



The Eastern High Court’s Judgment in the Damages Action initiated by the Municipality of Copenhagen against a cooperative Housing Association due to its Breach of a “Subsidy Declaration”

07 February 2022

Introduction

Several cooperative housing associations in the greater Copenhagen area are subject to a so-called “subsidy declaration” due to of the associations having received partial public funding in connection with the construction of their real estate (typically executed in the 1920s).

The declaration is registered as a burden on the real estate of the associations with the Municipality of Copenhagen (“the Municipality”) as the creditor entitled to enforce the declaration.

The declaration provides that the Municipality may claim the transfer of the “profit” arising from any sale of shares in the associations or from the sale of the real estate of the association. The declaration contains a particular definition of what constitutes a “profit” for these purposes.

Contrary to the standard regulation in the Danish Cooperative Housing Association Act, the declaration does not fix any mandatory maximum price applicable to the sale of shares in the associations, nor does it grant the buyers of such shares any excess repayment right against the sellers.

This complex regulation has given rise to a long-standing dispute between the Municipality and a significant association, *Andelsboligforeningen København & Omegn* (“ABKO”), which has so far been tried 3 times by the Eastern High Court and once by the Supreme Court.

The core subject of the latest dispute between the parties concerned whether the Municipality had a direct payment claim or damages claim against ABKO due to ABKO having condoned certain sales of shares at an excess price (as calculated according to the declaration).

By its appeal judgment of 7 February 2022, the Eastern High Court has now ruled on the matter. In doing so, the High Court provides an important precedent with respect to the legal nature of the Municipality’s claims arising from an association’s breach of the declaration.

The Judgment of the Copenhagen City Court

In its preceding judgment, the Copenhagen City Court (extended composition) had held that the Municipality does not have a direct payment claim against the association (in this case ABKO) due to it having accepted the sale of shares at an excess price in contravention of the declaration. It is the seller of the shares who receives the excess price, for which reason it is only the seller who can be subject to any direct payment claim.

Nonetheless, the City Court held that ABKO was liable, on a tort basis, for the damages incurred by the Municipality consisting of the non-received excess price payments from the responsible sellers.

In this regard, the City Court held that the tort claim of the Municipality could not be considered subsidiary to the direct payment claim, which the Municipality held against the responsible seller. Consequently, the City Court implicitly held that the Municipality was not under any duty towards ABKO to mitigate its loss incurred by way of pursuing – in due time – its direct payment claims against the responsible sellers.

As concerns the calculation of the “excess price” pursuant to the declaration and thereby the calculation of the loss incurred by the Municipality, the City Court held that the “excess price” would have to be established without having regard to the senior debt incurred by the associations when making (recognized) improvements on their real estate. This led, in turn, the City Court to conclude that the Municipality was only entitled to a fraction of the damages claimed, for which further reason the Municipality was ordered to pay the legal costs incurred by ABKO partially.

The Appeal Proceedings before the Eastern High Court

Disagreeing with the City Court’s judgment, the Municipality lodged an appeal to the Eastern High Court.

As a result of this appeal, ABKO submitted a principal counterclaim consisting in the High Court 1) dismissing the payment claim of the Municipality, 2) ordering the Municipality to repay ABKO the amount transferred to the Municipality in compliance with the City Court’s judgment and 3) ordering the Municipality to pay ABKO total legal costs for both court instances.

The Judgement of the Eastern High Court

With its judgment, the Eastern High Court set aside the judgment of the City Court while accommodating ABKO’s principal claim in full.

First, the High Court stressed that the Municipality does not have any direct payment claim under the declaration against the association (in this case ABKO) given it is the seller of the shares, not the association, who has received the excess price and thereby the undue enrichment.

Next, the High Court agreed with the City Court that ABKO had incurred liability for damages, in principle, as a result of its failure to observe the excess price regulation under the declaration.

Notwithstanding, the High Court corrected the City Court’s reasoning on the damages claim of the Municipality not being subsidiary to its direct payment claim against the responsible sellers of the shares.

Given the tort nature of the Municipality’s claim against the associations (in this case ABKO), the High Court ruled that the Municipality’s damages claim is subject to the Municipality having complied with its obligation to mitigate its loss towards the association in question.

Therefore, the Municipality is obligated to pursue its direct payment claims against the responsible sellers of shares in due time.

The High Court observed that the Municipality had not complied with this mitigation obligation in the present case as the Municipality had failed – in due time - to request the requisite information from ABKO to allow the Municipality to direct its claims against the responsible sellers. Furthermore, the Municipality did not request such information from ABKO prior to the Municipality having, in any event, lost its claims against the sellers due to these claims (then) being time-barred or forfeited due to inaction.

Against this background, the High Court dismissed the payment claim of the Municipality, ordered it to repay ABKO the amount transferred to the Municipality in compliance with the City Court judgment and ordered the Municipality to pay total legal costs for both court instances.

Our Comments

The High Court’s judgment clarifies in many respects the state of play regarding the “subsidy declarations” and – importantly – the legal consequences arising from any “excess price” sales made in contravention of the declaration.

First, the Municipality has only a direct payment claim against the responsible seller of the shares who has received the excess price. Second, the possible damages claim of the Municipality against the association concerned is subsidiary to the Municipality’s direct claim against the seller. Third, the Municipality’s damages claim is consequently dependent upon it having sought to mitigate its loss by pursuing its immediate payment claim against the responsible seller in due time.

The case also shows that all cooperative housing associations with “subsidy declarations” are well-advised to ensure strict compliance with the declaration.

Moreover, the associations are equally well-advised to contemplate redeeming themselves from the declaration by using the avenue provided in the special regulation on redemption of “subsidy declarations”.

ABKO was represented by Thomas Mygind, Moalem Weitemeyer, both before the City Court and the Eastern High Court, to whom you may pose any questions regarding the case complex and/or the special regulation on redemption of “subsidy declarations”.

If you have any questions or require further information regarding any of the above, please do not hesitate to contact us:



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