

A Study on the Duty of Cooperation during Registration of Title in Real Estate Transactions

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I . Introduction

In the context of Korean law, a double seller of real estate has been charged with Breach of Trust¹⁾ apart from responsibilities for default. Whilst

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1) According to Article 355(2) of the Criminal Act, Breach of Trust is any act

a few has criticized on this attitude toward the double seller, both academia and actual practices has extensively accepted it. The double sale of contract may even be nullified by Article 103²⁾ of the Civil Act when the 2nd buyer is intentionally involved in the second contract. However, the Supreme Court recently made a remarkable declaration in 2008do10479 that the double seller of chattels shall not be subjected to Breach of Trust. Whilst the Court has previously applied the Breach of Trust to double sellers of real estates, it distinguished the double sale of chattels from that of real estate on the ground that transfer of chattels does not require the other party's cooperation.

In this paper, the conventional attitude of the Supreme Court toward the double seller of real estate will be discussed and criticized, especially concerning the seller's duty to cooperate with the buyer on the registration of title. To suggest our conclusion in advance, the duty of cooperation on registration shall be the seller's own business, and thus, s/he shall not be the subject of Breach of Trust.

II . Definitions

As a preliminary point, the terms used in Korean legal system will be discussed and defined for the benefit of readers.

which violates the duties encumbered on a person when administering another's business.

2) According to Article 103 of the Civil Act, "A juristic act which has for its object such matters as are contrary to good morals and other social order shall be null and void."

1. Movable and Immovable

According to Article 99,³⁾ Land and things firmly affixed thereto shall be *immovables*. All things other than *immovables* shall be *movables*.

2. Real rights and Claims

A *Claim* is a demand for something (such as money) due or believed to be due specifically a demand for a benefit or contractual payment.

A *Real Right* is a right that is attached to a thing rather than a person. A real right is not restricted to real property since it can also be attached to movable property. *Real rights* include ownership, use, pledge, usufruct, mortgage, and praedial servitude.

3. Formalism and Voluntarism in the Transfer of the Real Right

Formalism is a legislative principle, in which the transfer of real right shall go into effect not by the expression of one's intention but by the process of public announcement-registration for real property, handing over the chattel. In contrast, *Voluntarism* acknowledges the effect of the transfer of real right only by expressing a person's intention without a public announcement. Korean Civil Act has upheld the formalism in regard to transfer of title.

3) Civil Act unless otherwise indicated in Section II.

4. The Stages of the Sales Contracts



〈Figure 1〉 The Stages of the Sales Contracts

1) Contract and Down Payment

After the parties make a contract, the buyer provides down payment in accordance with the contract in general. The deliverer of the down payment may rescind the contract by forfeiting his down payment. The seller may rescind the contract by returning double the amount so long as the intermediate payment has not been received (Article 565(1)).

2) Intermediate Payment

When the price of the object of the contract is too high to pay at once, the buyer can divide it into several payments. The second payment is usually named intermediate payment. After the intermediate payment, the parties to the contract are regarded as being contractually bound. Therefore, hereafter, any violation of a duty shall amount to a default and the defaulter shall compensate the other party to the contract.

3) The Balance and Registration Procedure

The buyer's duty comes to an end when he finishes paying the balance. But here, the fulfillment of the contract is achieved differently between the

sale of movables and immovables. In case of movables such as chattels, the transfer of real rights takes effect by delivery (Article 188(1)). When a buyer takes delivery of goods under a contract, the stage of the sales contract is completed.

On the other hand, for immovables such as real estate, the contract will only be completely finished when the realestate registration is done because the acquisition of real rights over immovables takes effect upon its registration (Article 186). According to the Article 27(1) of Registration of Real Estate Act,⁴⁾ registration shall be filed by the seller and the buyer together for registration. The seller has a duty to provide the documents that is necessary to transfer the title of registration to the buyer. Otherwise, according to the Article 28 of Registration of Rear Estate Act,⁵⁾ the applicants can entrust the registration procedure to his agents such as an attorney or a certified juridical scrivener by providing them the documents during the sale contract. In the registration procedure, aforementioned duty is called the duty of cooperation during registration of title.

5. Double Transaction (Double Selling) of Real Property

Double transaction or double selling of real property means a situation where the ownersells his property to the 2nd buyer and completes the registration of title before the 1st buyer has finished the process of registration.⁶⁾

4) In Korean-written version, it conforms to Article 23(1) of Registration of Real Estate Act.

5) In Korean-written version, it conforms to Article 24 of Registration of Real Estate Act.

6) Definition of double transaction came from the dissenting opinion of adjudication

6. Crime of Breach of Trust

1) The Provision

Criminal Act Article 355(2)

“The preceding paragraph shall apply to a person who, administering another’s business, obtains pecuniary advantage or causes a third person to do so from another in violation of one’s duty, thereby causing loss to such person.”

