Warranty disclaimers in contracts for sale of land

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1. Introduction

Warranties define the scope of a vendor's liability for defects in the property sold. The warranty provisions of the Code of Obligations (CO, Art. 219 and Art. 221 read in conjunction with Art. 192 et seq. and Art. 197 et seq.) are essentially dispositive in nature, meaning that contracting parties are free to amplify, to limit, or even to exclude altogether the purchaser's warranty rights. It is particularly common in contracts for the sale of land to find clauses disclaiming warranties in toto. Such clauses have the effect of shifting the risk and the cost of any defects in the property from the vendor to the purchaser.

2. Fraudulently concealed defects

There are limits placed on such disclaimers, however, and they will be held invalid or ineffective in particular if the vendor has fraudulently concealed a defect from the purchaser (CO Art. 199).

Fraudulent concealment arises, according to the case-law of the Federal Supreme Court, where a vendor has concealed from a purchaser the absence of a quality without the presence of which the purchaser would not have entered into the contract, either on the same terms or at all. A matter may not be concealed where the vendor is subject to a duty of disclosure. Such a duty arises, inter alia, where the vendor cannot but be aware that the defect within his knowledge will substantially impair the use of the property. There is no duty of disclosure, by contrast, where the vendor is entitled to assume that the purchaser will become aware of the defect upon exercising due care and attention.

The Federal Supreme Court recently gave judgement (BGE 4A_11/2015) in a case which we outline below in somewhat simplified form: The parties had entered into a contract of sale for two adjoining parcels of land. The vendor's warranty was excluded outright and the exclusion clause explicitly included public-law restrictions. It subsequently transpired that the entirety of one of the two parcels was zoned for public use. The parcel was thus subject to public-law restrictions. The zoning was not apparent from the land register. The purchasers had a specific building project for the parcel in question which they were unable to carry out because of this zoning. The purchasers thereupon sued the vendor for the amount of the resulting reduction in the value of the land.

The Federal Supreme Court found that the purchasers, who had no legal expertise or experience in the property market, were not under an obligation to know or discover the parcel's zoning status and thus the defect constituted by the fact that the site could not be built upon. Although the purchasers had had a specific building project, it was not reasonably incumbent on them to inquire as to the parcel's zoning. In terms of Art. 199 of the Code of Obligations, the Federal Supreme Court held that fraudulent concealment includes deliberate deception and that there is deliberate deception where the vendor, knowing of the defect, proceeds on the assumption that the purchaser will not discover it.
The Federal Supreme Court concluded that the vendor had fraudulently concealed from the purchasers the parcel’s public-use zoning and the associated public-law restrictions and that therefore the warranty exclusion clause could not be relied upon against the purchasers. The Federal Supreme Court thereby upheld the judgment of the lower court which had ordered the vendor to pay the purchasers a sum of just under CHF 65,000. This judgment significantly qualifies the effect of a full-blown exclusion clause.

3. Extraordinary defects

Exclusion clauses are also subject to limits in terms of their scope. This is determined in the first place by the parties’ actual common intent (subjective interpretation). If that – as is most often the case – cannot be determined, it is the parties’ presumptive intent that applies (normative or objectivized interpretation).

Under an exception which has become established in the settled case-law of the Federal Supreme Court, a defect - on an objectivized interpretation - is not covered by a disclaimer "if [the defect] lay entirely outside the scope of what a purchaser must reasonably have contemplated". It is not sufficient for the defect to be unexpected from the purchaser’s perspective; the defect must also substantially impair the economic purpose of the contract of sale. The criterion is whether or not the purchaser must have contemplated the possibility of a defect of the particular type and degree.

A somewhat older judgment (BGE 107 II 161) may serve as an example. The facts of the case may be summarized, in simplified form, as follows: the purchaser had acquired two parcels of land from the vendors. The vendor’s warranty had been excluded in the contract of sale. It was subsequently found, during the course of construction works, that the site was badly contaminated with heating oil.

The Federal Supreme Court held that the possibility of contamination from heating oil could not reasonably be expected to have been contemplated if the site had never previously been developed. In the case at hand, however, it was apparent from the contract of sale and therefore known to the purchaser that there had been greenhouses built on the land a few years previously and that these had been oil-heated. The associated risks (leaking oil pipes) must, in the view of the Federal Supreme Court, have been known to the purchaser.

The Federal Supreme Court therefore concluded that the possibility of oil damage, even in the considerable degree to which it had occurred, did not lie entirely outside what the purchaser must reasonably have contemplated.

4. Conclusion

Exclusion clauses in contracts for the sale of land are, as has been shown, subject to certain limits in terms of both validity and scope. Prospective purchasers are nonetheless well advised, not least in order to avoid the risk of expensive disputes, to obtain as much information as possible on a property before entering into a contract of sale. To avoid any risk of unpleasant surprises a prospective purchaser should consult not only the land register entry but also the zoning plan and the contaminated sites register.

It is worth noting, in this context, that under Art. 962 of the Civil Code (in force since 2012) the authorities must arrange for any public-law restrictions on ownership affecting a particular site to be noted in the land register. In addition, under Art. 16 et seq. of the Geoinformation Act (in force since 2009), public-law restrictions on ownership affecting an entire area and hence multiple properties (e.g. inclusion in a particular planning zone) must be recorded in a new register which the cantons have until 2020 to set up. Such information is or will be more accessible as a consequence. But the land register together with this new register will still not provide full and conclusive information.

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