illegally does not exercise its regulatory authority. Despite the fact that the legislation gave administrative authority to the regulatory authority to obviate a danger to public health and life, when it did not exercise its authority and in consequence gave damage to someone, the responsibility of the State and the government is brought into question. Then it is at issue whether it is illegal or not that the administrative authority did not exercise its power. In most cases it is unclear, because legislation generally gives it discretion to do or not to do so. So judges are faced with the problem of how and by which they figure out if the administrative authority had an obligation to exercise its power. In this regard, jurisprudence has built a framework for judgement; "obligation to do" theory and "reduction of administrative discretion to zero" theory. The former is that it imposes an obligation to do so on the administrative authority under the given conditions in view of the interest protected through the exercise of its power and the object of the legislation, the latter is that with respect to its discretion to do or not to do so as a general rule, but when the circumstances need not respect its discretion, its scope constracts so that it becomes illegal to do nothing. In each case it behooves that we define the conditions for the illegality of non-exercize of the regulatory authority.

3. Law of Property and Obligations

Xs v. Urban Renaissance Agency
Supreme Court 1st P.B., November 18, 2004
Case No. (*jyu*) 482 of 2004
58 (8) MINSHU 2225; 1883 HANREI-JIHO 62

Summary:

A case which affirms that a claim for *isharyo* where a transferor did not explain the fact that is important for the transferee of the transfer contract of the condominium to consider the propriety of the price in deciding whether or not to enter into the contract, deserves to be considered an illegal act.

Reference:

Civil Code, Article 709.

Facts:

A, the predecessor of defendant Y, in 1990, decided to rebuild the B apartment and the C apartment that A set up. Then A promised to ensure the opportunity of a prior sale against plaintiff Xs, who lived in those apartments at that time, if they wished to buy the condominium after rebuilding, and cooperated with the rebuilding through the vacation of the house, and delivered a note. The note contained the provisions which meant that A, after priory mediation of the condominium to Xs, immediately would take ordinary recruitment of the rest of the condominium, and that the selling price in the ordinary recruitment is at least much as that to Xs. Xs entered into the sale of the condominium respectively.

At the time of the contract, A had cognizance that the selling price to Xs was too high and that a person who wanted to buy the condominium would not present himself at that price, so had no intention to immediately take ordinary recruitment. A nevertheless did not elucidate that intention to them.

Afterward A took ordinary recruitment of the condominiums with a reduction in price. The reduction rate was 25.5% in B, 29.1% in C, and the average reduction price was 8,548,000 yen in B, 16,314,000 yen in C.

Xs brought the action, insisting principally on a breach of contract by A. And they secondly claimed an *isharyo* (which is damages to cover non-physical damage; *solatium*), insisting that though A, at the time of the contract, had a duty to explain that A had no intention to take ordinary recruitment immediately, A failed to do so, and so Xs lost the chance to decide whether to enter into the contract after well considering the propriety of the price set by A. The court below accepted X's secondary claim, so Y, who succeeded A, filed a *jokoku* appeal.

Opinion:

The appeal shall be dismissed.

Although A could easily know whether Xs recognized the terms of

the prior sale at the time of concluding the contract that A, after priory mediation of the condominium to Xs, immediately would take ordinary recruitment of the rest, A did not explain to them at all that A had no intention to immediately take ordinary recruitment, so it could be said that A took away X's chance to decide whether they would enter into the contract after well considering the propriety of the price set by A, so that it is a notable breach of *Shingi-Seijitsu-no-Gensoku* (*bona fide*) not to take that into account. The decision whether Xs entered into the contract with A or not relates to property interests, but A's above behavior deserves to be thought of as an illegal act which affirms a claim for *isharyo*. The above conclusion is not contrary to the authority that the appellant quoted (the Supreme Court, December 9, 2003, 57 (11) MINSHU 1887).

Editorial Note:

After the collapse of the "bubble economy," the price of real estate including condominiums fell. So a real estate agent cut the price of unsold condominiums. Many actions were brought in which those who bought a condominium at a high-price in the process of the collapse insisted that the asset value of their condominiums fell because of the price cut. The defendant is in many cases the Housing Corporation, as in this case. But the plaintiffs have almost always lost such a case. This case is the first case in which the plaintiff has partly won. However, the material fact here is the relationship between X and Y before the contract. So this decision has little effect on similar cases.

About the claim for *isharyo* on the breach of duty to explain, the Supreme Court, in the above case on December 9, 2003, held that an improper explanation of the decision concerning property interests did not deserve to be thought of as an illegal act which affirms a claim for *isharyo* unless *tokudan-no-jijyo* (special circumstances) were shown. In this case, the relation to this decision comes into question, and then the court affirms a claim for *isharyo*.