues above, it seems to me that the principal issue raised in Damac Park's appeal relates to the effect of the Transferred Sum on Mr Ward's payment obligations under the Reservation Agreement and whether Damac Park was in breach of the Reservation Agreement.

A. Preliminary Points: Whether the Reservation Agreement was valid and binding, and proper construction of the phrase "Sale Date" in the Reservation Agreement.

23. First, the trial judge held that the Reservation Agreement was a valid and binding contract. He further found that the absence of a concluded Agreement of Sale did not affect the validity of the Reservation Agreement. To this end, he relied on Article 27 of the DIFC Contract Law, which effect was that any terms relating to the sale of the Unit which the Parties intended to leave open in the Reservation Agreement would not preclude the Reservation Agreement from coming into existence.

24. Second, the trial judge held that the expression "Sale Date" in the Reservation Agreement referred to the date of the Reservation Agreement, 28 October 2009. He rejected Mr Ward's contention that the "Sale Date" referred to the date when legal title to the Unit passed to him, an event which never took place.

B. The effect of the Transferred Sum on Mr Ward's payment obligations under the Reservation Agreement

25. The trial judge found that, determining the effect of the Transferred Sum on Mr Ward's payment obligations under the Reservation Agreement was contingent on two related questions:

(a) First, how were the instalments payments and subsequent percentages in the Payment Schedule to be calculated?

(b) Second, whether the Transferred Sum would rest in Mr Ward's account as a credit towards payments and used to defray the instalment payments as they fell due, or whether the Transferred Sum operated as a credit to alter the purchase price and therefore the instalment payment percentages to be payable as they became due on 26 April and 25 July 2010.

26. The trial judge decided that the instalment payment percentages set out in the Payment Schedule should be calculated according to the Full Unit Price and not the Reduced Unit Price. In reaching this conclusion, he referred to Articles 52 and 53 of the DIFC Contract Law which provide as follows:

> "**Part 5: INTERPRETATION**
>
> **52. Reference to contract or statement as a whole**
>
> Terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear.
>
> **53. All terms to be given effect**
>
> Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect."

27. He then reasoned that, because the Reservation Agreement described the "Office Unit Price" as "AED 4,544,000" (the Full Unit Price), the percentages representing the instalment payments set out in the Payment Schedule must necessarily be based on the Full Unit Price and not the Reduced Unit Price. In his view, adopting the contrary conclusion would be inconsistent with Article 53 of the DIFC Contract Law, because it would "deprive effect to some of the contract terms", i.e., the express terms of the Reservation Agreement.

28. He then proceeded to answer the second question by holding that the Transferred Sum operated as a standing pool of funds which would be used to offset instalment payments under the Reservation Agreement as and when they fell due. He held that, if the Transferred Sum did not so operate, the Transferred Sum would have to be deducted from the Full Unit Price in determining the payment instalments set out in the Payment Schedule. Such a result could not be permitted for the reasons set out at [27] above.

29. The effects of the trial judge's decision were that (1) the instalment payments under the Payment Schedule were based on the Full Unit Price and (2) that the Transferred Sum would operate as a standing pool of funds that would be applied to discharge Mr Ward's payment obligations as and when they fell due. Accordingly, Mr Ward's payment obligations under the Reservation Agreement ought to be understood as set out in the table below. The header titled "Amount Due" represents the portion of the Full Unit Price which Mr Ward was liable for and the header titled "Amount Payable" represents the amount of money which Mr Ward was required to actually pay after taking into account any offsets of the balance. Transferred Sum against what was due to Damac Park.

Description	% of Full Unit Price	Amount Due	Amount Payable (Transferred Sum less Amount Due)	Payment Date
Deposit	0%	0		-
1ST INSTALMENT	0%	0		-
2ND INSTALMENT	25%	1,136,000	0	26 April 2010
3RD INSTALMENT	30%	1,363,200	1,291,720	25 July 2010
4TH INSTALMENT	45%	2,044,800	2,044,800	On Completion

C. Whether Damac Park's purported termination of the Reservation Agreement amounted to a repudiation of the Reservation Agreement.

30. Having decided that Mr Ward's payment obligations were such that Mr Ward was not required to make any cash payments to Damac Park for the second instalment, the trial judge found that, when the First Termination Notice was issued on 15 July 2010, Mr Ward was not in arrears. The First Instalment was fully paid for by the Transferred Sum when it fell due on 26 April 2010. It follows that, the First Termination Notice was premature and erroneous. In issuing the First Termination Notice, Damac Park was in breach of the Reservation Agreement.

31. Following the issuance of the First Termination Notice by Damac Park, Mr Ward made two further payments to it in October 2010 totalling AED 1,346,445. Given that the amount

payable as at 25 July 2010 was less than AED 1,291,720, Mr Ward not only settled all amounts due to Damac Park, he actually overpaid the Full Unit Price by 3%. Since Mr Ward was not in arrears when the Second Termination Notice was subsequently issued on 22 March 2011, the trial judge held that the Second Termination Notice was also invalid and Damac Park's cancellation of Mr Ward's reservation of the Unit amounted to a wrongful termination of the Reservation Agreement.

D. Damac Park's failure to issue an Agreement of Sale

32. The trial judge also found that Damac Park committed a separate and distinct material breach of the Reservation Agreement, because it was contractually required but failed to issue an Agreement of Sale to Mr Ward timeously.

33. In the trial judge's view, Clause 9 of the Reservation Agreement expressly imposed on Damac Park an obligation to issue an Agreement of Sale "in due course". A reasonable time for issuing the Agreement of Sale should not have exceeded the time when the second instalment was due, namely 180 days from the date of the Reservation Agreement. Since Damac Park had not issued an Agreement of Sale to date, it was plainly in breach of this obligation.

34. The breach was a material one amounting to fundamental non-performance within the meaning of Article 86 of the DIFC Contract Law, which entitled Mr Ward to terminate the Reservation Agreement for the following reasons.

35. First, he observed that Clause 3 provided that Mr Ward's failure to sign the Agreement of Sale would entitle Damac Park to terminate the Reservation Agreement. Next, Clause 16 provided that the Reservation Agreement would cease to be effective once the Agreement of Sale was executed. These provisions, in his view, underscored the essentiality of the Agreement of Sale to the Reservation Agreement. Finally, the trial judge was of the view that the absence of an Agreement of Sale prejudiced Mr Ward because it could have afforded Mr Ward more substantive rights than under the Reservation Agreement, such as expected dates by which the Unit would be handed over to Mr Ward and detailed calculations of payment terms.

E. Whether the Reservation Agreement had been terminated

36. Having found that Damac Park had committed two separate repudiatory breaches of the Reservation Agreement, the trial judge found that it was Mr Ward who was entitled to elect to terminate the Reservation Agreement.

37. Having regard to the Parties' extensive period of non-performance since the Parties' last correspondence in 2011 until the commencement of the Suit in 2014, the trial judge found that an intention to abandon and terminate the Reservation Agreement had been evinced by Mr Ward.

F. The relief Mr Ward was entitled to in the event the Reservation Agreement was terminated

38. Given that the Reservation Agreement had been terminated, without any legal title to the Unit passing to Mr Ward, the trial judge found that Damac Park had been enriched by an amount equal to the sums paid by Mr Ward to date. This amount was AED 2,626,335, which included the Transferred Sum and monies paid under the Reservation Agreement (the "**Claimed Sum**").

39. The trial judge therefore found that Article 48 of the DIFC Damages and Remedies Law No. 7 of 2005 and Article 90 of the DIFC Contract Law applied in these circumstances, with the result that Mr Ward would be entitled to restitution of the sums paid to Damac Park to date.

III. THE PARTIES' ARGUMENTS ON APPEAL

A. Damac Park's Case

40. The thrust of Damac Park's appeal is that the trial judge had wrongly construed the Reservation Agreement in preferring Mr Ward's interpretation of the Payment Schedule. The trial judge's error flows from the following matters.

