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Commercial Property - Austria

Supreme Court limits contractual exclusion of a seller's warranty

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Introduction

In civil law jurisdictions, sale and purchase agreements tend to be less comprehensive than their common law counterparts. Contracts frequently use certain key phrases which either trigger or exclude a set of legal rules laid down by statute, and which thus need not be explained in detail in the contract.

While such references to sets of legal rules are a useful tool to reduce contract negotiations, they require careful drafting. The Supreme Court recently handed down a decision concerning the contractual exclusion of a seller's warranty in a property transaction, with surprising results.

Facts

The decision concerned a purchase and sale agreement for a property. The purchase agreement contained - among others - the following clause:

"The purchasers are aware of the state of the property and they were also given the opportunity to gather information about the factual state of the property, as regards factual and (public) legal matters. Therefore, the seller does not warrant a certain condition of the subject-matter of the contract except that it is free from any registered or unregistered encumbrances, mortgages or land charges. The seller does not assume any liability for a certain size or revenue or usability."

As it later emerged, the house was built on a former gravel pit which had been filled with demolition waste, rather than on solid ground. As a result, the walls showed cracks and there was water damage in the building.

The sellers refused any payments on the grounds of the abovementioned clause.

Decision

The Supreme Court took a two-stage approach, first analysing the seller's obligations under the sales contract and then considering the exclusion of a seller's warranty.

As to the seller's obligations, the court held that a seller has no general duty to disclose every material circumstance unless the buyer specifically requests this information.

However, if the seller is aware or negligently unaware of the fact that a certain circumstance is of significant importance to the buyer, the seller must disclose this information irrespective of a request by the buyer. If the seller fails to disclose such a circumstance, it is liable for this circumstance.

In the present case, the seller was aware that the house was built on a former gravel pit. He must have known that this information was vital to the buyer, as it would lead to repair work and reduced the value of the property. As the seller did not disclose this information to the buyer, the buyer was entitled to assume that the house was built on natural ground.

In the second stage, the Supreme Court analysed whether the seller had validly excluded its liability by including the abovementioned clause into the contract.

The court held that the abovementioned clause did not intend to exclude the seller altogether from liability. Given that the clause explicitly referred to the property inspection by the buyer, it intended to exclude the seller's liability only for such circumstances which the buyer could have perceived when inspecting the property, but not for hidden defects. Therefore, the court concluded that the seller had not validly excluded its warranty and the buyer could make a warranty claim.

Comment

It is difficult to disagree with the first part of the decision concerning the seller's duty to disclose certain material circumstances irrespective of whether the buyer requested this particular information. The second part, however, comes as a surprise. The notion that a certain object is sold 'as seen' is a common term used to exclude the seller's warranty.

When drafting a purchase agreement on behalf of a seller, it should be made clear that the clause excluding the seller's warranty also relates to hidden defects which the buyer could not have perceived when inspecting the property.

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