

## ARTICLE

# PROBLEMS OF RESIDENTIAL REAL ESTATE BONA FIDE ACQUIRER PROTECTION

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## ABSTRACT

The article analyzed current legislation and judicial practice on the disputes of a bona fide purchaser right protection when he buys real estate objects, in particular, the practice of RF Constitutional Court, the Supreme Court of Russian Federation and the European Court of Human Rights on the application of vindication laws due the fact that the domestic practice of the relevant standard application does not protect the rights of the bona fide purchaser of residential real estate object adequately. The study revealed the following problems of business participant right protection: 1) the interpretation problem of real estate bona fide purchaser concept by the courts; 2) the application problem of the clause 1, Article 302 of Russian Federation Civil Code [1] (hereinafter - RF CC) during the consideration of vindication cases on state and municipal authority claims; 3) the problems of the currently valid Federal Law article 31.1 "On State Registration of Real Estate Rights and Real Estate Transactions" application by the courts [2] and the Article 68 of the Federal Law "On Real Estate State Registration" [3], which will enter into force on January 1, 2020; 4) the problem of compensation payment to bona fide purchasers whose property was taken under the claims of public law entities and who have not received an appropriate compensation from the state yet.

## INTRODUCTION

### KEY WORDS

ownership right, bona fide purchaser, real estate objects, the protection of rights, judicial practice.

The ownership right is a constitutional right and is included in the number of fundamental rights and freedoms of a person and a citizen (the Article 35 of Russian Federation Constitution [4]). The inviolability of property is one of the fundamental principles of civil law (Article 1 of RF CC). The Basic Law of the State provides the right to housing: no one can be deprived of a dwelling arbitrarily (the Article 40 of RF Constitution).

In order to protect property rights, the legislator provides for a special method - vindication (article 301 of RF CC), limiting its operation BY the interests of a bona fide purchaser (p. 1, article 302 of RF CC). [4]

Traditionally, a bona fide purchaser is a person who purchased some property from a person who did not have the right to alienate it, and the acquirer did not know and could not know about it. This concept is evaluative, the explanations regarding the legal status of such a business participant are given in various acts of the Supreme Court of Russia [5].

With the entry of Russian Federation into the Council of Europe, international legal documents such as the Convention on the Protection of Human Rights and Fundamental Freedoms [6] (hereinafter the Convention) and the subsequent protocols to it have become mandatory for Russia.

Bona fide purchasers from whom apartments were requested by state and municipal body claims under the pretext of privatization rule violation (such claims have been considered by general jurisdiction courts since 2007 and the victims were denied compensation payment or other housing provision), they had to apply for protection to the European Court of Human Rights (hereinafter - ECHR).

## METHODS

In the process of research, we used comparative legal method, legal socio-logical method, the methods of legal modeling and forecasting, and legal interpretation method.

## RESULTS AND DISCUSSION

Considering the case on the complaint of one of such victims, S.M. Gladysheva, ECHR recognized that Russian Federation by the decisions of the judicial authorities on the vindication of the apartment acquired by S.M. Gladysheva violated the rights of the applicant the under Art. 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the art. 8 of this Convention". According to the legal position of ECHR, "an oversight of the authorities cannot be an excuse for the subsequent punishment of a bona fide property acquirer by the authority. Such errors should not be eliminated at the expense of a person concerned" [7]. Moreover, if there is an interference with private property on the part of municipal or state bodies, then it should be justified and lawful [8], and there should be a special procedure by which not only public interests, but also private ones will be taken into account [9].

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The result of such ECHR decision influence on the practice of courts in Russia can be seen from the numerous acts of RF Supreme Court [10]. There is also the Resolution of RF Constitutional Court No. 16-P "On the case of the pro-*vision* legality from the paragraph 1, the article 302 of RF CC in relation with the complaint by the citizen A.N. Doobovets" [11], according to which the paragraph 1, Art. 302 of RF CC is recognized as partly contrary to the RF Constitution. As was noted in the Resolution, this approach is consistent "with the position of the European Court of Human Rights, according to which, when it comes to the general interest, the public authorities should act in a timely manner, properly and as consistently as possible; the errors or the miscalculations of state bodies should serve as the benefit for interested parties, especially in the absence of other conflicting interests; the risk of any mistake made by a state authority must be borne by the state, and mistakes should not be eliminated at the expense of a person concerned [7; 12]. This position formed the basis for the solution of ECHR cases involving the reclamation of residential premises from citizens by public-law entities as an *escheat* property [13].