(a) First, he did not give proper weight to the requirement in the Payment Schedule that a payment was to be made at the time of the second instalment.

(b) Second, he failed to give proper weight to the specific conditional language of the credit in the Waiver Agreements.

(c) Third, he failed to consider and/or give any weight to the Parties' conduct after the Reservation Agreement had been concluded.

(d) Fourth, his decision ignored the commercial purpose of the Reservation Agreement and Waiver Agreements.

(e) Finally, he gave undue weight to the "Office Unit Price" as adopted in the Reservation Agreement.

41. Mr Reed argues that the critical issue is how the Transferred Sum would be applied to the purchase price set out in the Reservation Agreement. The inquiry must be guided by the following considerations.

(a) First, it is necessary to construe the Reservation Agreement together with the Waiver Agreements (which refer to the Reservation Agreement), as two parts of a larger arrangement.

(b) Second, the Waiver Agreements make clear that the crediting of the Transferable Sum was *conditional*, and the question is how that conditionality should be applied.

42. As to the approach which this Court should adopt in its interpretative exercise, Mr Reed has referred to Article 49 of the DIFC Contract Law, which provides that the exercise is one of ascertaining the parties' common intention or, alternatively, the understanding that a reasonable person in the parties' position would have in the circumstances. Mr Reed also points out that Article 51(c) of the DIFC Contract Law permits this Court to take into account the subsequent conduct of the parties in this regard.

43. Further, Mr Reed has pressed us to adopt the iterative process endorsed by Lord Mance in *Re Sigma Finance Corp (in admin. Rec.)* [2010] UKSC 2 ("***Re Sigma Finance***") at [12] where he said:

> "...the resolution of an issue of interpretation in a case like the present is an iterative process, involving "checking each of the rival meanings against other provisions of the document and investigating its commercial consequences" ([2009] B.C.C. 393 at [98], and also [115] and [131])."

44. Applying the iterative process of construing the Reservation Agreement, Mr Reed has canvassed three permutations as to how the credit could operate under the Reservation Agreement.

(a) First, the Transferred Sum would be credited only at the time the final instalment falls due. Mr Ward would be required to pay the second and third instalments based on the Full Unit Price. When making payment of the final instalment, the credit would be effected by reducing the amount payable as the final instalment by an amount equal to the Transferred Sum. Damac Park refers to this as the "**Deferred Credit Interpretation**".

(b) Second, the Transferred Sum reduced the total amount payable by Mr Ward at the outset, with the effect that Mr Ward was required to pay the second, third and fourth instalments but with reference to the Reduced Unit Price. If Mr Ward failed to do so, the crediting of the Transferred Sum would be reversed and Mr Ward would be required to pay an additional amount equal to the Transferred Sum in addition to the instalments set out in the Payment Schedule. Damac Park refers to this as the "**All Instalments Credit Interpretation**".

(c) Third, the instalment payments under the Payment Schedule would be based on the Full Unit Price and the Transferred Sum would be applied towards payment of the second instalment (which was less than the Transferred Sum) when it fell due. Accordingly, Mr Ward need only pay the third and fourth instalments. Damac Park refers to this as the "**Immediate Credit Interpretation**".

45. Damac Park's case is that the All Instalments Credit Interpretation is correct, and that the trial judge erred by adopting the Immediate Credit Interpretation instead. Its reasons are as follows.

46. The Immediate Credit Interpretation should be rejected because it ignores the fact that the Payment Schedule clearly envisaged that some payment should be made at the time of the second instalment.

47. A second reason why the Immediate Credit Interpretation should be rejected is because it fails to recognize that, as is expressly provided under the Waiver Agreements, the credit of the Transferred Sum is conditional on Mr Ward making prompt payment in accordance with

the Payment Schedule. That condition would not be given effect if Mr Ward were able to benefit from the Transferred Sum without first having to perform his payment obligations.

48. Mr Reed further contends that the trial judge's bases for rejecting the All Instalments Credit Interpretation are erroneous for the following reasons.

(a) First, in holding that the All Instalments Credit Interpretation contradicts the "Office Unit Price" stated in the Reservation Agreement, the trial judge fell into error by equating the application of credit with amending the purchase price. In Damac Park's submission, the All Instalments Credit Interpretation merely affects the level of payments required from Mr Ward to complete the purchase and not the "Office Unit Price".

(b) Second, the trial judge also fell into error in demanding that there be "clear agreement" that the Payment Schedule be applied to anything other than the "Office Unit Price" for Damac Park's argument to succeed. He effectively imposed an evidential burden on Damac Park, but he had no basis for doing so since the point is one of legal construction.

(c) Third, the trial judge gave undue weight to the "Office Unit Price". The fact that the Payment Schedule makes no reference to the Office Unit Price is striking evidence that the instalments were based on some *other* amount. There is nothing unusual about recording the total value which Mr Ward was to provide as the Full Unit Price even though there would be a further calculation of a net price. The application of a "Recovery Transfer" was recorded under the section titled "Remarks" under the Reservation Agreement.

49. Finally, the Immediate Credit Interpretation is wrong because it contradicts the Parties' subsequent conduct. In this regard, Mr Reed relies on the following facts as evidence that Mr Ward understood the credit to operate in accordance with the All Instalments Credit Interpretation.

(a) Mr Ward did not question the amount of AED 816,027.50 which was stated as due in Damac Park's letter of 22 June 2010.

(b) When negotiating the First Extension and Second Extension, Mr Ward accepted the amounts owing for the second and third instalments as 25% and 30% respectively of the Reduced Unit Price. He eventually provided cheques for those amounts.

(c) If the Immediate Credit Interpretation properly reflected the Parties' understanding, Mr Ward would have resisted Damac Park's demand for payment set out in its letter of 22 June 2010 and the First Termination Notice. That he sought to renegotiate the payment schedule supports the All Instalments Credit Interpretation.

50. A final point made by Mr Reed is that only the All Instalments Credit Interpretation would achieve the commercial object of the Reservation Agreement and Waiver Agreements. The Immediate Credit Interpretation is uncommercial because it involves extending substantial credit immediately to Mr Ward and requiring no payment until the third instalment. In contrast, a proper balance is struck between crediting the Transferred Sum and requiring Mr Ward to make regular payments to Damac Park. There was no reason why Damac Park would seek more commercial risk by proposing a plan in accordance with the Immediate Credit Interpretation.

B. Mr Ward's Case

51. Mr Ward's case is that the trial judge was correct in his decision and none of the arguments advanced by Damac Park establishes that the trial judge erred.

52. As a threshold issue, Mr Bacon argues that, because two of the five grounds of appeal advanced by Damac Park were not raised at trial, they should fail *in limine*. Those two grounds are:

(a) Damac Park's argument that there was a common intention held by the Parties that there should be *some* payment made for the second instalment under the Payment Schedule; and

(b) Damac Park's argument that the Parties' subsequent conduct is evidence that the All Instalments Credit Interpretation is correct.

53. In answer to Mr Reed's argument that the Immediate Credit Interpretation failed to give effect to the conditional nature of the Transferred Sum, Mr Bacon's argument is that the Immediate Credit Interpretation does recognize the conditionality of the Transferred Sum. As Mr Ward was required to make further payments after the credit was applied, the credit was conditional until all subsequent payments were made.

54. Further, Mr Bacon argues that the trial judge was right to regard the All Instalments Credit Interpretation as contradicting the express terms of the Reservation Agreement. Damac Park in the Court of First Instance did argue that the All Instalments Credit Interpretation would give rise to a new "net purchase price", so the trial judge did not misunderstand Damac Park's argument at trial but squarely addressed it. Further, the trial judge did not confuse the application of credit with the level of the purchase price, as Mr Reed contends. He expressly found the purchase price to be AED 4,544,000 and that it was accordingly incorrect for any sums to be deducted from it to give rise to any "net" purchase price.