2) Elements of Breach of Trust

To apply *Breach of Trust* to the accused, the following elements shall be satisfied:

- ① Subject: a person who is in position of administering another’s business.
- ② Action: to violate his or her duty.
- ③ Effect: to cause loss to another.
- ④ Intention: to obtain pecuniary advantage or to cause a third person to do.

The Supreme Court has interpreted the subject of the Breach of Trust (Element①) to mean the person who assumes responsibility to protect or preserve another’s property. Concerning the violation of one’s duty (Element ②), this has been defined as an act of betrayal of ‘the good faith principle’.⁷⁾

No. 2008do10479 of the Supreme Court which declared 2011. 1. 20.

7) See, inter alia, the Adjudication of the Korean Supreme Court which was declared in 2010. 3. 11, 2009da82244., the Adjudication of Korean Supreme Court which was declared in 2009. 12. 24, 2009da10898.

When deciding whether Breach of Trust shall be applied or not, it is important to determine the scope of the violation of one's duty. Our discussion starts hereto. If the seller's duty to cooperate on the registration is regarded as the administration of another's business, his or her violation of the duty shall satisfy the conditions of Breach of Trust. In this regard, it is important to define the characteristic of the seller's duty to cooperate on the registration.

III. The Attitude of Supreme Court toward the Duty of Cooperation on the Registration

Once a contract has been made, it is a trite law that the parties are obliged to perform the duties of the agreement. Any party in default shall compensate for the damages to the other party/parties to the contract, and the creditor shall have a claim to the compensation. However, in Korea, apart from the claim by Civil Act, the defaulter may be punished for the crime of Breach of Trust under the Criminal Act. One such instance is the double selling of real estate. According to the Supreme Court's decision in 84do691,⁸⁾ the seller's duty to cooperate on the registration of the property is regarded as the position of administering buyer's business which is a key element of Breach of Trust, and thus, his or her violation of the duty shall be applicable to Breach of Trust.

In this part, the grounds of the Supreme Court's decision will be discussed by analyzing the way in which the Supreme Court has interpreted legal

8) The Supreme Court, 84do691, 1984. 8. 21. declared.

structure of sales of real estate, the characteristic of the duty on the registration, and that of the intermediate payment.

1. Legal Structure of Sales of Real Estate under Formalism

Before the Civil Act was revised, property transfer in Korea had been governed by Japanese civil law and the principle of Voluntarism. According to Japanese civil law, the right of ownership was transferred to the buyer with the conclusion of the sale and purchase contract only, regardless of other rights which may have existed. In case of double seller, when a buyer acquired the right of ownership upon concluding a contract with a seller his rights in that property would be protected by the law of embezzlement.⁹⁾ Any attempt by the seller to transfer the object of the contract to another buyer would amount to embezzlement.

Under formalism,¹⁰⁾ however, a buyer cannot acquire the right of ownership until he completes the public announcement requirement, namely registration in the case of the real property and handing over in the case of chattels. In case of double seller the laws of embezzlement do not apply as the seller retains an ownership right/interest in the property until registration is effective.¹¹⁾ Despite the different perspective towards the matter of transfer of the real-property right taken in the revised Civil Act, the Supreme Court has nonetheless applied Breach of Trust to the double seller of real estate, thereby sustaining the conventional attitude that regards

9) Embezzlement is a crime of embezzling money. It is made an offence by Article 355J of the Criminal Act.

10) Korean adopted formalism when the Civil Act was revised at 1. Jan, 1960.

11) Dong-Kwon Son, 「Criminal Law」, 2nd Edition, Yul-Gok(Seoul), 2006, pp. §24/27-§25/31.

the double selling of real estate as a crime. The Supreme Court has admitted in the decision of 2008do10479 that the Court's application of Breach of Trust would be contrary to the fundamental principles of the present Civil Act. In other words, the court has expanded the scope of Breach of Trust to meet the social need. The double sale of real property has caused a social problem in Korea. It is obvious that a buyer is at a disadvantage as he bears a duty to pay an intermediate payment without any security, until he gets an ownership in the property in exchange for the balance. Taking advantage of this sales condition, sellers have often been doubleselling the property so that they could swindle a buyer out of his money-down payment and intermediate payment. Since punitive damage reimbursement is not adopted in Korean legal system and damage is hard to prove, a buyer usually cannot be sufficiently compensated by taking a civil action. Therefore, as the social need to protect the buyer grows, criminal sanction has been applied in double sale of real property. Also, it was expected that the Court would act to stabilize the market by punishing such behaviors, and this was what the court did.

