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■ Developers who wish to make off-plan sales must obtain a written permission from the Dubai Land Department before advertising the units

Photo: Photos.com

## Off-plan buyers no more at developers' mercy

■ New laws safeguard escrow accounts, ensure registration of transactions and help resolve disputes as Dubai bolsters measures to protect investors' rights

**Andrew Gibson**



As Dubai's real estate market continues to suffer from falling prices and a general lack of liquidity, it is understandable why many developers, in a bid to curb expenditure, are taking the decision to either scale down construction works, or in some cases suspend them altogether. However, the ramifications of such decisions are far-reaching and potentially disastrous for many other participants in the market.

This article explains how purchasers are able to stand up against some unscrupulous developers who are terminating projects and seeking to hold on to their payments.

With real estate prices continuing to

fall and rents still among the highest in the world, it is easy to understand why many have recently taken to plunge by investing into Dubai's real estate market. That is, provided that they have been able to secure finance, or perhaps even be fortunate enough to be a cash buyer.

### Unprecedented risk

However, for those who have brought off-plan, a new and unprecedented risk now exists as a result of the sheer number of real estate projects being delayed, or in some cases, cancelled altogether.

According to a recent report issued by HSBC Global Research, a total of 59 individual projects have officially been affected, costing \$75 billion. It should also be noted that the vast majority of these projects are high-end residential units situat-

### 'Scrapping projects is becoming prevalent in Dubai as developers suffer from a lack of liquidity'

ed in Dubai, the sort which until not all that long ago, were selling like hot cakes.

Being told that the apartment or villa you had visions of owning will no longer be constructed is an obvious setback in itself; but what if the developer then informs you that it will not be refunding any of the installments already made? Unfor-

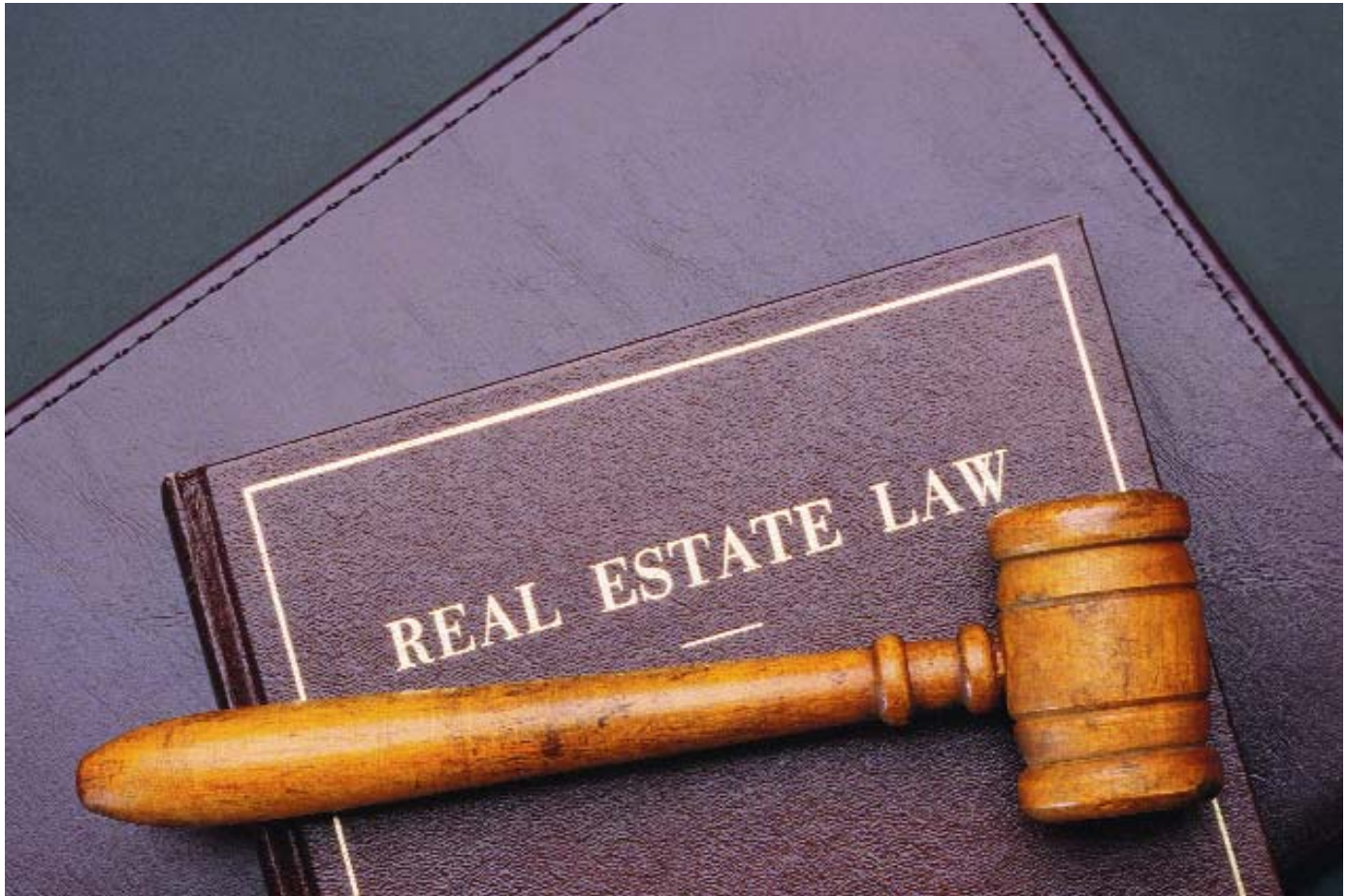
tunately, this practice is becoming more prevalent in Dubai due to the current economic climate as developers suffer from a lack of liquidity and an ever-decreasing pool of potential purchasers.