55. Mr Bacon also rejects Damac Park's contention that the trial judge imposed any burden of proof on Damac Park when he found that the Immediate Credit Interpretation was correct "in the absence of a clear agreement to the contrary". In Mr Bacon's submission, all that the trial judge had decided was that the circumstances and evidence supported a finding that the Payment Schedule was based on the Original Purchase Price, especially since that was the only figure which appeared in the Reservation Agreement. Mr Bacon emphasizes that, in reaching this conclusion, the trial judge was persuaded by Mr Ward's oral evidence and witness statements. On that basis, Damac Park would have required clear evidence to advance a contrary construction, and the trial judge found that no such evidence was available.

56. Mr Bacon denies that the Parties' subsequent conduct provides any basis for overturning the trial judge's decision for the following reasons.

    (a) First, it is not permissible for Damac Park to raise in this appeal factual points that were not raised at trial and, more importantly, not put to Mr Ward at the witness stand.

    (b) Second, and more fundamentally, the trial judge did take into account the Parties' subsequent conduct in reaching his decision.

(c) Third, Mr Bacon argues that none of the subsequent conduct relied on by Damac Park clearly establishes that the Parties' mutual intentions were for the Payment Schedule to be calculated according to the Reduced Unit Price. Mr Ward never received a copy of the Reservation Agreement, and the letter from Damac Park dated 22 June 2010 only referred to an outstanding amount without setting out the basis of the calculation of those sums or attaching a Statement of Accounts. Further, Mr Ward never received the First Termination Notice dated 13 June 2010 which was sent to Mr Ward by letter. Finally, Mr Ward had given evidence that his only interest in renegotiating payment terms under the First Extension was to secure an extension of time, and was not approving an interpretation of the Reservation Agreement which he had never read or been given a copy of.

57. Finally, Mr Bacon disagrees that only the All Instalments Credit Interpretation would give effect to the commercial object of the Parties' transaction. To the contrary, it would give rise to an unreasonable result by requiring Mr Ward to pay a significantly higher percentage of the Office Unit Price than what was stated in the Payment Schedule, namely 55%. The Immediate Credit Interpretation does not, as Damac Park contends, amount to granting Mr Ward the full benefit of the credit before paying any money to Damac Park or extending substantial credit to him immediately.

58. By way of Supplemental Skeleton Arguments dated 7 September 2015, Mr Ward contends that, even if Damac Park were to succeed on its interpretation of the Reservation Agreement, Mr Ward would still be entitled to a return of his monies. Since the trial judge found that Damac Park had separately committed a repudiatory breach by failing to issue the Agreement of Sale to date, a finding which Damac Park has not appealed against, then Mr Ward was entitled to terminate the Reservation Agreement in any event.

IV. ISSUES TO BE DECIDED

59. In this appeal, the issues requiring decision are as follows.

(a) First, on a proper construction of the Reservation Agreement, what were Mr Ward's payment obligations to Damac Park.

(b) Second, whether Mr Ward breached his payment obligations under the Reservation Agreement. If not, whether Damac Park was in breach of the Reservation Agreement by purporting to terminate it on 21 April 2011.

(c) Third, whether Damac Park was in breach of the Reservation Agreement by failing to issue an Agreement of Sale to Mr Ward timeously.

(d) Fourth, which party was entitled to and did lawfully terminate the Reservation Agreement.

(e) Fifth, whether Mr Ward is nevertheless entitled to a return of the monies paid to Damac Park if Damac Park lawfully terminated the Reservation Agreement.

V. DISCUSSION

60. The claim at the centre of this appeal is a simple one. Mr Ward seeks a return of all monies he has paid to Damac Park for the purchase of the Unit. He never acquired this Unit because Damac Park alleged that Mr Ward had failed to meet his payment obligations and, on that basis, terminated the Reservation Agreement. The basis of Mr Ward's case is that, on a proper construction of the Reservation Agreement, he had in fact discharged his payment obligations so Damac Park's purported termination of the Reservation Agreement was wrongful. Additionally, Mr Ward argues that Damac Park also committed a separate repudiatory breach of the Reservation Agreement by failing to issue the Agreement of Sale to him. On either ground, he argues that he was entitled to (and did) terminate the Reservation Agreement and obtain a return of the Claimed Sum as damages or restitution.

61. In the Court of First Instance, the trial judge found in favour of Mr Ward on both grounds and held that he was entitled to terminate the Reservation Agreement. In particular, the trial judge preferred Mr Ward's interpretation of the Reservation Agreement (the Immediate Credit Interpretation) and held that he did not breach his payment obligations, so that Damac Park's purported termination of the Reservation Agreement was wrongful. The principal controversy is whether the trial judge was correct to have so decided.

62. As will be apparent later, the outcome of this issue is determinative of all other ancillary issues, including the question of which party was entitled to terminate the Reservation Agreement and what remedy, if any, Mr Ward is entitled to.

63. Before considering these issues, I first address Mr Ward's preliminary objections against the admissibility of certain points raised by Damac Park in this appeal.

A. Preliminary Issue: Whether and how new points may be raised on appeal

64. Mr Ward has challenged the admissibility of various points raised by Damac Park in this appeal. He argues that, because they were not advanced at trial, it is too late for the following points to be advanced now.

(a) The argument that there was a common intention of the Parties that some payment be made at the time of the second instalment (the "**Second Instalment Argument**").

(b) The argument that the Parties' subsequent conduct reinforces the All Instalments Credit Interpretation. In this regard, certain factual allegations by Damac Park which support the subsequent conduct argument were not raised at trial or put to Mr Ward at the witness stand (the "**Subsequent Conduct Argument**").

65. Notwithstanding that Mr Bacon has not referred to any authority which establishes the basis of his objection, I understand his complaint to be that Damac Park should not be permitted to raise new points in an appeal. While the principle is not as wide as Mr Bacon has suggested, I recognize the importance of the long-standing principle that an appellant should not have free rein to introduce points on appeal that were not advanced at trial. In *The Tasmania* (1890) 15 App Cas 223, Lord Herschell articulated the principle in the following terms at p. 225:

> "My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.
>
> It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation had been afforded them when in the witness box."

66. Where the question raised is one of pure law which involves no further factual investigation, then a court has no reason to preclude admission of the new point. To the contrary, as explained in the House of Lords' decision in *Connecticut Fire Insurance Co v Kavanash* [1892] AC 473 ("***Connecticut Fire***") at p. 480, the interests of justice requires the point to be considered:

> "When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea."

67. Thus, in *New Zealand Meat Board v Paramount Export Ltd (in liquidation)* [2004] UKPC 45, the Privy Council permitted a new argument to be raised on appeal in relation to the proper construction of a document when no further evidence was required:

> "47. It therefore appears to their Lordships that **despite the fact that the true construction of the contract was not argued before the judge, the plaintiffs could not have complained of prejudice if the point had been taken before the Court of Appeal. It was a question of law on which no further evidence could have been called.** The position is the same before their Lordships' Board. It is no doubt very disappointing for the plaintiffs, having succeeded in the courts below, to lose on a new point in the final court. On the other hand, it would be a miscarriage of justice if the Meat Board were required to pay some $7m out of public funds when it had no legal liability to do so, merely on account of the way its advisers had conducted the litigation."
>
> (emphasis added)

68. The position is more restrictive where the new point raised presents factual questions which might affect the evidence or conduct of the trial if the new point was raised then. In the words of Rix LJ in *Lowe v W Machell Joinery Ltd* [2011] EWCA Civ 794 at [83]:

> "83 This court may often, in dealing with issues on appeal which had previously been debated at trial, have been required and prepared to draw inferences where the findings of a trial judge are incomplete. However, **it has generally resisted doing so where a new issue of law is raised in this court which, if it had been raised below, might have affected the evidence or conduct of the trial.**"

69. It is important to be clear about what Rix LJ precisely meant in the passage above. He was not suggesting that an appellate court could not make any new findings of fact which an appellant did not put to the trial judge. It would only be impermissible if raising the point at trial might have called for more evidence to be adduced in answer to the point. This is a sensible qualification; an appellate court should not embark on an exercise in establishing primary facts, a task which can only be properly undertaken at trial. The same view was expressed in *Connecticut Fire* at p. 480:

> "The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, **in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below**. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea. To accept the

> proof adduced by a defendant in order to clear himself of a charge of fraud, as representing all the evidence which he could have brought forward in order to rebut a charge of negligence, might be attended with the risk of doing injustice."