2. The Characteristics of the Duty of Cooperation on Registration

The Court will find double selling of real estate to be Breach of Trust as soon as the 2nd payment has been received by the seller. In the context of a person who administers another's business, there have been two types of cases decided: the first case is about a person subrogating another's property for his own profit, and the other case is about a person owing a duty to cooperate to protect another's property. The following discussion will focus on the second case.

The key issue of our discussion is whether the duty to cooperate to protect another's property, the duty of cooperation on registration can be regarded as the same with administering another's business in the second provision of article 355 of the Criminal Act. 'Another's business' is different from 'the business for another'. The latter can include a person's own business.

The duty of cooperation during registration for buyer's acquisition of the ownership cannot be regarded as same as a matter of Breach of Trust. However, if we interpret the second provision of article 355 as 'the business for another' the duty of cooperation during registration can be punished as a Breach of Trust. The Supreme Court has interpreted '*another's business*' not only as '*the business of another*' but also as '*the business for another.*' There are two different opinions on the matter of the characteristics of the duty of cooperation on registration.

1) The Opinion Which Sees the Duty as Seller's Own Business

The first opinion regards the duty of cooperation during registration as the seller's own business. In order to be another's business, the seller must be the person who takes care of the buyer's business. However, if the duty of cooperation during registration is the seller's own business the person who has that duty is not the person which takes care of the buyer's business. Therefore, the duty of cooperation on registration is not able to be identified with another's business which is mentioned in the second provision in Article 355 in the Criminal Act. Eventually the person who has a duty of cooperation on registration shall not be punished as Breach of Trust.

2) The Opinion Which Sees the Duty as Another's Business as well as Seller's Business

This opinion postulates that the duty of cooperation on registration has double aspects which belong to the seller's own business as well as another's business. The duty of cooperation on registration is mainly for the buyers so the business is for another's acquisition of the ownership. At the same time the duty is seller's own business since the duty came from the contract which charges a duty to perform the contract.

3) Court's Opinion

In the case of 83do2057 and 88do750, the Court saw the duty of cooperation during the registration as another's business as well as seller's business. Following the court's broad interpretation on the subject of the Breach of Trust which includes 'business for another,' it is determined that duty of cooperation on registration can be identified with 'administering another's businesses' in the second provision of the article 355 of the Criminal Act. So the violation of duty of cooperation on registration can constitute Breach of Trust.

3. Establishment of Duty of Cooperation on Registration

As mentioned above, a person should be in the position where he administers another's business so as to apply Breach of Trust. If he deals with the affairs generated from the contract, he is not criminally liable because the duty from the contract is his business and not another's. Only

civil claims for compensation can be raised. But after getting the intermediate payment of the property, the court sees it as another's and Breach of Trust. We need to focus on the viewpoint of the court following the steps of the contract.

1) In the Stage Between Down Payment and the Intermediate Payment

After the seller receives down payment only from the 1st buyer, the court does not consider the double transaction as Breach of Trust. The Court reasoned that the concerned parties have reached the situation which is not recoverable by revocation of contract. In this regard, the intermediate payment is therefore needed to constitute a Breach of Trust.¹²⁾ Where only the down payment has been made, the seller is not in the position where he administers another's business because the seller can cancel the contract anytime by giving the twice the amount of down payment to the buyer.¹³⁾ This conclusion can be reached since the court takes the view that the 1st payment has a function of cancellation fee in accordance with article 565 of the Civil Act.

2) After the Intermediate Payment

The Court finds that after getting the 1st and 2nd payments, the seller has a duty to cooperate with 1st buyer to transfer the registration of the real property as soon as he gets the remainder.¹⁴⁾ Therefore if he sells the

12) The Supreme Court, 85do187, declaration dated 1986. 7. 8.

13) The Supreme Court, 84do315, declaration dated 1984. 5. 15.

property to 2nd buyer, making it impossible to perform the procedure of transferring registration to 1st buyer, he will be liable for Breach of Trust.¹⁵⁾ In conclusion, if the owner of the property gets the 1st, 2nd payment from the 1st buyer, the owner owes a duty to the 1st buyer of cooperation on registration. This duty is for another's business as well as for his own, because in order to complete the procedure of transferring registration, cooperation between the seller and the buyer is needed.

To Sum up, this attitude of the Court means that strong relationship between the seller and the buyer is constructed as soon as the seller receives the intermediate payment. In this stage, the principle of *rebus sic stantibus*¹⁶⁾ could not be applied in contrast with the stage of receiving down payment. At the same time, a strong expectation arises on the other party to fulfill the contract. From this point, the breach of contract develops into not only the problem of default¹⁷⁾ but also the infringement of the trust relationship which can be punished criminally.¹⁸⁾

14) According to first provision of article 23 of the Real Property Registration Act, the registration of the real property must be applied by the obligator of the registration together with the person entitled to registration.