### Imbalance of power

However, all is not lost, as recent legal developments have sought to protect purchasers against such unwelcome predicaments by addressing the imbalance of power between the parties. The only problem is to know what the laws are and how to use them.

The following provide a brief summary of the effect of the new laws, and also explain what formal steps a purchaser should consider taking against the developer in order to seek recovery of his/her dues.

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■ The Real Estate Regulatory Authority has set up a Property Court to deal specifically with all property-related disputes, apart from landlord and tenant disputes

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#### Escrow Law (Law No 8 of 2007)

This law applies to developers who wish to sell off-plan units. It stipulates that they must be registered with the Dubai Land Department (DLD) and the developer must obtain a written permit from them before being able to advertise or sell any of the units.

### 'Developers have a right to cancel a contract and retain up to 30 per cent of its value where the purchaser is in default'

It also states that the developer must apply to the DLD to open a Guarantee Account for the sums paid by purchasers. This account must relate

specifically to the project. Therefore, the proceeds can only be used for its construction. Furthermore, the developer will be in breach if it does not commence construction within six months from the date it was granted approval to sell off-plan, without an acceptable excuse.

If the developer fails to comply with the provisions of this law, it risks a fine of not less than Dh100,000 and may, in certain circumstances, be cancelled from the register.

#### Off-Plan Sales Registration Law (Law No. 13 of 2008)

This law (applicable to agreements dated August 31, 2008 and onwards) states that all off-plan transactions must be registered with the DLD. Developers are also unable to charge transfer fees on off-plan sales, although they may still charge an administrative fee. The current proposal is to limit this amount to Dh5,000.

Purchasers should however be aware of Article 11 of this Law, which effectively gives the developer a right to cancel the contract and retain up to 30 per cent of its value in circumstances where the pur-

chaser is in default (for instance, by refusing to pay any further installments without justification).

The only condition is that the developer must first serve a 30-day notice upon the purchaser and consult the Real Estate Regulatory Authority (RERA) for approval of the cancellation.

Alternatively, rather than cancel the contract and retain 30 per cent of its value, the developer may instead choose to insist upon specific performance (i.e., compel the purchaser to perform his/her obligations under the contract). This has increasing significance in the current market where it is now perceivable that the value of the unit could have decreased more than 30 per cent since the date the contract was entered into.

#### New laws in the pipeline

In addition to the above, two new draft laws are expected to be implemented shortly, which are aimed towards introducing even further protection to purchasers buying off-plan.

The first states that developers must own the land in question and have com-

pleted at least 20 per cent of the construction works before they can request consent from RERA to commence sales.

The second states that the payment plan must be linked to construction milestones, and that a maximum of 20 per cent of the purchase price can be secured upfront.