70. It is therefore clear that this Court may make new factual findings on appeal that were not in issue at trial, so long as it is not in a "much less advantageous position than the Courts below". This is especially true when the factual dispute revolves around an inference to be drawn rather than a question of primary fact.

71. Having set out the applicable legal principles above, I now consider whether each of the two new points raised by Damac Park should be admitted for consideration.

72. I have no difficulty deciding that the Second Instalment Argument should be admitted because it falls squarely within the first situation envisaged in *Connecticut Fire*. The narrow inquiry is simply whether the *text* of the Payment Schedule in the Reservation Agreement suggests that some payment had to be made at the time of the second instalment. This point is purely one of legal construction which does not rely on any disputed facts. It is difficult to imagine what further evidence Mr Ward could have put forward on the question had it been raised at trial, and Mr Bacon has not suggested any.

73. The position with the Subsequent Conduct Argument is less straightforward. It is plainly an argument of mixed fact and law, comprising some factual assertions which Mr Bacon denies and argues were not put to Mr Ward at trial. The crux of Mr Bacon's objection is that, had certain of those factual assertions been raised at trial, Mr Ward would have provided further evidence (whether oral or documentary) to refute Damac Park's assertions.

74. The essential factual assertions which Damac Park is putting forward to this Court, and which Mr Ward now challenges, is that Mr Ward had full knowledge of and accepted Damac Park's understanding of the Payment Schedule. As with all questions of knowledge or mental culpability, this is plainly a matter of inference and not a question of primary fact. To this end, Damac Park relies *only* on the following facts and evidence, as set out at [55] to [61] in its Skeleton Arguments.

    (a) Mr Ward received Damac Park's email of 22 June 2010, which Damac Park says contained a statement of account which stated that the sum of AED 816,027.50 (being 25% of the Reduced Unit Price) was payable in April 2010, and the First Termination Notice. Mr Ward did not challenge the basis on which the outstanding amounts stated in those documents were calculated.

(b) Mr Ward proceeded with the First Extension, Second Extension and Third Extension which calculated the second and third instalments according to the Reduced Unit Price. Mr Ward even provided post-dated cheques in accordance with those figures.

75. As against the above, Mr Bacon makes the following points.

(a) Mr Ward never received a copy of the Reservation Agreement.

(b) Mr Ward never received Damac Park's letter of 13 June 2010.

(c) Damac Park's emails of 22 June 2010 and 28 June 2010 did state AED 816,027.50 as the amount which Mr Ward was due to pay, but did not attach a statement of account explaining how the sum was derived.

(d) Mr Ward had given evidence that he only agreed to the First Extension, Second Extension and Third Extension because he trusted Damac Park to accurately calculate the amounts actually owing by him to Damac Park, and that his only interest was in securing an extension of time for payment. The inference which Damac Park is inviting this Court to draw should have been put to Mr Ward at the witness box.

76. I have already explained that there is nothing inherently objectionable about an appellate court drawing an inference which the trial judge was not asked to consider, as long as it could not have affected the evidence had it been raised at trial. The only question which remains for consideration is whether the inference which Damac Park now invites us to draw could be affected by any further evidence which might have been put forward at trial. I can see none.

(a) First, Damac Park does not deny Mr Ward's assertion that he did not receive a copy of the Reservation Agreement or Damac Park's letter of 13 June 2010. In any event, Damac Park does not specifically rely on Mr Ward's receipt of these documents in its Subsequent Conduct Argument.

(b) Second, although Damac Park has asserted in its Skeleton Arguments that its email of 22 June 2010 contained a Statement of Account and Mr Ward denies this, the email *was* produced at trial and Damac Park's error in this regard is plainly reflected in the email which states "Attachment: none". Apart from the Statement of Account, Mr Ward does not deny receiving all other documents which Damac Park relies on

in its Subsequent Conduct Argument. In particular, Mr Ward admits that he received the email of 22 June 2010 (Second Witness Statement of Youssef Issa Ward dated 28 January 2015 at [12] and Hearing Transcript at p. 180) as well as the First Termination Notice (First Witness Statement of Youssef Issa Ward dated 31 October 2014 at [24]).

(c) Finally, Mr Bacon argues that Mr Ward's motives (as asserted by Damac Park) for requesting the extensions of time ought to have been put to him at the witness stand. But Mr Bacon also accepts that Mr Ward had already given evidence on that question. Indeed, Mr Ward had put forward in very clear terms his explanation of his motivations for renegotiating payment terms with Damac Park, in his First Witness Statement dated 31 October 2014 at [27]:

> "Under normal circumstances, I would have been careful to check the details of the payment plan contained in the Reservation Agreement, why it was alleged that I was in breach of the payment plan and the figures of the proposed revised payment plan. **However, because I was distracted with other matters at that point in my life, and because I had what I thought was a good relationship with Damac, I trusted that the figures that were presented to me as being outstanding were correct and that the revised payment plan was to my benefit**."
>
> (emphasis added)

Had Damac Park put the Subsequent Conduct Argument to Mr Ward, it is difficult to imagine what further evidence Mr Ward would have given other than to reinforce a point that was already made at trial in his witness statement. Cross-examining Mr Ward on the statement would not have yielded any fresh evidence in his favour.

77. What remains of Mr Bacon's objections are really arguments about whether the inference put forward by Damac Park is *appropriate*. That is a matter which an appellate court is fully empowered to determine under RDC 44.141.

78. Accordingly, I conclude that Damac Park is not foreclosed from advancing either the Second Instalment Argument or the Subsequent Conduct Argument.

B. Mr Ward's payment obligations under the Reservation Agreement

79. Mr Ward's payment obligations under the Reservation Agreement are set out in the Payment Schedule. The Parties have advanced competing constructions of the Payment Schedule, and it falls on this Court to determine its proper construction. In construing the Reservation Agreement, this Court will be guided by Article 49 of the DIFC Contract Law which defines the nature of the exercise:

> "49. Intention of the parties
>
> (1) A contract shall be interpreted according to the common intention of the parties.
>
> (2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances."

80. Although Article 49(1) provides that a contract shall be interpreted according to the "common intentions of the parties", this provision is only engaged when disputing parties have jointly put forward an interpretation of the contract.

81. Since the Parties disagree on the proper interpretation of the Reservation Agreement, it is Article 49(2) that applies. In providing that a contract shall be interpreted according to the meaning that would be ascribed to it by a reasonable person in the parties' positions, Article 49(2) mandates that the inquiry should be an objective one.

82. The starting point in objectively ascertaining the parties' common intentions is to give the instrument in question its plain and ordinary meaning if there exists unambiguous language to that effect, regardless of what commercial result arises from it (*Investors Compensation Scheme LTD v West Bromwich Building Society* [1998] 1 WLR 896 at p. 902).

