

## Litigation - Turkey

### Appellate court reverses decision on good faith and acquisition of property

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#### Introduction

Although one of the most fundamental principles of Turkish law, 'good faith' is not directly defined under Turkish law. The principle of good faith is governed by Article 3 of the Civil Code (4721), which reads as follows:

*"Good faith is presumed whenever the existence of a right has been expressly made to depend on the observance of good faith.*

*No person can plead good faith in any case where he has failed to exercise the degree of care required by the circumstances."*

The Civil Code can therefore be said to lay down a presumption of good faith. The Civil Code further mentions good faith in Article 1023, in the context of the acquisition of property: "Ownership or acquisition of other real rights (right *in rem*) of a person in good faith relying on the registration before the Title Registry shall be protected." Article 1024 of the Civil Code continues as follows: "One who knows or should have known illegal registration of a real right shall not depend on such registration."

Therefore, in the context of the acquisition of property, the other party must prove that the party pleading good faith indeed knew or should have known about a legal defect.

#### Recent case

The First Chamber of the Court of Appeals recently reversed a first instance decision that the real right (ie, the right *in rem*) of a third party was not protected (and thus cancelled) as a result of the previous illegal registration of such right at the land title registry. The appellate decision came despite the legal acquisition of such right by a third party in good faith.<sup>(1)</sup>

Under Articles 3 and 1023 of the Civil Code, such right and registration of the third party should have been protected, provided that the third party acted in good faith and duly acquired an immovable property relying on the registration at the registry. This would be the case in spite of the illegality of the previous registration.

The established practice of Turkish courts has previously been to protect the rights of a third party in good faith, since such party relies on the official records of the state as a citizen and should not be held responsible for a previous illegality that it was unaware of, or could not be expected to be aware of.<sup>(2)</sup>

However, through its decision the Court of Appeals has taken a new path regarding the principle of good faith.

#### Facts

The lawsuit focused on the cancellation of a transfer of ownership rights for a parcel of immovable property to a third party by the municipality, and a resultant claim for compensation from both the third party and the municipality.

The plaintiff claimed before the first instance court that his immovable property had been wrongfully transferred to the municipality and that, on his filing before the administrative court, the court had ruled in his favour and cancelled the transfer and

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registration of such immovable property at the registry, in the name of the municipality.

However, the municipality had already sold the immovable property by tender to a third party - who had bought the property in good faith and duly made the necessary registrations at the registry - before the finalisation of the administrative lawsuit filed by the plaintiff against the municipality.

Therefore, the plaintiff requested that the first instance court cancel the registration of the property in the name of the third party, and that the immovable property be registered in his name.

### **First instance decision**

The court rejected the request for cancellation of the transfer of the immovable property and for compensation from the third party, but ordered symbolic compensation against the municipality.

Although the grounds for the court's decision were not published in detail, they were presumably based on the good-faith principle, since the third party relied on the records of the title registry and duly concluded the acquisition in good faith, without being aware of the previous illegal registration. The plaintiff appealed.

### **Appellate decision**

The First Chamber of the Court of Appeals reviewed the file and initially determined that:

- the administrative court had cancelled the administrative zoning plan decision of the municipality regarding the related immovable property, which wrongfully transferred the related immovable property to the municipality; and
- accordingly, registration of the immovable property previously owned by the plaintiff in the name of the municipality was illegal, null and void.

The Court of Appeals further determined that the requisite municipality council decision for the transfer of the immovable property to the third party had not been taken; the transfer had rather been made solely pursuant to a decision of the municipality committee (a subdivision of the municipality council). Therefore, the registration before the land title registry in the name of the third party was null and void.

Consequently, the Court of Appeals ruled that good or bad faith on the part of the third party did not affect the result due to:

- the unauthorised, illegal transfer of immovable property by the municipality committee; and
- the null and void registration of the property before the land title registry in the name of the third party, in the absence of a municipality council decision.

### **Comment**

Although this decision is not yet considered to be established practice, it may lead to a tendency by the courts to disregard the good faith of buyers of immovable properties, even where such buyers have carefully reviewed the land title register and duly concluded the acquisition.

Reliance in good faith on the official records of the registry, which is a state authority, should be protected, especially in cases where the seller is another state authority that appears to be the owner of an immovable property at the time of the sale, according to the registry records.

Following this decision, it is advisable that when acquiring immovable property, parties should not rely on the principle of good faith to protect their rights and should carry out detailed due diligence, even if the registry entry for such property does not reflect any risk at the time of a transaction.

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### **Endnotes**

(1) First Chamber of the Court of Appeals, 2011/12911, 2011/11645.

(2) The Court of Appeals referred to similar explanations in its decision:

*"Indeed, on the one hand there is a person who claims that he/she acquired a right relying on the accuracy of the land title registry, and on the other hand, there is a previous owner who may have lost his/her real (in rem) right, which is valuable and even sometimes has a sentimental value. Consequently, a formalistic investigation and approach might cause substantial damage,*

*destroying trust and respect of persons on the government and justice. Thus, it should be taken into consideration that the purpose of the legislator is to protect the person who is really in good faith rather than the person who seems to be in good faith." (First Chamber of the Court of Appeals, 2005/5656, 2005/6493)*

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