

although it recognized the unconstitutionality of the Act, was appropriate in terms of both theory and policy.

## 2. Law of Property and Obligations

### **X v. Y**

Supreme Court 1st P.B., June 17, 2010

Case No. (ju) 1742 of 2009

64(4) MINSHU 1197; 1510 SAIBANSYO JIHO 1;

2082 HANREI JIHO 55; 1326 HANREI TAIMUZU 111;

85 SHOUHISHA HOU NEWS 263

#### **Summary:**

Where a new building, which is the subject of a sale, must be pulled down and rebuilt due to serious defects contained therein, if, according to the socially accepted standards, the building itself is judged to have no social or economic value on the grounds that, for example, there is the concrete danger of the collapse of the building because those defects would affect its safety in terms of structural strength, the benefit that the purchaser of the building has enjoyed from having lived in it should not be set off or similarly adjusted with the purchaser's losses and therefore should not be deducted from the amount of compensation for damage based on a tort as claimed by the purchaser against the constructor, etc., equivalent to the expenses to be required for rebuilding.

(There is a concurring opinion.)

#### **Reference:**

Article 709 of the Civil Code

#### **Facts:**

Appellant Y1 concluded a contract for work with Appellant Y2, for the purpose of building the building, which is a steel-framed and slate-roofed three-story residential building, indicated in 2 of the list of articles attached to the judgment in the first instance (hereinafter referred to as

the “Building”). Appellant Y2 took charge of its construction, while Appellant Y3 and Appellant Y4 took charge of its design and supervision of the construction work. The construction of the Building was completed no later than May 14, 2003.

On March 28, 2003, the appellees purchased the Building with its site from Appellant Y1 at the price of 37 million yen, equally sharing the interest in these properties. On May 31, 2003, the appellees received the delivery of the Building, and have been living there since then.

The Building has, in its beam-column connections, parts that are not welded and parts that should have been butt-welded (by full joint penetration welding) but are welded by fillet welding or partial joint penetration welding, and in addition, it also has the following serious defects that would affect its safety in terms of structural strength. Due to these defects, the Building must be pulled down and rebuilt.

(a) As the members of the columns on the first and second floors are too small, the beam-column strength ratio of these columns fails to meet the minimum required level; as for the columns on the first floor, their stress intensity exceeds the allowable stress limit.

(b) As the members of the girders on the second floor are too small, their stress intensities exceed the allowable stress limit.

(c) The joints of the high-strength bolts of the girders on the second and third floors are not strong enough.

(d) As the furring strips of the exterior wall are made of light gauge steel frames, which should usually be used for the furring strips of partition walls that are not exposed to wind blasts, there is the risk that when the exterior wall is exposed to wind in the event of a windstorm, this would cause a significant deflection to the furring strips and the exterior wall itself would collapse.

(e) As the mat-slab foundations are not thick enough, most of their stress intensities exceed the allowable stress limit.

The court of prior instance recognized the appellants’ tort liability, and determined their liability to compensate for damage in an amount equivalent to the expenses to be required for pulling down the Building and rebuilding, upholding the appellees’ claims to the extent that they seek payment of 15,644,715 yen per person, with delay damages accrued thereon.

The appeal counsel argues that the benefit that the appellees have enjoyed from having lived in the Building until now, and the benefit that they will enjoy from pulling down the Building and rebuilding, thereby acquiring a new building with a longer life, should be set off against their losses, and should therefore be deducted from the amount of compensation, equivalent to the expenses to be required for rebuilding.

**Opinion:**

*Judgment of the First Petty Bench, dismissed*

(1) In cases where a new building, which is the subject matter of a sale, must be pulled down and rebuilt due to serious defects contained therein, if, according to the socially accepted standards, the building itself is judged to have no social or economic value on the grounds that, for example, there is the concrete danger of the collapse of the building because those defects would affect its safety in terms of structural strength, it is appropriate to construe that the benefit that the purchaser of the building has enjoyed from having lived in it should not be set off or similarly adjusted against the purchaser's losses and should therefore not be deducted from the amount of compensation for damage as claimed by the purchaser against the constructor, etc., equivalent to the expenses to be required for rebuilding.