15) The Supreme Court, 88do750, declaration dated 1988. 12. 13., The Supreme Court, 83do2057, declaration dated 1983. 10. 11.

16) Literally "things thus standing". This principle explains the situation where the contract lost its legal binding power after the basic social elements surrounding the contract have been changed dramatically.

17) Default means a situation in which a person, company, or country defaults on something that they have legally agreed to do, such as paying some money or doing a piece of work.

18) Oh-Geol Kwon, "A Study on the double transaction to the movable property and Misappropriation," *Korean Journal of Comparative Criminal Law*, Vol.13 No.2, Korean Association of Comparative Criminal Law, 2011, p. 407.

4. Summary

According to the conventional attitude of the Supreme Court, the seller's duty to cooperate on the registration is regarded as the administration of the buyer's business, and thus, his or her violation of the duty shall be applicable to any Breach of Trust. There are three grounds leading to this conclusion: first, the Court was strongly expected to regulate the double sales of real estate by punishing the sellers. Second, the Court has interpreted the duty on the registration is applicable to 'the business for another.' The business for another has been regarded as one of 'another's business' by the Court, and accordingly the double seller shall be the subject of Breach of Trust. Third, after the intermediate payment, the seller and the buyer is considered bonding in a trusting relationship. Therefore, the seller's duty on the registration shall be the business for the buyer, and the violation of the duty constitutes Breach of Trust.

IV. The Criticism on the Attitude of the Supreme Court: the Seller's Duty on the Registration Procedure shall be his own Business

The attitude of the Supreme Court that applies Breach of Trust to the double seller of real estate has been criticized, especially with regards to the seller's duty of cooperation during registration. The state of the law is unsatisfactory and needs to be reconsidered. It should be noted that precedent cases have all concerned the cooperation duty of a seller as the

business for a buyer. Despite of the controversy, the Supreme Court had stood at this position until the case of 2008do10479 was announced on 20 January 2011.

The Court in 2008do10479 held that the double seller of a chattel was not guilty of breach of trust. By far the most important issue arising from the decision is that the Court called into question its own precedents on the application of Breach of Trust to the double seller of real estate, and emphasized the legal differences between the sales of chattel and real estate. The decision itself offers the possibility to interpret the duty of the cooperation with the buyer during registration as the business for his own, not the business for the buyer.

We proceed to review and analyse the ground of the Supreme Court's decision in the case of 2008do10479. Subsequently, we will explore and discuss the problems of the attitude of the Supreme Court in terms of legal aspects and criminal political aspects. By discussing those points, it will become apparent that the duty of cooperation shall be the business for the seller's own, and hence, the double seller of real estate shall not be the subject of Breach of Trust.

1. 2008do10479: The Case of the Double Seller of a Chattel

1) The Facts of the Case of 2008do10479¹⁹⁾

The accused concluded a contract with the victim (i.e. the first buyer) for selling his printing press for 135,000,000 won on 1 April 2005, and the victim offered the appropriate amount of fabric instead of a down payment

19) The Supreme Court, 2008do10479, declaration dated 2011. 1. 20.

and an intermediate payment. However, as the accused's business suffered from financial difficulty, he suggested his creditor to buy the printing press for 80,000,000 won in replacement of repayment of his debt of 84,000,000 won. The creditor (i.e. the second buyer) accepted the suggestion and received the press.

The prosecutor charged the accused of Breach of Trust on the grounds that the accused had infringed a responsibility to transfer the press to the first buyer for his own profit in tandem with resulting in a loss of first buyer.

2) The Decision of the Supreme Court: An Acquittal

The Supreme Court declared an acquittal on the charge of Breach of Trust by seven judge's votes out of twelve. The main ground for the majority's opinion is that the duty to transfer a chattel to a contract party is not a business for the party but the obligator's own business for himself. By differentiating the chattel from the real estate in 2008do10479, issues have arisen as to the legal difference between the sale of goods and the sale of real estate as well as in the legal characteristics of a seller's duty to cooperate with a buyer on registration procedure.

3) The Grounds of the Decision

(1) The Majority Opinion

The majority reasoned that the legal structures of the sales of chattel and real estate are different each other. Distinction was found mainly in the way of transferring the complete right of ownership under the principle of formalism.

In the case of the sale of a chattel, a seller fulfills the conditions of the contract by handing over the object of the sale to a buyer, and, simultaneously, the buyer acquires the complete ownership of the object. Therefore, in a contract for sale of goods, the seller's duty is only to transfer the goods to the buyer. There is no additional condition for the seller to comply with, such as duty of cooperation in maintenance or preservation of the goods. That is, the seller of a chattel does not take the responsibility of assuming another's business but his own business to hand it over. Hence, Breach of Trust cannot be applied to the seller of a chattel even if s/he transfers the object to another buyer against the contract.