Thus, due to the activities of RF Constitutional Court, which uses the legal positions of ECHR during the consideration of cases, there is some convergence of Russian law with the law of European states on the issues of right protection for a *bona fide* real estate acquirer. Domestic and foreign legal scholars note rightly that the abovementioned and similar judicial practice demonstrates the horizontal effect of constitutional rights, that is, constitutional law may interfere with the essence of private law and impose certain restrictions on private law relations [14].

As Resolution No. 16-P emphasizes in connection with the complaint by A.N. Dubovets, a *bona fide* purchaser of real estate in the context of the para-graph 1, Art. 302 of RF CC, is the acquirer of real estate, the right to which is subject to state registration in accordance with the procedure established by law, unless it clearly follows from the circumstances of the case established by the court that this person knew about the absence of the alienator right to dispose of the property, or proceeding from the specific circumstances of the case, did not show a proper reasonable care and prudence in which it can be found out that the alienator does not have such a right. [11]

Fixing the right of everyone to housing, the Constitution of Russian Federation imposes an obligation on public authorities to create the necessary conditions for this. The legal status of residential premises differs from the legal regime of non-residential real estate and is established, in addition to RF CC, by the Housing Code of Russian Federation [15] and other regulatory acts.

Thus, a penalty under an executive document cannot be applied to a dwelling (its part), if it is the only dwelling suitable for permanent living for a citizen - a debtor and the members of his family, with the exception of the mentioned property, if it is the mortgage subject (thus, the article 446 of RF CPC [16] establishes "property immunity" [17]).

According to the Article 68 of the Federal Law "On State Registration of Real Estate" [3], an individual is the owner of a dwelling who is not entitled to demand it from a *bona fide* purchaser, and also a *bona fide* purchaser from whom a premise was demanded has the right for one-time compensation at the expense of Russian Federation treasury. But the right to one-time compensation arises in case of a dwelling loss, which is only suitable for permanent residence (the law will come into force on January 1, 2020).

A *bona fide* purchaser of real estate, including a residential premise that does not have property immunity, if it is claimed by the owner, will not receive compensation from the state. The problem is complicated by the fact that minors with the right of ownership or right of use as family members of residential real estate owner may live in a dwelling requested by a vindicating claim [18]. The courts evicted parents along with the children from illegally privatized apartments under the claims of state bodies (for example, in the case analyzed above, Gladysheva was also evicted from the apartment with his son by the court resolution).

The provisions of the current standard of the Article 31.1 from the Federal Law "On State Registration of Real Estate Rights and Transactions" [2] are deemed as not corresponding to RF Constitution within the extent in which these provisions do not allow the payment of one-time compensation to a *bona fide* purchaser, from whom residential premises was claimed when, for the reasons beyond his control, in accordance with the court decision that had come into legal effect on compensation for damage caused as the result of such property loss, the litigation document was not carried out for one year, because of the lack of grounds for making a state body accountable for illegal actions (inaction) allowed during registration." [19] In fact, "RF Constitutional Court confirmed the in effectiveness of the compensation measure, the uncertainty of its role in legal regulation cost reduction concerning transactions and the lack of a clear correlation between this measure and the provisions on liability during the registration of rights" [20].

## CONCLUSIONS

The analysis of existing regulations and judicial practice shows that the system of state registration of rights to immovable property in Russia does not fully protect the rights of such object *bona fide* purchasers.

Considering the practice of compensation funds creation in Russia (Compensation Fund to Protect the Rights of Participants in Share Construction [21], the Banking Sector Consolidation Fund to Protect the

Rights of Creditors from Credit and Insurance Organizations [22]), it seems appropriate to consider the possibility of a compensation fund creation to protect the rights of victims during the transactions with real estate in Russia. For example, the experience of Australia is interesting, where financial guarantees are provided by registration fee payment at the amount of 0.1 pro-cent from the transaction price, which, in fact, is not burdensome either for the transaction participants or for the state” [23]. Since the issue of privatized dwelling vindication prohibition does not help to secure all bona fide purchasers of real estate (the bill on amendments in the Article 302 of RF CC was submitted to the State Duma by the Government of Russia in 2017” [24]) one can discuss the proposal to amend the law on real estate state registration.

At the same time, it is necessary to remember about the need for a legislative solution of compensation issue to bona fide purchasers, who have already lost their property under the claims of public legal bodies and have not received such compensation from the state so far.

This article presents the analysis of Russian Federation legislation, the works of domestic and foreign authors. They provided the practice of the European Court of Human Rights and RF Constitutional Court in the field of bona fide homeowner right protection. They described the problems of public and private interest correlation during the vindication of residential premises by public authorities with bona fide purchasers. The options are offered to solve the problem in the form of creation of various compensation funds that are formed at the expense of small deductions during the making of transactions alienating residential premises.

#### CONFLICT OF INTEREST

There is no conflict of interest.

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None

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