According to the facts mentioned above, as the Building has serious defects that would affect its safety in terms of structural strength, as mentioned in 2(3) above, there is the concrete danger of the collapse of the Building, and it is evident that according to the socially accepted standards, the Building should be judged to have no social or economic value. Consequently, the benefit that the appellees have enjoyed from having lived in the Building until now should not be set off or similarly adjusted against their losses and should therefore not be deducted from the amount of compensation that they claim.

(2) Even where the appellees, by pulling down the Building, which has no social or economic value, and rebuilding, will eventually acquire a new building with a longer life as compared to the case where they received the delivery of a building with no defect from the beginning, this consequence cannot be regarded as a benefit and should not be set off or similarly adjusted with their losses.

**Editorial Note:**

When the purchaser of the building or the party ordering the construction work of the building (hereinafter “purchasers etc.”) demands compensation from the seller or the constructor (hereinafter “sellers etc.”) to cover the rebuilding costs if the building has any serious defect, the purchasers etc. usually come to notice the defect in the building while having lived there. In such a case, the issue is whether or not the purchasers etc. can only receive an amount of compensation less, by the general principle of restitution, the benefit of having lived there, which would amount to the rent of the building. Before this case, the opinions had been divided on this issue among the academics and lower courts.

The Supreme Court held that “the benefit that the purchaser of the building has enjoyed from having lived in it should not be set off or similarly adjusted against the purchaser’s losses and should therefore not be deducted from the amount of compensation for damage as claimed by the purchaser against the constructor, etc.”, “[i]n cases where a new building …must be pulled down and rebuilt due to serious defects contained therein, if, according to the socially accepted standards, the building itself is judged to have no social or economic value.” The reason is that, in the view of the Supreme Court, having lived in such a dangerous building of no social or economic value could not be regarded as a benefit to the purchaser. The concurring opinion also points out that if the Court did not so hold, the sellers etc. would be unfairly allowed to delay compensation in order to increase the amount of deduction. The decision would not change even if the purchasers etc. had knowledge of the defect, because the Supreme Court did not care about such knowledge in giving its decision.

In this case, it was also argued that the purchaser enjoyed the benefit of acquiring a new building of longer life as result of rebuilding, and therefore the issue came out whether this benefit too must be deducted from the amount of compensation the purchaser demands against the seller.

This is also the first appearance before the Supreme Court. The Supreme Court has dismissed such an argument in favor of this kind of deduction, by saying that it cannot be regarded as a benefit to the purchaser because the rebuilt building does not have a longer life than the original building would have done.

The decision has its English text at the website of the Supreme Court. Since the Summary and Opinion in this Note are the extracts from it and the Facts are summarized with reference to it, please see the website at <http://www.courts.go.jp/english/judgments/text/2010.06.17-2009.-Ju-No..1742.html> for the details of the decision.

### 3. Family Law

#### X v. Y

Tokyo High Court, March 10, 2010

Case No. (ne) 1828 and 3247 of 2005

1324 HANREI TAIMUZU 210

#### Summary:

Both the clause for a statutory share in inheritance which provides that the share of a child born out of wedlock be one half of the share of a child born in wedlock (Civil Code, the proviso to Art.900, Item 4; hereinafter referred to as the clause in question) and the provision of *mutatis mutandis* application (Civil Code, Art.1044 based on which the clause in question shall apply *mutatis mutandis* to the legally reserved portion: the portion of a child born out of wedlock becomes one half of the portion of a child born in wedlock.) do not violate Art.14, Para.1 of the Constitution. The clause in question, however, violates it and shall not be effective if the clause in question shall be applied *mutatis mutandis* to this matter where a child born out of wedlock conflicts with an adopted child and which does not relate to the legislative purpose of the clause in question, that is respect for the legal institution of marriage.

#### Reference:

Civil Code, Art.809, 900, Item 4, 1028 and 1044; Constitution, Art.14, Para.1

#### Facts:

Z (decedent) supported totally the livelihood of X (appellee) 's mother;