However, In case of sales of real estate, or other Real Rights, the buyer cannot acquire the complete right of ownership until it is registered on the registration book.²⁰⁾ It is necessary that a seller should cooperate with the buyer in registering the right of ownership by giving the related document. In this regard, Supreme Court differentiates the sales of real estate from chattel on the ground that real estate needs to be registered. Therefore, the duty of seller to cooperate on the registration is regarded as the business of the buyers, not his own.

(2) The Minority Opinion

On the other hand, 'the minority opinion'²¹⁾ in the case of 2008do10479

20) It is a kind of governmental record to indicate the ownership of the real property or indicate any relationship of the property.

21) To explain the meaning of 'minority opinion,' when the members of the Supreme Court does not agree with the decision, or the Supreme Court changes its previous interpretation and application of a provision of rules, laws, or constitutions, the members organise 'Supreme Court Justices' Council,' in other words, 'the unanimous consent committee.' The majority's opinion by vote is adopted as the decision of the Supreme Court, and

argues that there is no ground to differentiate the sales of chattel from real estate in terms of legal structure. In case of the sale and purchase of a chattel, the seller has the obligation to hand over the object of the contract to the buyer and the buyer is bound to receive it, which is in the process of cooperation of the seller and the buyer. The minority argued that sale of chattel has the same structure with the sale of real estate so seller has to cooperate with the buyer during registration of the transaction. The duty of cooperation incumbent on the seller of real estate has been interpreted as the business for the buyer in precedent cases. Either, the duty of seller of chattel is the business for the buyer, they argued. In short, in the case of the sales of both real estate and chattel, the seller has a duty of cooperation with the buyer. Therefore the double seller of chattel should be the subject of Breach of Trust as well.

In sum, on the issue of the application of Breach of Trust in double seller of real estate, the contrary opinion approves of the precedent cases' attitude that the double seller of the real estate shall be the subject of Breach of Trust on the ground that the seller's duty of cooperation on the registration is the business for the buyer. While the majority held that the double seller of chattel's duty to hand over the object is not the business for the buyer but his own as the obligation of fulfilling the contract, the minority argues that chattel seller's duty should be also interpreted as duty of maintenance of the buyer's property, and accordingly, the business for the buyer.

simultaneously, the minority's arguments and the grounds for the contrary view should be exposed on the Court ruling.

2. Juridical Problems of the Attitude of the Supreme Court

1) The Legal Structure of Sales of Chattel and Real Estate

The legal characteristics of the seller's duty of cooperation with the buyer on registration is of critical importance for contracting parties as it consequently decides whether the seller shall be the subject of Breach of Trust or not.

It is submitted that the minority view best represents a definition of the legal structure of the sale of a chattel or real estate. The double sales of real estate and the chattel should have the same legal structure. In both cases, after the seller makes a contract with the buyer, s/he transfers the object of the contract to someone else other than the initial buyer.

The seller's duty to cooperate on the registration procedure should be reinterpreted as his own business. This viewpoint is distinct from both the majority and the minority opinion in the decision of 2008do10479. Giving an explanation of the structure of Breach of Trust in short, the Court has regarded the duty to maintain and preserve the other's property as one of the business of others or the business for others. The Court defines the duty of cooperation with the buyer on the registration is one of the duty of maintenance of the buyer's property, namely, the business for the buyer. The main reason why the majority opinion regards the seller of real estate's duty of cooperation as one of the duty to maintain the buyer's property is that in transferring the registration of the right on real estate, the seller and the buyer need to go through the registration procedure together by law. The Court derives the seller's duty to cooperate on the registration from these legal proceedings.

However, this interpretation is not appropriate from both a logical and

practical standpoint. First, as the sale of chattels and real estate are comprised of the same structure, the same logic that interpreted the duty of handing over the goods as the seller's own business in the sales of chattel should also apply to the case of real estate. Thus, the seller of real estate should also be regarded as having his own business in the property. There is no ground to differentiate them. Second, in real estate transactions, the seller and the buyer hardly visit to the registration office together. Instead, in most of cases, the seller usually delegates the proceedings to legal staff by providing the relevant documents to them.²²⁾ In other words, the duty to cooperate on the registration for real estate transactions usually extends only as far as the action of the seller handing over the documents to a juridical scrivener. In decision of 2008do10479, the Supreme Court reasons that handing over the goods is the business of the seller's own and decides that the seller of chattel does not have the duty to maintain the property of the buyers. If so, likewise in the case of real estate, handing over the documents to juridical scrivener should also be interpreted as the seller's own business.