#### Resolving the dispute

Being aware of the applicable laws is one thing, but knowing how to act on them is another. There are, in fact, many ways of resolving a dispute, apart from referral to conventional court proceedings. Such methods are collectively referred to as 'Alternative Dispute Resolution' (ADR), the most widely used methods being arbitration (resulting in a binding award enforceable through courts) and mediation (non-binding negotiation before a mediator).

#### New property court

However, if the dispute cannot be resolved through ADR, the only recourse available is through court proceedings. This is where Dubai's new Property Court steps in.

The Court itself is situated within Dubai's main courts near the Creek and

## A FINE IN CASE OF NON-COMPLIANCE

■ **If the developer fails** to comply with the provisions of the Escrow Law, it risks a fine of not less than Dh100,0000 and may, in certain circumstances, be cancelled from the register

■ **Before cancelling a contract**, the developer must first serve a 30-day notice upon

the purchaser and consult the RERA

■ **An upcoming law** states that developers must own the land in question and that payment plans be linked to construction milestones

■ **All hearings in the Property Court** will be conducted in Arabic

has been set up by RERA to deal specifically with all property-related disputes, aside from landlord and tenant disputes which Dubai's Rent Committee retains jurisdiction over.

### Unwanted practices

The primary purpose of the new Property Court is to try and instill more confidence in the sector, and to counteract some of the unwanted practices associated with the market — cancellation of reservations and failure to return installments being a prime example.

As per all other cases put before Dubai's Court of First Instance, litigants will be able to have the judgments reconsidered by the Appeals Court, and ultimately the Cassation Court.

Although it is envisaged that the Property Court is to be transparent (judgments are to be made available to the public) and slightly more informal than conventional court proceedings, it should be remembered that the hearings will continue to be conducted in Arabic. Therefore, if you do not speak the language, you will need to appoint a duly empowered representa-

tive/attorney to act on your behalf.

### Precautionary attachments

It is also worth bearing in mind that if the developer has cancelled a project and is refusing to return the purchasers' installments, chances are it is experiencing severe financial difficulty. This reinforces the need to act quickly.

Therefore, pending issuance of the substantive court proceedings, a purchaser may decide to apply to court for a precautionary attachment. Put simply, these are applications to the court preventing the defendant (in this case, the developer) from acting in a certain way.

The most appropriate example in the current context would be to prohibit the developer from dealing with assets or moving them out of the jurisdiction, otherwise known as a 'freezing injunction'. If successful, the freezing injunction would be for a limited period of time and conditional upon the subsequent issue of substantive court proceedings.

### The cost of litigation

Understandably, one of the key concerns



■ A developer must apply to the Land Department to open an escrow account for the sums paid by purchasers

of potential litigants is how much going to court is going to cost them, and whether they have a right to recover any amount from the losing party in the event that they are successful.

Dealing with the latter first, it should be noted that the UAE does not recognise the principle adopted in common law jurisdictions that the losing party should automatically be liable to pay the successful party's legal costs. In essence, the position is very much 'each to their own'.

The current court fees for each level of appeal are as follows:

**Court of First Instance:** 7.5 per cent of the

amount claimed, subject to a maximum of Dh30,000

**Court of Appeal:** 1.5 per cent of the amount claimed

**Court of Cassation:** Dh1,520

If it is apparent that there are other purchasers who have a similar dispute with the same developer, one way of reducing your exposure to legal costs is to combine efforts by jointly instructing one lawyer. Although the cases will be filed separately, savings can be made because much of the content of the court documents can be reproduced.

### Act quickly

It is undoubtedly a challenging time for both developers and purchasers alike. In most cases, the differences between the two can invariably be resolved amicably.

Unfortunately, there is little a purchaser can say or do to miraculously speed up the progress of construction works that are evidently behind schedule, although this does not necessarily mean that their legal position should be compromised.

Where possible, the general approach recommended by RERA is for the developer and purchaser to agree on an adjustment to the payment schedule to achieve a workable solution.

### Combined approach

However, if this cannot be achieved, it is worth bearing in mind that there will probably be many other purchasers in the same position. Whether they end up being your friend or foe will ultimately depend upon whether you intend to unite forces or target the developer separately.

Whichever option is pursued, one thing is for certain, and that is the 'wait and see' attitude is unlikely to lead to a favourable outcome, hence the need to act quickly.



■ In case of a dispute, the RERA recommends the developer and purchaser to agree on an adjustment to the payment schedule