Defect Disputes Reframed: Silence Is Not an Option

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This Federal Supreme Court decision highlights the importance for the buyer to meet its burden of proving timely notice of defects and for the seller to avoid a tacit waiver of its right to invoke late notice.

Judgment of the Federal Supreme Court of 13 March 2025
Case Reference : 4A_357/2024

Facts

C (the "Seller") sold multiple condominium units (the "Property") to A and B (the "Buyers"). After the conclusion of the sales contract, the Buyers issued a series of defect notices relating to the pipes, drainage, heat pump, blinds, smoke vents, roof, snow hooks, and sheet metal work of the Property (the "Defects"). By filing a warranty claim for defects with the Court of first instance of the Canton of Vaud, the Buyers sought monetary compensation for the cost of remedying the Defects.

On February 13, 2023, the Court of first instance ordered the Seller to pay damages to the Buyers. The Court of first instance admitted the existence of the Defects, confirmed that they all occurred before the transfer of risk to the Buyers and found that the Buyers were unaware of them at the time of the sale. However, the Court of first instance held that the Buyers complied with their inspection and notification of defect obligations only with respect to the Defects relating to the pipes, drainage system and roof, for which there was no evidence suggesting that the Seller had not been informed immediately upon their discovery by the Buyers. Consequently, the Buyers were awarded a price reduction corresponding solely to the cost of repairing these Defects.

The Seller appealed this decision. On May 13, 2024, the Cantonal court of the Canton of Vaud overturned the Court of first instance's decision, rejecting the Buyers' claims in full. The latter filed an appeal with the Federal Supreme Court, seeking to reinstate the original decision of the Court of first instance for the full payment of the amounts therein with interest.

Issue

The Federal Supreme Court had to decide if the Buyers had sufficiently established their notice of the Defects was given in a timely manner, notably with respect to the date of discovery and the date of notification of the Defects; and whether the Seller had tacitly waived its right to invoke the alleged lateness of the notice of the Defects by acknowledging the Defects and committing, without reservation, to remedy or to have them remedied.

Decision

Under Swiss law, the warranty for defects of a sold item is governed by arts. 197 and seq. of the Swiss Code of Obligations (SCO), which also apply to real estate sales contracts by virtue of arts. 216 and seq. SCO and the reference in art. 221 SCO.

Buyer's right to warranty is conditional on compliance with certain duties in order to retain it, including a proper inspection of the sold item after the sale and an immediate notification to the seller of any hidden defects upon discovery (art. 201 para. 3 SCO). Failure to notify immediately results in the item being deemed accepted with its defects, extinguishing the warranty claim (art. 201 paras. 2 and 3 SCO). Case law allows the buyer a short reflection period, while emphasizing the decisiveness of the specific circumstances of the case, particularly the nature of the defect.

Before the Cantonal court, the Buyers alleged that the notice of the Defects had been issued "immediately after their discovery" without providing any additional details or evidence to substantiate their claim. The Seller simply reacted by rejecting that claim in its entirety. For the Cantonal court, it was sufficient for the Seller to challenge the Buyers' compliance with the prescribed deadline for the notice of the Defects along with an allegation that the Buyers failed to prove their timely notice of the Defects.

The Federal Supreme Court also concluded that the Buyers had failed to meet the burden of proof resting on them (art. 8 of the Swiss Civil Code [SCC]), which would ordinarily lead to dismissal of their claim.

However, the Federal Supreme Court ruled that the Seller may waive its right to rely on a late notice of the Defects to dismiss a warranty claim, drawing on case law regarding art. 370 para. 3 SCO in the context of contracts for work and services. Such a waiver may be explicit or tacit, so long as the circumstances allow for it to be clearly inferred. Furthermore, when a seller or a contractor, despite being aware of the lateness of the notice, undertakes repairs without reservation or acknowledges the obligation to remedy the defect, this constitutes a tacit waiver.

In this case, the Buyers rightly argued and provided elements of proof that demonstrated that the Seller explicitly and unreservedly committed to correcting the Defects after receiving the notice of the Defects. On multiple occasions, the Seller's attorney, who only questioned the existence of the Defects and never the timeliness of the notice of the Defects, stated that repairs would be carried out and that subcontractors were solicited for that purpose. Furthermore, the Seller even initiated legal proceedings against the subcontractors responsible for the Defects. The Federal Supreme Court noted that the Seller's decision to initiate separate legal proceedings against its subcontractors could only be interpreted as an intention to remedy the Defects and accept liability toward the Buyers. By this repeated behavior, the Seller had tacitly waived its right to invoke the late notification of the Defects.

Accordingly, given that the existence of the Defects was undisputed, the Federal Supreme Court admitted the appeal and remitted the case to the Cantonal court to determine the amount of damages.

Key Takeaway

- The Buyers had the burden of proving the timeliness of their notice of defects. This required proving both the **timing of their discovery** of the Defects and the **timing of their notice of the Defects**. Failure to substantiate these elements results in forfeiture of warranty rights.
- The Seller may **tacitly waive its right to invoke late notice of defects.** When the Seller or the contractor, despite being aware of the lateness of the notice, undertakes the repair work without reservation, acknowledges an obligation to remedy the defect, or initiates a separate legal proceeding against third parties responsible for the defects, such conduct may constitute a tacit waiver of the right to invoke the lateness of the notice of defects.