In effect, The supreme court failed to give a full and coherent explanation as to the reason why the duty of cooperation on the registration is the business for others or the business of others rather than the seller's own business. There is no logical ground to treat sales of chattels and the sale of real estate differently, because they are essentially based on the same legal characteristics. Therefore, as for both of them, the seller's duty of transferring the complete right of ownership should be interpreted as the seller's own business. Accordingly, the infringement of the duty to cooperate with the buyer on the registration as the seller's own business does not constitute Breach of Trust apart from default under the Civil Act.

22) Oh-Geol Kwon, *ibid*, p. 418.

2) Intermediate Payment as the Establishment of the Duty of Cooperation on the Registration

The Supreme Court has determined the intermediate payment as the establishment of special trusting relationship between the seller and the buyer. Thus, the seller will be accused of Breach of Trust in the case of when he transfers the right of ownership to the second buyer after the first buyer's intermediate payment. However, as the Supreme Court in 2008do10479 has admitted itself, it is not understandable that just because the intermediate payment is made, the property becomes to belong to the buyer without registration and the seller is at the position of preserving and maintaining the buyer's property.

According to the formalism enshrined in the Civil Act, even after receiving the intermediate payment the seller is still entitled to refuse to transfer the right of ownership to the buyer until he receives the balance. In addition, both parties may still rescind the contract despite 1st payment being made. This is achieved either by the deliverer of down payment, the buyer, giving up such money that he paid or by the receiver repaying double such money before the intermediate payment has not been received (see Article 565(1)). Therefore, the intermediate payment in the Civil Act has the meaning of initiating the performance of the contract, and from the time of being delivered such money, the contracting parties are charged with the obligation to compensate the other party for damages resulting from the rescission of the contract.

The intermediate payment is merely the point when the obligation of compensation takes effect, and the parties to the contract still have the free right to rescind it. Notwithstanding this, the Supreme Court considers the

intermediate payment as the point of time at which the two parties to enter in a special trusting relationship, and breach of this relationship gives rise to liability for Breach of Trust. Under the interpretation taken by the Supreme Court, the object of the contract is dealt with as the buyer's property by criminal force, whereas the right on the object still belongs to the seller until he has transferred it.

Furthermore, even presuming the seller's cooperation on the registration shall be the business of the buyer or the business for the buyer, the seller's duty should only arise at least after receiving the balance. After the buyer pays the balance, the seller's duty to cooperate during the registration only remains between the parties to the contract. Therefore, to regard the duty on registration as the business for another, it should at least be after the balance received when the duty of the seller only remains to be done. It is clear that the intermediate payment does not convert the seller's duty on the registration from his own business to the buyer's business.

For the last point, the attitude of the Supreme Court is definitely against the equality of two parties to the contract. Because the buyer's obligation of payment is not interpreted as the business for the seller, he basically shall not be liable for Breach of Trust even on his non-payment or cancellation of the contract. This is unsatisfactory. The Court's attitude excessively burdens on the seller in favour of the buyer, contrary to the principle of equality between the parties to a contract.²³⁾

3) Unnecessary Distinctions

By regarding the duty on the registration as the business for the buyer,

23) Oh-Geol Kwon, *ibid*, pp. 415-420.

the conventional attitude of the Supreme Court has raised unnecessary distinctions. One is a distinction according to the types of seller's defaults and the seller's role in the default and the other is the seller's guilty or not guilty according to breach of trust of 1st or the 2nd buyer.

Concerning the first issue, the types of default in the Civil Act are roughly divided into delay of payment, and impossibility of performance of the obligation. According to the Civil Act, whether the obligator has taken an active role in the resulting impossibility of performance does not affect the Court's decision of the legal effect of the default or the level of compensation for damages due. In other words, the fact that default has occurred is the sole matter, and the role of the obligator is not considered.

However, the Supreme Court has treated differently according to the role of obligator without reasonable juridical ground. When the seller does not fulfill the obligation of transferring the registration of the right of the ownership, he shall not be the subject of Breach of Trust. On the other hand, when he has a decisive role in resulting in the default by transferring the registration to another other than the initial party to the contract, he shall be liable for Breach of Trust. Considering the purpose of the Supreme Court is to protect market order by using criminal legislation where necessary, it stands to reason that the criminal legislation should be at least consistent with the purpose of the Civil Act. The Supreme Court's different treatment for active and passive sellers does not agree with the Civil Act that applies the legal effects evenly to the seller regardless of his role

While in civil the infringement of transferring the registration is merely a type of default, in criminal cases the duty of cooperation is understood as the business of others. That is to say, the Criminal Act Article 335(2) divides the duty on the registration into *the duty of transferring the*

registration and the duty of cooperating on transferring the registration. Concerning the purpose of charging Breach of Trust on double seller of real estate, the crime should coincide with the purpose and contents of the Civil Act. However, the decisions in the precedent cases do not accord consistency with the Civil Act.

