

Warranty and condominium ownership: new case law

The Federal Supreme Court recently issued a landmark ruling on the rectification obligations in the context of condominium ownership (BGer, 4A_71/2018, judgement of 18 September 2018, intended for official publication). The judgement was (essentially) based on the following facts:

The facts of the case

The contractor constructed a block of flats on its land. It built 44 condominium units and sold them to individual buyers. At the same time, it entered into a contract with the buyers labelled "general contractor contract". Some time after acceptance, defects in the common parts of the building were discovered. After internal decision-making and after the contractor had refused to remedy the defects, the community of condominium owners (CCO) sued for the advance payment of the rectification costs. 15 of the condominium owners did not assign their rectification claims under the respective general contractor contracts to the CCO.

The judgement

The lower courts ordered the contractor to advance all of the rectification costs. In its appeal before the Federal Supreme Court, the contractor argued, among other things, that the claim should not have been successful because 15 of the condominium owners had not assigned their rectification claims to the CCO. The Federal Supreme Court dismissed the contractor's appeal.

The Lausanne judges first referred to their previous case law: The CCO is capable of being entitled to claims. In the context of these claims it has the capacity to be a party to legal proceedings and to act before a court of law. This includes the ability to have defects in common parts of the building rectified and to assert warranty claims under purchase contracts and contracts for works and services against the seller and against the contractor. The CCO can assert not only claims arising from contracts it entered into itself but also those assigned to it (insofar as an assignment is permitted). However, there is no automatic transfer of the owners' rights to the CCO by virtue of statutory law. The rectification claim under

a contract for works and services – unlike the other warranty rights, i.e. the right to reduce the price and to withdraw from the contract – is assignable.

The Federal Supreme Court then questioned whether the CCO could demand that the entire rectification costs be advanced, even though not all the condominium owners had assigned their claims to the CCO. Pursuant to the previous case law, this was not possible. In accordance with this traditional view, the individual condominium owners would not have been able to demand any rectification works and would have been restricted to demanding an advance of the rectification costs on a proportionate basis.

With its new ruling, the Federal Supreme Court has now explicitly deviated from precedent. The highest Swiss court ruled that each individual employer according to his contractual agreement with the contractor, had an indivisible contractual right to require the common parts of the building to be free from defects. The fact that under certain circumstances third parties (i.e. the other condominium owners) would benefit from this is irrelevant. Since each condominium owner had an independent claim to rectification of the defect of the common parts of the building and since this claim was assigned to the CCO, no harm was caused by the fact that 15 of the condominium owners had not assigned their claims. As a result, the contractor had to advance the entire rectification costs.

The consequences

The judgement of the Federal Supreme Court is to be welcomed. The effects of the ruling should not be underestimated. This can be illustrated by the following examples:

Example 1:

Circumstances basically the same as in the original case. The defect comes to light and is discussed at a meeting of the CCO on 1 October. On 12 October, the first of the condominium owners issues a notice of defect. The contractor refuses to remedy the defect on the grounds that the notice of

defect was given too late. At a new meeting of the CCO on October 20, the owners discuss how to proceed. At this meeting, X, who was on a long journey, first learns of the defect. He issues a notice of defect immediately, requesting rectification and assigns his claim to the CCO.

In the above example, the CCO (although 43 of the 44 condominium owners forfeited their rights) could demand the complete rectification of the defects of the common parts of the building. This is because X had his own rectification claim, which was asserted via timely notice and X has assigned this claim to the CCO. The contractor would therefore be fully liable – contrary to the previous case law, according to which it would have come off largely unscathed – even though 43 of the 44 employers had given notice too late.

Example 2:

Circumstances basically the same as in the original case. All (but one) of the condominium units are sold by December 2018, and the new owners take the flats immediately. X is a late buyer. He does not acquire the flat until December 2019. In the summer of 2024, defects in the common parts are discovered, and a notice of defect is immediately issued. The contractor invokes the statute of limitations. X transfers his claims to the CCO.

The warranty claims of the employers are time-barred in principle because more than 5 years have elapsed since acceptance. However, the limitation period for X has not yet expired. His rectification claim will not become time-barred until December 2024. Since X has assigned this unexpired claim to the CCO, the latter, according to the new case law of the Federal Supreme Court, can demand an advance payment of the rectification costs for all of the units, even though the warranty period has expired for 43 of the 44 condominium owners.

Contractual solutions

If contractors want to avoid the consequences described above, special attention must be paid to contract drafting. For example, one possibility might be to assign

rectification claims relating to common parts of the building directly to the CCO in the contracts for works and services and to stipulate that the warranty period with respect to common parts of the building commences upon the first buyer's acceptance. Or it could be stipulated that the notice period for defects commences when the first condominium owner learns of the defect. Another possibility worth considering might be to exclude all liability with regard

to defects in common parts of the building and instead to issue an independent guarantee in favour of the CCO (contract for the benefit of third parties). In this guarantee, it should then be specified in detail under what circumstances, for how long and subject to what notice period the CCO (and not the individual buyer) can assert claims against the contractor with respect to defects in common parts of the building.

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