Comment

1. Procedural rules on the burden of proof

First, the Federal Supreme Court clarified, in this case, the procedural rules on the burden of proof (art. 8 SCC) in the context of the adversarial principle set forth in art. 55 para. 1 of the Swiss Civil Procedure Code (SCPC). Accordingly, it is the responsibility of the parties to allege the facts on which they base their claims (subjective burden of allegation), submit the relevant evidence (burden of producing evidence), and challenge the facts alleged by the opposing party (burden of contestation).

As regards the burden of contestation, a blanket denial (*contestation en bloc*; *pauschale Bestreitung*) is, in principle, insufficient. However, the court reiterated that, as a rule, an opposing party may simply reject the facts alleged by the other party. It is not required to justify its contestation. In other words, the opposing party does not have to explain why it rejects the allegation, since it does not bear the burden of proof, and is therefore, in principle, not required to assist in the administration of evidence. Only in exceptional circumstances must a party substantiate its denial (*Substanziierung der Bestreitungen*), in such a way that the claimant can identify precisely which allegations are being disputed and introduce supporting evidence. Moreover, the more detailed and specific the claimant's allegations, the higher the expectations placed on the opposing party to provide a specific and substantiated denial are.

In this case, because the Buyers failed to make sufficiently specific allegations regarding the timing of discovery and notification of the Defects, the Seller's burden of contestation was satisfied by invoking lateness of notice and issuing a general denial of the grouped allegations.

2. Extent of the burden to prove timely notice

According to established Federal Supreme Court case law[[1]], in warranty disputes the seller bears the burden of contesting the alleged defects, whereas the buyer bears the burden of proving that notice of defects was given in a timely manner.

In this case, the Federal Supreme Court held that it was the Buyers' duty to allege precisely when they had discovered the Defects and when they had reported them in establishing their timely notice. A general assertion that "the defects in the item sold were reported immediately after their discovery" was deemed insufficient. Without concrete indications as to the date of discovery and the date of notification, the Buyers were unable to demonstrate that notice had been given as soon as the Defects were sufficiently identifiable.

By failing to substantiate these elements, the Buyers had forfeited their right to warranty.

As regards the calculation of the notice period, the Cantonal court relied on the date of dispatch of the notice of the Defects rather than the date of its receipt.[[2]] The Federal Supreme Court did not comment on this.

3. Tacit acceptance of late notice of defects

At the time this decision was rendered, art. 201 para. 3 of the SCO required that notice of defects in a sales contract be given "without delay". This principle was also anchored in the art. 370 para. 3 SCO (work contract) for hidden defects, and the Federal Supreme Court case law had also extended this requirement to apparent defects.[[3]]

In the present case, the Federal Supreme Court extended its case law developed in the context of contracts for work and services to real estate sales with regard to tacit waiver of the objection of late notice. The court reasoned that, since the legal framework of both art. 370 para. 3 SCO and of art. 201 para. 3 SCO is identical; an implied waiver may be recognized on the same grounds in sales contracts.

At the time when this case was rendered, this practice was neither surprising, nor open to serious criticism.[[4]] The Federal Supreme Court had already defined the content of the notice of defects in sales contracts of immovable property in the same way.[[5]]

Moreover, the broader legislative context at the time supported this approach. The Swiss Federal Council had already proposed an amendment to the Code of Obligations [[6]] addressing construction defects.

In the message accompanying this project, the Federal Council highlighted that buyers of real estate and clients of contractors in construction contracts are in comparable positions, particularly when contrasted with the stronger position of their counterparties, sellers and contractors. It further explained that, in the lower price segment – typically when clients commission the construction of their own home built or buyers purchase real estate–, sellers and contractors often enjoy a better position due to their professional experience, technical expertise, and greater financial resources. By contrast, their clients frequently face budgetary constraints and lack both legal and technical knowledge. This imbalance has led in practice to the proliferation of contractual clauses that place buyers and clients at a significant disadvantage.[[7]]

With specific regard to the buyer of a new building, the Federal Council recognized its similarity to that of a customer in a construction contract, given that the building has not yet been used for its intended purpose. This was justified by the fact that it is not uncommon for defects to appear that were not yet apparent at the time the work contract was concluded or the property was acquired.[[8]] The Federal Council also expressed concern that inexperienced buyers may find the default statutory regime difficult to navigate, in particular the requirement of a brief notice period combined with the forfeiture of all warranty rights in the event of ineffective or late notification of defects.[[9]]

Against this background, courts, scholars and legal authorities have repeatedly emphasized the need to rebalance the rights and obligations of the parties in real estate sales, especially in the context of newly constructed buildings.

In light of these considerations, the Federal Supreme Court's transposition of case law developed in the context of work contracts to real estate sales appears to align with the broader legislative framework. Rather than relying strictly on the notion of "immediate" notice under the SCO, interpreted in case law as allowing only a short period of reflection, the court grounded its reasoning in the concept of waiver of the objection of lateness, thereby safeguarding the Buyer's interests. [[10]]

On a further note, the modification of the Swiss Code of Obligations, which entered into force on January 1, 2026, directly addresses several of the structural concerns that the Federal Supreme Court had to resolve indirectly in the present case.