83. As Lord Steyn observed in his extra-judicial writings ("Contract Law: Fulfilling the reasonable expectations of honest men" in 113 LQR 433 at p. 441), however, it is a rare thing to be able to identify the "plain and ordinary" or "natural" meaning of a document. In that case, the appropriate course of action is to prefer an interpretation which better accords with commercial sense:

> "**Often there is no obvious or ordinary meaning of the language under consideration. There are competing interpretations to be considered**. In choosing between alternatives a court **should primarily be guided by the contextual scene in which the stipulation in question appears**. And speaking generally commercially minded judges **would regard the commercial purpose**

> **of the contract as more important than niceties of language**. And, in the event of doubt, the working assumption will be that a fair construction best matches the reasonable expectations of the parties."
>
> (emphasis added)

84. The same view was echoed by the English Supreme Court in *Rainy Sky SA v Kookmin bank* [2011] UKSC 50, where Lord Clarke said at [21]:

> "21 The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. **If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.**"
>
> (emphasis added)

85. Thus, where the language used in an agreement is capable of bearing more than one meaning, the ambiguity must be resolved in favour of a construction which best gives effect to the commercial object of the agreement. This is squarely in line with the iterative process prescribed in *Re Sigma Finance* which Mr Reed has referred us to.

86. The principles set out above are not the subject of controversy; neither Mr Reed nor Mr Bacon has challenged them. Applying these principles, Damac Park's interpretation is eminently preferable

87. I am mindful that, if there was an unambiguously natural meaning to the Reservation Agreement and Payment Schedule, that meaning should be adopted. It seems to me that in the trial judge's view, there was such a natural meaning. He found that the Reservation Agreement expressly provided the "Office Unit Price" to be the Full Unit Price. He then reasoned that, since the "Office Unit Price" was the only price identified in the Reservation Agreement, it could only be the "Office Unit Price" which the instalments set out in the Payment Schedule could be derived from. With respect, I do not think that the meaning which the trial judge ascribed to the Payment Schedule was self-evident at all.

88. In my judgment, there was no unambiguous "natural meaning" which the Payment Schedule could be understood to have. It is striking that each instalment under the Payment Schedule was denoted only by numerical percentages and no mention is made of what sum those percentages would be calculated according to. If the Reservation Agreement constituted the only document upon which the Parties' transaction was founded, I would be more inclined to agree with the trial judge's analysis. However, that is not the present case.

89. Mr Ward's purchase of the Unit from Damac Park was but one facet of a larger effort to prevent the forfeiture of sums he had paid to Damac Star under the EBAs. To secure that principal goal, Mr Ward entered into the Waiver Agreements (on the same day he executed the Reservation Agreement) with Damac Star and Damac Park, under which Damac Park and Damac Star would permit Mr Ward to retain the benefit of the sums paid under the EBAs if he purchased the Unit in place of the Executive Bay Properties. To the extent that the purchase of the Unit was subservient to and a component of the wider compromissory arrangement which Mr Ward reached with Damac Park and Damac Star, the trial judge erred by construing the Reservation Agreement in isolation. This is evident from [50] to [63] of his judgment where, in construing the Reservation Agreement, no reference is made whatsoever to the Waiver Agreements or the way they might have affected the operation of the Payment Schedule.

90. The error of such a narrow approach is all the clearer when one considers that the Reservation Agreement does allude to the operation of credit envisaged by the Waiver Agreements. On the first page of the Reservation Agreement, the section titled "Remarks" states "Recovery Transfer from EB/14/1401 to 1407 – AED 4,544,000/-". "EB/14/1401 to 1407" are clearly references to the seven Executive Bay Properties which Mr Ward had purchased, and the same documentary references are made in the Waiver Agreements. Accordingly, notwithstanding that the Reservation Agreement did not specifically identify the existence of the Waiver Agreements, it was evident on the face of the Reservation Agreement that the EBAs might have had some effect on Mr Ward's payment obligations under the Reservation Agreement.

91. Further, Mr Ward has not been able to offer any explanation as to why, if (under the Immediate Credit Interpretation) no payment was required at the time of the second instalment, the Payment Schedule specified a payment date and payment percentage for the second instalment. The discordance between the Payment Schedule and the Immediate Credit Interpretation is accentuated by the fact that, in respect of the deposit and

the first instalment (where it is undisputed that payment was *not* required), the Payment Schedule does *not* specify a percentage and payment date. While this disparity is not conclusive, it plainly suggests that the Immediate Credit Interpretation was not free from difficulty or obviously preferable to the All Instalments Credit Interpretation.

92. In the light of the foregoing, it cannot be persuasively argued that the "Office Unit Price" or Full Unit Price was, as the trial judge held, the only sum which the Payment Schedule was referring to. To the contrary, the precise operation of the Payment Schedule is fraught with ambiguity. In the face of ambiguity, the proper approach should have been to give close appraisal to the commercial outcome arising from the Parties' respective interpretations, an exercise which was not undertaken at trial. It is this inquiry which I now turn to.

93. The Parties have advanced competing arguments as to why their respective interpretations would better accord with commercial sensibility.

94. Before embarking on the iterative process of comparing the commercial results flowing from each Party's interpretation of the Reservation Agreement, it is worth setting out the commercial context to the Parties' transaction on 28 October 2009, which has its origins in Mr Ward's prior dealings with Damac Star in relation to the EBAs.

95. Following Mr Ward's purchase of the Executive Bay Properties on 8 April 2007, he fell into arrears in less than a year. By 29 January 2008, Damac Star saw fit to issue termination notices to Mr Ward in respect of the EBAs, which were eventually terminated by notices which Damac Star issued on 24 March 2008. Notwithstanding that Damac Star was thereafter entitled to forfeit the Transferred Sum, it withheld the exercise of that right and entered into a compromise with Mr Ward, by requiring him to purchase the Unit for AED 4,544,000 while permitting him to credit sums paid under the EBAs towards the Unit's purchase price.

96. In my view, three crucial points emerge from this historical account:

    (a) Damac Star's principal concern was to secure cash flow and maximize the recovery of debt that was due under the EBAs by incentivizing Mr Ward to make timely payment under the Reservation Agreement.

(b) The credit risk of transacting with Mr Ward, a defaulting party, was high. Accordingly, Damac Park would have been eager to minimize this risk by requiring regular payments at the earliest possible time.

(c) Damac Star did not receive any payment from Mr Ward for amounts due under the EBAs for almost one and a half years (since the date they were terminated) at the time it entered into the Waiver Agreements with Mr Ward in October 2009.

97. Mr Bacon's position is that it would be unreasonable to adopt the All Instalments Credit Interpretation because it would require Mr Ward to pay a greater amount than that required under the Payment Schedule, namely 55% of the Full Unit Price. In my judgment, the argument is circular and must be rejected. It presupposes that the Payment Schedule is to be calculated according to the Full Unit Price, but that is the very issue in dispute. If the All Instalments Credit Interpretation were correct, then Damac Park would be legally entitled to payment of 63% of the Full Unit Price (the sum of 55% of the Reduced Unit Price and the Transferred Sum) before completion, and it could hardly lie in Mr Ward's mouth to complain of the amounts that he was legally obliged to pay.

98. Mr Reed has made two arguments to demonstrate why the All Instalments Credit Interpretation better accords with the commercial object of the Parties' transaction.

99. First, he contends that it is only the All Instalments Credit Interpretation which gives effect to the conditionality of the credit. He refers in particular to the language of the Waiver Agreements which describe the Transferred Sum as being conditional on Mr Ward fulfilling all his "*obligations as set out within the [Reservation Agreement] including having made full payment of the amount equal to Purchase Price-II less the Paid Purchase Price-I*". The Immediate Credit Interpretation would not give effect to the conditional nature of the credit, because Mr Ward would receive the benefit of the credit without first making full payment of the balance. Mr Bacon is correct to contend that the conditional nature of the credit does not assist Damac Park. In my view, this argument does not assist Damac Park; the Immediate Credit Interpretation is equally capable of being conditional, albeit in a different way. For instance, the credit could be applied immediately, so that payment of the second instalment was not required, but that credit could be reversed in the event that Mr Ward defaulted on *subsequent* payments due under the Payment Schedule. The point is that there is no obvious mechanism by which the conditionality of the credit could be effected, so neither of the Parties' arguments bring them closer to shore.