On the other hand, the attitude of the Supreme Court also raises distinction between the two buyers, the 1st and the 2nd buyer. Whereas the double seller shall be liable to Breach of Trust when he has transferred the registration of the title to the 2nd buyer, he is not guilty when he has transferred the registration to the 1st buyer even after he had received the payment from the 2nd buyer. In other words, whilst the violation of duty to the 1st buyer is guilty, breach of trust of the 2nd buyer is not guilty at all. If the parties to the contracts enter into the trusting relationship after intermediate payment, it should be applicable to the double seller and the 2nd buyer too. In the case that the double seller has transferred the registration of the title to the 1st buyer after 2nd buyer's intermediate payment, he shall also be liable to Breach of Trust too. However, in that case, the Supreme Court does not apply Breach of Trust to him on the grounds that because he cannot have the duty on the registration to two persons at once he still has the duty to cooperate on the registration with the 1st buyer yet.²⁴⁾ In other words, he does not have the duty to the 2nd buyer even though he has already received the payment from him. This is not only unbalanced between two buyers, but also illogical.

24) The Supreme Court, 92do1223, declaration dated 1992.12.24., The Supreme Court, 2008do11722, declaration dated 2009.2.26.

3. Criminal Justice Policy Problems of the Attitude of the Supreme Court

The Supreme Court of Korea has applied Breach of Trust to the double seller of real estate in order to regulate the capital market by using criminal measures. In doing so, the duty of the seller to cooperate with the buyer during registration has been interpreted as the business for the buyer not his own as the seller. However, in the era of capitalism, excessive intervention of the law and government would prevent the principle of private autonomy in the transaction and result in the failure of the market system. Problems regarding criminal justice policy in the application of Breach of Trust to the double sellers will be argued in this part.

1) The Distortion of the Balance of the Equality of the Parties to a Contract

Assignment of the duty of cooperation to the seller of real estate results in the imbalance in the potential liabilities of two parties to the contract.²⁵⁾ Under formalism, in principle, although the second buyer recognizes the initial contract, the right of ownership of real estate still belongs to the seller until he transfers the registration. Therefore, in this structure, the double contract of the seller is not illegal in principle. The seller can transfer the registration of title to another buyer who offers higher price to the object, and then, the seller has a duty to compensate for a damage of the initial buyer.

25) Ji-Hong Joo, "The negative impact of applying the criminal method of Breach of Trust into the double transaction of real property", *Journal of Law research*, Volume 51, No.2, 2010, Bu-San University Law Research Institute, pp. 319-347.

However, according to the Supreme Court's decisions 83do2057²⁶⁾ and 84do2127,²⁷⁾ under the conception of the duty of cooperation on the registration as the business for the other, after the intermediate payment of the buyer the relationship between the two parties is converted into the relationship whereby the seller has a duty to maintain and preserve the other's property from the simple contractual relationship. Accordingly, if the seller has received the intermediate payment, he cannot make a contract with the second buyer even if he offers the higher price.

At this point, the role of the Civil Act should be reminded. The Civil Act aims to protect a buyer's expected profit under the contract. If there remains no possibility for the seller fulfilling his obligations, the buyer can have a claim corresponding to his or her economic loss through the courts. Civil Act aims to protect the profits that each party is supposed to acquire, not to supervise or force the parties to fulfill the conditions of contract. Regarding the duty of cooperation as the business for others and applying the Breach of Trust provision results in excessive protection for the buyer unilaterally, and goes far beyond the regulation of market order rationale.

2) The Abuse of Criminal Justice

Civil cases should be resolved privately and any criminal sanctions or enforcement should be a last resort.²⁸⁾ The Supreme Court has regarded the duty of cooperation as the business for others in order to sustain the

26) The Supreme Court, 83do2057, declaration dated 1983. 10. 11.

27) The Supreme Court, 84do2127, declaration dated 1984. 12. 26.

28) Chang-On Lee, "A study on the Adjudication of Supreme Court, No 2008doi0479: Double Transaction of chattel and Breach of Trust", *Law Review*, Volume 2, Seoul National University Law Review Committee, 2011, pp.50-60.

conventional attitude that regard the double selling of the real estate as a crime under Japanese Civil Act. As pointed several times so far, in the precedents cases, the supreme court failed to give a full and coherent explanation as to the reason why the duty of cooperation on the registration is the business for others or the business of others rather than the seller's own business. Therefore, the persistent application of Breach of Trust without a fully understandable ground or reconsideration will amount to the abuse of criminal justice.

