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Legal qualification of disorders affecting a property purchased off-plan

In a decision dated September 21, 2011, the *Cour de Cassation* (French Supreme Court) partially overturned a judgment rendered by the Chambery Court of Appeals on June 16, 2009 and recalled the necessity to accurately qualify the disorders put forth by the purchaser of an apartment bought under the French legal mechanism of *vente en l'état futur d'achèvement* (i.e. sale of a property not yet built/completed or off-plan property).

The sale of a property to be erected is defined in Article 1601-1 of the French Civil Code as a sale “by which the seller undertakes to erect a property within a period of time set forth by contract”.

This mechanism allows real estate developers to sell properties or premises that are not yet erected.

In the commented decision, a French *société civile immobilière* (property investment company) sold an off-plan apartment by contract dated November 8, 2002. The purchasers took possession of this apartment on March 18, 2003. At the time they took possession, they expressed several reservations. It seemed that, a priori, such reservations had not been lifted by the seller – or had been only partially lifted – and other reservations were expressed by the purchasers after they took possession of the apartment.

The parties were unable to find an agreement on the existing disorders and the judge appointed an expert to perform an expertise assignment. The expert reported the existence of several disorders and the purchasers consequently decided to seek compensation.

The nature of the disorders

In addition to delivering the property within the contractually fixed time-line, real estate developers have several other obligations, including in particular the obligation to deliver a property that is in conformity with what had been purchased off-plan.

Lack of conformity means that the delivered property is technically correct but different from that set forth in the sale contract. It must be distinguished from construction defects or other defects that reflect an irregularity or a fault in the works.

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The qualification of the disorders – that is a matter of evaluation of facts – is a cornerstone of the legal regime governing disorders and, consequently, an essential term from which will depend the scope of real estate developers' liability.

Here again, the saying “facts govern the law” finds its full significance as a wide range of disorders affected the apartment.

There exist two main types of disorders, those that you can notice at first sight, i.e. patent disorders, and those that appear subsequently.

Patent disorders

Pursuant to Article 1642-1 of the French Civil Code, referred to in Article L 261-5 of the French Construction and Housing Code, real estate developers must provide a guarantee against patent defects: *“The seller of a property to be erected may not be discharged, either before the acceptance of the works, or before the expiry of a period of one month after purchaser takes possession of the property, for construction defects that are then patent”*.

The warranty provided for under Article 1642-1 of the French Civil Code covers all types of patent defects. In the commented decision, the reported patent defects included cigarette burns on the floor covering, a scratched mirror and glue spread over glazing beads holding the glass door panel.

Latent defects

Pursuant to Article 1646-1 of the French Civil Code, the seller of a property to be erected is liable towards the acquirer, from the acceptance of the works, for the obligations for which the architects, contractors and other persons bound towards the building owner by a contract of hiring of industry and services are themselves liable under Articles 1792 et seq. of the same Code.

In the commented decision, two defects falling within the scope of the 10-year liability warranty had been identified by the Chambery Court of Appeals: outdoor woodworks that were not waterproof and a mechanical ventilation system that let odors from other apartments come in.

The *Cour de Cassation* considered that the Court of Appeals had properly and accurately qualified these disorders.

Yet, it overturned the part of the judgment of the Court of Appeals that considered the cigarette burns on the floor covering and the scratched mirror as conformity defects. Indeed, the *Cour de Cassation* considered that these disorders were defects affecting the works, and, therefore, construction defects.

It is obvious that such disorders did not render the apartment unfit for its intended use and that they were patent defects for which, in the case at hand, a legal action was probably time-barred.

Legal provisions governing disorders

In construction-related disputes and litigation, time is of the essence.

Statute of limitations

In construction matters, the statute of limitations, i.e. the period during which the holder of a right can exercise such right or claim enforcement thereof, varies according to the nature of the disorders.

With respect to patent defects, Article 1648 §2 of the French Civil Code stipulates that the purchaser is entitled to bring a legal action within the year following the date on which the seller may be discharged from patent defects.

Pursuant to Article 1642-1 of the French Civil Code, the date on which the seller is discharged from patent defects is either the date of acceptance of the works or the date of expiry of a 1-month period after purchaser takes possession of the property.

With respect to latent defects – which fall under the 10-year or 2-year liability warranty, the applicable statute of limitations is respectively 10 or 2 years.

In the commented decision, a debate had been engaged on the issue of wood panels. At the time they took possession of the apartment, the purchasers required that such panels be replaced – which had been done. Then, after the one-year timeline had expired, the purchasers had requested that other wood panels be changed. The real estate developer raised an objection, arguing that this request was time-barred because it related to patent defects.

The *Cour de Cassation* followed the reasoning of the Court of Appeals and rejected the real estate developer's argumentation on the basis of the expert's report who had indicated that the fixation of wood panels was faulty in the whole apartment and that this defect was due to a too high humidity rate at the time the panels were installed. By ruling that this defect fell under the 10-year liability warranty, the judges allowed the admissibility of purchasers' requests over time.

Compensation for disorders:

In case of conformity defects, the purchaser can, at his discretion, either request the cancellation of the sale or claim a reduction of the purchase price.

In the case at hand, the purchasers had chosen to request a reduction of the purchase price.

The *Cour de cassation* overturned the part of the Chambery Court of Appeals that concerned defects for an amount of 180 Euros, 210 Euros and 1,580 Euros respectively, in a case where all the defects taken together totaled 5,654.68 Euros.

It is unlikely that the purchasers will obtain the payment of these sums since their action seems time-barred at it relates to patent disorders.

As such, it appears that the *Cour de Cassation* wanted to remind the Chambery Court of Appeals of this obvious fact and of the consequences associated therewith, since it remanded the case to this very same court, sitting in a different composition.

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