100. Second, Mr Reed argues that, as between the All Instalments Credit Interpretation and the Immediate Credit Interpretation, the former better accords with the commercial object of the Parties' transaction because it would involve Damac Park taking on the least commercial risk and securing cash flow at the earliest possible date.

101. I accept this submission, which is fully informed by the historical background to the Parties' transaction set out at [94] and [96] above. It bears emphasizing that Damac Park and Damac Star were extending to Mr Ward an indulgence by permitting him to retain the benefit of monies that Damac Star was otherwise entitled to forfeit. In exchange, Damac Park's objective was to secure a stream of cash that Damac Star would otherwise have obtained under the EBAs, which were already overdue by approximately one and a half years at the time the Waiver Agreements were entered into. In that context, the interpretation which imposes the least commercial risk on Damac Park and requires the earliest payment by Mr Ward best reflects Parties' common intentions. That is undoubtedly the All Instalments Credit Interpretation.

102. Mr Bacon's suggestion that Damac Park would permit Mr Ward to provide no payment until 9 months after the Reservation Agreement had been executed has a surreal quality about it, particularly when one considers Mr Ward's nearly one and a half year-long default under the EBAs when the Waiver Agreements were executed. In the light of Mr Ward's credit history, Mr Bacon's proposition clearly calls for an explanation, but he has not been able to provide any.

103. On this basis alone, and without reference to the Parties' subsequent conduct, I am satisfied that it is the All Instalments Credit Interpretation which is correct. That conclusion is only reinforced when I consider the Parties' subsequent conduct.

104. Mr Reed's Subsequent Conduct Argument is as follows. Mr Ward had knowledge of Damac Park's interpretation of the Payment Schedule. Notwithstanding this, he not only failed to challenge that understanding but in fact proceeded to make payments in accordance with it. That demonstrated an acceptance on his part that the All Instalments Credit Interpretation was correct. In this regard, Mr Reed has relied on Article 51(c) of the DIFC Contract Law, which permits this Court to take cognizance of the Parties' subsequent conduct in interpreting any agreement between them.

105. Mr Bacon has argued that the inference which Damac Park is inviting us to draw is inappropriate for the following reasons.

(a) Mr Ward could not have realized what the basis was of the calculation of the sums which Damac Park demanded from him at all times. Mr Ward never received a Statement of Account from Damac Park. He also did not read the contents of the Reservation Agreement before signing it, nor was he provided a copy.

(b) Mr Ward's entry into the First Extension, Second Extension and Third Extension do not evince an acceptance of the All Instalments Credit Interpretation. He completely trusted Damac Park to have calculated the sums correctly, and his only interest was to secure an extension of time for payment.

106. None of Mr Bacon's arguments can be accepted. The suggestion that Mr Ward could not have known what the contents of the Reservation Agreement were because he did not retain a copy is legally and factually unsustainable.

107. As a matter of law, it is trite that a party who signs a document will be regarded as being bound by all its terms, even if he claims that he did not take notice of particular provisions (*L'Estrange v F. Graucob Ltd* [1934] 2 KB 394; *Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd* [2006] EWCA Civ 386 at [43]).

108. Neither am I persuaded that, as a matter of fact, Mr Ward was ignorant of his payment obligations under the Payment Schedule.

(a) First, Mr Ward had knowledge of the contents of the Reservation Agreement, even if he did not receive a copy of the document thereafter. The Reservation Agreement is a succinct, two-page document. The Payment Schedule is set out conspicuously in a table on the second page, on which Mr Ward placed his signature. That information could not have been lost on a sophisticated businessman like Mr Ward, so Mr Ward would have been able to test his interpretation of the Payment Schedule against Damac Park's as soon as a disagreement became apparent.

(b) Second, by 22 June 2015, Mr Ward must have known what Damac Park's understanding was of the Payment Schedule. Mr Ward admits receiving Damac Park's email of 22 June 2015, which demanded payment of "AED 816,027.50". That email does not attach a Statement of Account which calculates or explains the basis

of the sum demanded. But it should have been obvious to Mr Ward at the time that Damac Park did not adopt the Immediate Credit Interpretation because (1) Damac Park was demanding payment for the second instalment and (2) Damac Park was using a sum other than the Full Unit Price to calculate the instalments since the sum of "AED 816,027.50" which Damac Park demanded was less than 25% of the Full Unit Price. It is telling that Mr Ward did not subsequently ask for an explanation of the sum demanded by Damac Park. Damac Park subsequently issued the First Termination Notice, which Mr Ward also admits receiving, purporting to exercise the very drastic remedy of terminating the Reservation Agreement and forfeiting the Transferred Sum. Thereafter, at no point in time did Mr Ward challenge Damac Park's adoption of the All Instalments Credit Interpretation. He in fact agreed to the First Extension, Second Extension and Third Extension, which required him to pay an amount which corresponded with the All Instalments Credit Interpretation and, when taken together with the Transferred Sum, exceeded the pre-completion amount payable under the Immediate Credit Interpretation. The unavoidable inference is that he understood the Payment Schedule in terms of the All Instalments Credit Interpretation, and therefore saw no basis to contest Damac Park's demands at the time.

109. Accordingly, I accept that the Subsequent Conduct Argument reinforces the conclusion that I had independently reached based on a proper commercial understanding of the Reservation Agreement. It is the All Instalments Credit Interpretation which is correct, under which Mr Ward's payment obligations would be as set out in the table below.

Description	% of Reduced Unit Price	Amount Due & Payable	Payment Date
Deposit	0%	0	-
1ST INSTALMENT	0%	0	-
2ND INSTALMENT	25%	816,027.50	26 April 2010
3RD INSTALMENT	30%	979,233.00	25 July 2010
4TH INSTALMENT	45%	1,468,849.50	On Completion

C. Whether Mr Ward was in breach of the Reservation Agreement

110. Having found that the All Instalments Credit Interpretation is correct, it follows that Mr Ward was in breach of the Reservation Agreement by failing to make timely payment of the third instalment, which is the breach Damac Park relies on in terminating the Reservation Agreement. Thus far, Mr Ward has only paid to Damac Park the sum of AED 1,346,445 by way of cheque 130 towards payment of the second and third instalments, which falls short of the total amount due under those instalments, AED 1,795,260.50.

111. Accordingly, Damac Park was entitled to terminate the Reservation Agreement by issuing the Second Termination Notice in accordance with Clause 4 of the Reservation Agreement.

D. Whether Damac Park was in breach of the Reservation Agreement by failing to issue the Agreement of Sale

112. Having found that Damac Park had lawfully terminated the Reservation Agreement, I must now consider whether Damac Park was also in breach of the Reservation Agreement in failing to issue an Agreement of Sale to date, such that Mr Ward would be entitled to terminate the Reservation Agreement on an alternative ground. Mr Bacon has argued in his Supplemental Skeleton Arguments dated 7 September 2015 that, because Damac Park did not specifically appeal against the trial judge's finding that the absence of an Agreement of Sale amounted to a material breach of the Reservation Agreement, Damac Park must be bound by that finding.

113. The question is whether Damac Park's entire appeal must fail *in limine* for the reasons raised by Mr Bacon in his Supplemental Skeleton Arguments. In my view, this Court is not so constrained. Even though Damac Park has not specifically challenged the trial judge's finding on the absence of an Agreement of Sale, Damac Park's Notice of Appeal clearly states "Entire Judgment Under Appeal". Notwithstanding that Damac Park has not specifically challenged the trial judge's finding on the absence of an Agreement of Sale, that finding is clearly in issue given the relief sought by Damac Park This Court may, in its capacity as an appellate court, independently consider alternative legal theories not raised in the parties' submissions. It is our charge to ensure that no miscarriage of justice arises simply because one or both parties have not fully addressed a point which we consider material to the outcome of the dispute. For these reasons, this Court is entitled to "make or give any order that could have been made or given by the Court of First Instance" (RDC

44.133(1)), and may also "make any other order that the Court of Appeal considers appropriate or just" (RDC 44.133(6).