The new art. 219a SCO[[11]] provides the following:

[1] *The period for reporting defects when purchasing immovable property is 60 days. Defects that were not apparent on customary inspection must be reported within 60 days of their discovery. An agreement on shorter periods is invalid.*

[2] *The purchaser of immovable property with a structure that has yet to be built or was newly built less than two years prior to the sale may also demand rectification free of charge. This right is subject to the provisions governing work contracts.*

[3] *The purchaser's rights in relation to defects in the property shall prescribe five years after acquisition of ownership. The prescriptive period may not be changed to the detriment of the purchaser.*

This new provision distinguishes among existing buildings, buildings yet to be built, and buildings completed less than two years before the conclusion of the sales contract. It also expressly confirms the application of the rules governing contracts for work and services to provide remedies for buyers of newly constructed buildings in case of defects.

With regard to the timing of the notice, the one-week period previously considered reasonable by the Federal Supreme Court[[12]] has been widely criticized by legal scholars and practitioners as excessively restrictive, particularly since no convincing *ratio legis* justifies such stringent protection of the seller or the contractor in this case.[[13]] These arguments were acknowledged by the Federal Supreme Court.[[14]]

The latest modification of the SCO addresses this issue directly. It introduces a uniform 60-day period for the notification of defects irrespective of their nature, apparent or hidden. This period applies both to real estate sales and to construction contracts relating to real estate [[15]]. Any contractual shortening of this period is expressly prohibited. For apparent defects, the *dies a quo* starts on the day of the expiration of the inspection period. In real estate sales, the inspection period begins upon transfer of ownership from the seller to the buyer. For hidden defects, the 60-day period begins upon discovery of the defect.[[16]]

In our view, this new provision does not exclude the possibility of a tacit waiver. A seller should, therefore, still be able to waive the right to invoke late notice by conduct amounting to an implicit acceptance of a delayed notification of defects.

Other sources presenting the case

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[[1]] ATF 118 II 142 para. 3a, 107 II 50 para. 2a; Federal Supreme Court decisions 4A_405/2017 of 30 November 2017, para. 3.3; 4A_28/2017 of 28 June 2017, para. 4.

[[2]] The exact term used in this decision in French reads as follows: "*date d'envoi de l'avis des défauts*".

[[3]] See, for example, Federal Supreme Court decisions 4A_570/2020 of 6 April 2020, para. 4.1; 4A_251/2018 of 11 September 2018, para. 3.1; 4A_231/2016 of 12 July 2016, para. 2.2; 4A_53/2012 of 31 July 2012, para. 5.1.

[[4]] Schmid Jörg/Wolfisberg Jonas, Mängelhaftung des Verkäufers I; Mängelrüge, Behauptungs und Beweislast; Verzicht des Verkäufers, sich auf die Verspätung der Rüge zu

berufen; BGer 4A_357/2024, in: ZBJV, vol. 161, 2025, p. 539.

[[5]] ATF 131 III 145, para. 7.2; Federal Supreme Court decision 4A_261/2020 of 10 December 2020, para. 7.2.1.

[[6]] Federal Council, Code of Obligations (construction defects) (Project) of 19 October 2022, FF 2022 2744.

[[7]] Federal Council, Message concerning the modification of the Code of Obligations (Construction defects) of 19 October 2022, FF 2022 2743, n. 1.1.3.

[[8]] *Ibid*, n. 1.1.4.1.

[[9]] *Ibid*.

[[10]] Schmid/Wolfisberg, op. cit. fn. 4, p. 540 and references: the tacit acceptance of notice of defects is a doctrine based on the prohibition against abuse of rights.

[[11]] Federal Assembly, Code of Obligations (Construction defects), Modification of 20 December 2024, in force since 1 January 2026 (RO 2025 270; FF 2022 2743).

[[12]] See e.g. Federal Supreme Court decision 4C.82/2004 of 3 May 2004, para. 2.3.

[[13]] Stöckli Hubert, Bauherrschaft und Baumängel, Gutachten zuhanden des Bundesamtes für Justiz, 2013, n. 36.

[[14]] See e.g. Federal Supreme Court decision 4A_399/2018 of 8 February 2019, para. 3.2 and references.

[[15]] Articles 219a para.1, 367 para. 1bis, 370 para. 4 SCO; Federal Council, op. cit. fn. 7, n. 4.1.1.

[[16]] Federal Council, op. cit. fn. 7, n. 5.1 ad. art. 291a SCO.

Software in Asset Deals: Buying IP Rights on the Software, Buying Hardware or Buying a (mere) Copy of the Software?

The buyer was entitled to invalidate a sales contract (an asset deal for the sale of a car dealership that included software) for fraud that was committed by the seller (Art. 28 SCO) because the seller had not disclosed to the buyer that it did not own the intellectual property rights on the software but only had a license to use the software granted by a third-party licensor.