114. The relevant portion of the trial judge's reasoning on the issue is set out below:

> "77. Clause 9 of the Reservation Agreement states that, "The Agreement of Sale will be issued by the Developer in due course in its [sic] standard format." The Agreement of Sale failed to be issued over a period of at least a year and a half during the time the Reservation Agreement was signed on 28 October 2009 until the date the Second Termination Letter was issued on 22 March 2011 and to date, the Agreement of Sale has still not been issued.
>
> 78. Surely the term, "in due course" was not envisaged to exceed six months when the first instalment payment came due, let alone over a year. Even the most liberally applied reasonable test would interpret this amount of time as unreasonable...
>
> ...
>
> 80. As a result, the absence of the Agreement of Sale throughout this nearly two-year process despite the express mention of it being issued "in due course" in the Reservation Agreement constitutes a material breach of the contract by the Defendant; thereby placing the Claimant in the position of claiming breach and terminating the contract according to DIFC Contract Law, Part 8, Article 86 and 89... "

115. It is appropriate now to examine the provision which Damac Park had allegedly breached, Clause 9 of the Reservation Agreement provides as follows:

> "The Agreement of Sale will be issued by the Developer in due course on it's [sic] standard format. **In the meantime, I/we shall continue to abide by the payment plan and other terms and conditions of the Reservation**."
>
> (emphasis added)

116. I accept, as the trial judge had found, that Clause 9 plainly provides that an Agreement of Sale must eventually be issued by Damac Park. Where we part ways is in relation to whether there has been a breach of Clause 9 at all and, if so, whether the breach was a material one entitling Mr Ward to terminate the Reservation Agreement. In my judgment, the trial judge fell into error on both issues when he made the following conclusions.

(a) First, he found that there would be a breach of Clause 9 if Damac Park failed to issue an Agreement of Sale within six months from the date of the Reservation Agreement, when the first instalment payment fell due.

(b) Second, he found that the absence of an Agreement of Sale amounted to "a material breach" of the Reservation Agreement.

117. Before addressing each finding in turn, I will elaborate on the commercial and legal significance of the Reservation Agreement and Agreement of Sale, a proper appreciation of which is essential to the two issues decided on by Justice Omar.

118. In contracts for the purchase of immovable property, it is common for parties to first reach an agreement which envisages the subsequent execution of a more detailed contract between them. The potential forms and contents of such an initial agreement are myriad. It is often described as an "Option to Purchase" or, as is the present case, a "Reservation Agreement". Regardless of what name the initial agreement is given, its legal significance turns on its proper construction.

119. The Reservation Agreement is, in substance, a sale and purchase agreement. It is not merely an agreement granting Mr Ward an option to purchase property, with the Agreement of Sale being the agreement that is envisaged to transfer title over the property to Mr Ward. Damac Park's entry into the Reservation Agreement *was* the commitment to transfer the Unit to Mr Ward, and this is evident from the following provision in the Reservation Agreement:

> "I/We are aware that by signing this irrevocable Office Unit Reservation, I/we hereby enter into **a binding contract with the Developer for purchase of the above office unit**..."
>
> (emphasis added)

120. The Reservation Agreement is peculiar in its relative brevity as a two-page document, but that does not mean it is so uncertain that it is not an enforceable contract. It is elementary that an agreement for the sale and purchase of property will possess sufficient certainty to be enforceable so long as the following three aspects of the transaction are provided for:

(a) identification of the Parties (*Cohen v Roche* [1927] 1 KB 169);

(b) identification of the Property and interest to be disposed of (*Vale of Neath Colliery Co v Furness* (1876) 45 LJ Ch 276); and

(c) specification of the consideration or the means by which it is to be ascertained (*Re Kharashkhoma Exploring and Prospecting Syndicate Ltd* [1897] 2 Ch 451; *Milnes v Gery* (1807) 14 Ves 400).

121. Once the three matters above are addressed by the contract's provisions, all other essential terms may be implied to give business efficacy to the contract. These include the seller's obligations to complete within a reasonable time (*Re Bayley and Shoesmith's Contract* (1918) 87 LJ Ch 626), deliver vacant possession on completion (*Cook v Taylor* [1942] Ch 349) and to make a good title free from incumbrances (*Johnson v Jumphrey* [1946] 1 All ER 460). A contract possessing the anatomy I have just described is often described as an open contract. So understood, an open contract is sufficient to consummate the purchase transaction without more. Although the minutiae of the parties' legal obligations are not spelt out, they are broadly discernable and capable of being performed with sufficient certainty. The fact that an open contract might well be varied or superseded by a more extensively drafted contract (such as the Agreement of Sale) does not detract from this. The subsequent contract would typically cover matters not previously dealt with under the open contract, such as mode of delivery of property and its precise specifications. But none of these provisions are intended, however, to affect the *essence* of the parties' bargain under the open contract.

122. Accordingly, after executing the Reservation Agreement, Mr Ward possessed all legal rights necessary to acquire title to the Unit (provided he also fulfilled his obligations under the Reservation Agreement). There was nothing further he required to complete the transaction, even if his rights and obligations could be further delineated by an Agreement of Sale. His principal obligation was to make regular payments for the Unit, and the manner in which those payments were to be made was already provided for in the Payment Schedule.

123. Against this backdrop, what arises for decision is how the expression "in due course" in Clause 9 should be understood.

124. The trial judge found that the phrase "in due course" was intended to mean "within a reasonable time", and this is evident from the following passage of his judgment:

> "Surely the term "in due course" was not envisaged to exceed six months when the first instalment payment came due let alone over a year. **Even the most liberally applied reasonable test would interpret this amount of time as unreasonable**."
>
> (emphasis added)

125. I accept that an Agreement of Sale must be issued within a reasonable time. It is trite law that, in the absence of a stipulation as to time for the performance of an obligation, the law implies that performance shall take place within a reasonable time (*Pantland Hick v Ramond & Reid* [1893] AC 22 at pp. 32 and 33). However, that is only the beginning of the inquiry. In determining whether there has been a breach of an obligation to perform within a reasonable time, the nature of the inquiry was explained in the judgment of Judge Richard Seymour QC in *Astea (UK) Ltd v. Time Group LTD* [2003] EWHC 725, which was adopted by the English Court of Appeal in *Peregrine Systems Ltd v Steria Ltd* [2005] EWCA Civ 239 ("***Peregrine***") at [15]. There, Judge Seymour said that the inquiry involves:

> "...a broad consideration, **with the benefit of hindsight**, and viewed from the time at which one party contends that a reasonable time for performance has been exceeded, of what would, in all the circumstances which are by then known to have happened, have been a reasonable time for performance."
>
> (emphasis added)

126. Not only does the passage above demonstrate that the inquiry is a fact-centric exercise, it makes clear that one can look to events taking place after the contract's formation to determine what a reasonable time would be, with the benefit of hindsight.

127. With respect, the trial judge's finding that a reasonable time could not exceed the time when the first instalment fell due is unsustainable. While he has not explained how he reached that conclusion, it could only be justified if the terms of the Agreement of Sale would materially affect or was required for Mr Ward's performance of his payment obligations under the Reservation Agreement. But that connection is plainly absent since Mr Ward's payment obligations have been extensively provided for in the Payment Schedule; there was no reason why Mr Ward would require the Agreement of Sale by the time the first instalment was due or, for that matter, by the time any particular instalment was due.

128. Indeed, the terms of the Reservation Agreement strongly suggest that Damac Park was intended to have wide latitude in deciding when to issue the Agreement of Sale. Whereas Mr Ward was required to sign an Agreement of Sale "within one week" of its delivery to him under Clause 3, Damac Park was entitled to issue one "in due course" under Clause 9.

129. In my judgment, a reasonable time for issuing the Agreement of Sale is at or before completion, when title was to be transferred to Mr Ward and when some specification (in the Agreement of Sale) as to the precise procedure for how completion was to take place might facilitate it.

130. A hindsight assessment further supports this view. Mr Ward had never once requested a copy of the Agreement of Sale. It is testament to how, at all material times, he did not believe that Damac Park had fallen behind on issuing an Agreement of Sale timeously. Further, in light of Mr Ward's repeated defaults under the Reservation Agreement at a very early stage, Damac Park was entitled to exercise greater circumspection before issuing an Agreement of Sale. The convergence of these factors firmly establish that Damac Park was not obliged to issue an Agreement of Sale in as short as a time as the trial judge found.

131. As Mr Reed rightly argued at the hearing, given that Damac Park was entitled to and did terminate the Reservation Agreement before completion by issuing the Second Termination Notice, Damac Park was discharged from its obligation to issue an Agreement of Sale before the latest time it was required to do so. It follows that the continuing absence of an Agreement of Sale to date cannot amount to a breach of the Reservation Agreement by Damac Park, let alone a material breach entitling Mr Ward to terminate the Reservation Agreement.

132. In any event, I also disagree with the trial judge's finding that a breach of Clause 9 would be a material one entitling Mr Ward to terminate the Reservation Agreement. A breach of an obligation to perform within a reasonable time is not the same as contravening an obligation where time was "of the essence", the latter being the type of breach which gives rise to a right of termination. The point was recognized by Kay LJ in *Peregrine* at [15]:

> "First, even if Mr Blunt's construction of the contractual obligation had been correct, it does not follow that any breach of it would have been repudiatory. In his submissions he tended to elide the obligation to perform within a reasonable time and the concept of time being "of the essence". **The two things are not the same. If there had been a breach of the obligation to perform within a reasonable time, it would still have been necessary for Steria to establish that it was a repudiatory breach**, that is to say one "which will deprive the party not in default of substantially the whole benefit which it was intended he should obtain from the contract" (per Diplock LJ in Hongkong Fir Shipping Co v. Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26 ,70)."
>
> (emphasis added)

133. It is self-evident from the expression "substantially the whole benefit" that a repudiatory breach must be so serious that it undermines the very purpose for which the parties transacted.

134. The trial judge did not address the issue in terms of a breach which would deprive the innocent party of "substantially the whole benefit" of the contract, but he did consider the potential effects of a breach of Clause 9 by Damac Park:

> "It is very possible that clauses contained therein could have transferred more accountability onto the Defendant and put the Claimant in a more favourable position than he was with the existing Reservation Agreement. At the very least, surely it would have contained additional express terms and assurances such as the expected date of handover and a more detailed calculation of the payment terms."

135. With respect, I do not think that any of the reasons set out above establishes that a breach of Clause 9 would be a repudiatory one depriving Mr Ward of substantially the whole benefit of the contract. Mr Ward's primary interest in the transaction was to obtain good title over the Unit and have the benefit of its use within a reasonable time. Having found that the Reservation Agreement was a valid and effective open contract that was capable of effecting the sale and purchase transaction, the trial judge did not take that finding to its logical conclusion, namely that, as I have explained above, an open contract such as the Reservation Agreement was capable of achieving the purpose of the transaction. The "additional express terms and assurances" which the trial judge had in mind would simply make explicit what was already (broadly) implicit under the Reservation Agreement, and their absence cannot by any stretch deprive Mr Ward of substantially the whole benefit of the Reservation Agreement.

136. Accordingly, even if Damac Park had been in breach of Clause 9 of the Reservation Agreement, it would not have been a repudiatory breach entitling Mr Ward to terminate the agreement.

E. Whether Mr Ward is entitled to restitution of the monies paid to Damac Park

137. The trial judge ordered that all sums paid by Mr Ward were to be returned to him by Damac Park on the grounds of restitution. In this regard, he relied on Article 48 of the DIFC Damages and Remedies Law 2005 ("**DIFC Damages and Remedies Law**") and Article 90 of the DIFC Contract Law 2004 ("**DIFC Contract Law**") which provide as follows:

> "48. Right to restitution
>
> Restitution is available where the remedy is expressly provided in the DIFC Contract Law or where there has been unjust enrichment of one party at the expense of another party and there has been no subsequent change in the position of the enriched party which would render it unjust to order the enriched party to restore the benefits received."

138. It seems to me that restitution under these provisions would only be available to Mr Ward if he was the party who terminated the contract because of Damac Park's wrongful breach.

139. First, it is clear that, subject to the provisions of the DIFC Contract Law, restitution under Article 48 of the DIFC Damages and Remedies Law 2005 would only be available when there has been an "unjust enrichment" of the party which restitution is sought against.

140. The notion of "unjust enrichment" comprises two elements. First, the party which restitution is sought against must have been enriched. Second, the enrichment must be tainted by an unjust factor. It is beyond controversy that Damac Park was enriched by the sums paid by Mr Ward. The issue is whether any unjust factor operates to unravel that enrichment. In my judgment, there are none.

141. Mr Ward's payments to Damac Park were not made by mistake. He did so voluntarily in exchange for title to the Unit, as he was required to under the Reservation Agreement. Accordingly, Damac Park was not an unintended recipient of those monies. Far from it, it was legally entitled to receive them as payment for the Unit and retain them even if the Reservation Agreement were terminated. All of this is expressly set out in Clause 4 of the Reservation Agreement.

142. The only other relevant ground for establishing a right to restitution is if Damac Park's receipt and retention of the money was the result of some wrongful conduct on its part. Although the law on what categories of wrongs would justify restitution is in flux, that controversy need not detain us because Damac Park is not guilty of any wrongful conduct. Indeed, it is Mr Ward who has committed a repudiatory breach of the Reservation Agreement, so I do not accept that there is anything "unjust" about Damac Park's retention of the monies paid by Mr Ward.

143. Neither does Article 90 of the DIFC Contract Law assist Mr Ward. The provision is reproduced below:

> "90. Restitution
>
> (1) On termination of contract pursuant to Articles 86 or 88 either party may claim restitution of whatever it has supplied, provided that such party concurrently makes restitution of whatever it has received. If restitution in kind is not possible or appropriate allowance should be made in money whenever reasonable.
>
> (2) However, if performance of the contract has extended over a period of time and the contract is divisible, such restitution can only be claimed for the period after termination has taken effect."

144. On a plain reading of Article 90(1), it would appear that any party may seek restitution upon termination of a contract, even the party which committed the repudiatory breach of the contract in question. However, that cannot be the correct interpretation of Article 90(1). Such an expansive reading of the provision would facilitate and encourage opportunistic breaches as well as terminations of contracts whenever mutual restitution (effectively, a rescission of the contract) would best suit the interests of the wrongdoer. In my judgment, the proper construction of Article 90(1) entails understanding the phrase "either party" to mean only the party which lawfully exercised the right of termination pursuant to Articles 86 and 88 of the DIFC Contract Law.

145. Given that Mr Ward was not lawfully entitled to terminate the Reservation Agreement, it follows that he cannot avail himself of the remedy provided by Article 90(1) of the DIFC Contract Law.

F. Conclusion & Costs

146. For the reasons set out above, I allow Damac Park's appeal. While I am minded to also order that Mr Ward pay to Damac Park the costs of the appeal and below, I will first consider any written submissions on costs which the parties may wish to file, and direct that they do so within 14 days from the date of this judgment.

DEPUTY CHIEF JUSTICE SIR JOHN CHADWICK:

147. I agree with the judgment of Chief Justice Michael Hwang S.C. and, for the reasons he has given, would allow the appeal.

H.E. JUSTICE ALI AL MADHANI:

148. I agree with the judgment of Chief Justice Michael Hwang S.C. and, for the reasons he has given, would allow the appeal.

Issued by:
Amna Al Owais
Deputy Registrar
Date of Issue: 14 December 2015
At: 4pm