3) The Violation of *NullaPoena Sine Lege* (the Principle of Legality)

The Supreme Court's distinction between chattel and real estate is against the principle of legality, especially principle of disclosure. According to the Supreme Court, the business for others or the business of others includes the duty of maintenance and preservation. In this regard, the duty of cooperation on registration is interpreted as the maintained duty, thus, the business for others, the elements of Breach of Trust. However, in the case of chattel, the Supreme Court decided that it does not have maintenance duty of the seller without adequate grounds, as argued so far. In short, regarding the duty of cooperation as the business for others is not grounded clearly, thus it is against principle of clarification, one of the principle of legality.²⁹⁾

4. Summary

The duty of the cooperation on registration shall be the seller's own business on the grounds as follow: first, the decision of the Court on the

29) Chang-On Lee, Ibid, p. 54.

double seller of chattel, it interpreted that the duty to hand over the object of the contract is the seller's own business. As the sales of real estate and chattel have the same legal structure, there is no ground on which to differentiate them. Second, the intermediate payment cannot assign the special duty of administering the buyer's business to the seller. This unclear standard proves the lacuna of the Court's interpretation. Moreover, by the attitude, the Court distorts the balance of the parties to the contract by excessively protecting the buyer unilaterally. Third, according to the interpretation of the Court, the duties on the registration are dealt with differently in the Civil Act and the Criminal Act. Concerning the purpose of charging Breach of Trust on double seller of real estate, the crime coincided with the purpose and contents of Civil Act. For the last, the excessive application of the Criminal Act to transactions does not promote the capitalism market order in Korea. Therefore, the seller's duty of cooperation on the registration should be interpreted as his or her own business, and thus s/he shall not be the subject of Breach of Trust. The double seller is enough to be responsible for compensation by Civil Act.

V. Conclusion

Various reasons have been put forward to explain the stance of the Korean Supreme Court applying the Breach of Trust to the double seller of real estate. One argument takes root from the vestiges of Japanese imperialism and the adoption of the French system. An alternative argument is that the Court made a socio-political decision to terminate unlawful practice.

On the other hand, there are several criticisms on it. First, the conventional

judgments of the Supreme Court applying the Breach of Trust to the double seller of real estate are contradict against the formalism system and burdens excessive criminal principles on the private sector. Second, the Court's attitude results in unnecessary distinctions. In the Civil Act, the seller's role in the defaults does not matter on deciding the level of compensation of damages. However, according to the Court, when the seller took an active role by transferring the registration to the 2nd buyer, he shall be liable to Breach of Trust. Unlike to this, when the seller just avoided from the duty by doing nothing, he shall not. The other case is that when the 1st buyer gets the registration after the 2nd pays the intermediate payment, the court does not recognise the seller's breach of trust to the 2nd buyer. Lastly, it is hard to find a reasonable explanation why the intermediate payment becomes the criteria. It would, arguably, be more rational if the criteria were the same because after a buyer paid the balance a seller should bear a duty to execute the registration. Since the decision 2008do10479 has clarified that double transaction of movables does not consist Breach of Trust, it is carefully expected that the Supreme Courts could change his position to on the double transactions of real property.

Key Words : the duty of cooperation during registration of title in real estate transactions, breach of trust, sale contract, double transactions

[국문요약]

부동산 이중매매에 있어서
등기협력의무의 법적 성질 연구

김 현 주 · 이 나 은 · 반 승 혜*

현재 대법원 판례는 부동산이중매매의 이중매도인에 대하여 민사법적 손해배상책임과는 별개로 형사상 배임죄를 적용하는 것을 긍정하고 있다. 부동산 매도인은 매수인이 소유권이전등기를 함에 있어서 관련 서류를 교부하고 등기소에 함께 출석해야 하는 등기협력의무를 지는 바, 판례는 등기이전행위를 매수인의 사무로 보고 매도인을 타인사무처리자로 보고 있다. 판례에 따르면, 매수인이 중도금을 지급하면 중도금은 이행착수의 의미를 가지므로 매수인과 매수인은 이때부터 ‘특별한 신임관계’에 놓인다. 이러한 신임관계에 기한 등기협력의무를 위배하고 제2매수인에게 소유권이전등기를 경로해 준 경우 이중매도인은 형법 제355조 제2항 배임죄의 죄책을 지게 된다는 것이 판례의 확고한 입장이다.

그러나 2011년 1월 20일 선고된 2008도10479 전원합의체 판결은 동산 이중매매의 이중매도인에 대한 배임죄 적용을 부정함으로써 기존 판례 입장에 대한 논의의 장을 열어주었다. 더욱이 대상판례에서는 다수의견과 소수의견이 나뉘어 동산 이중매매와 부동산 이중매매의 차이점을 밝히는 과정에서 종래 판례 입장에 대한 심도 있는 논의가 이뤄졌다는 점에서 의미가 있다. 따라서 본 논문에서는 대상판결을 중심으로 종래 판례의 입장을 비판하였다. 특히 배임죄의 전제가 되는 등기협력의무에

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초점을 맞추어 종래 판례의 입장을 분석한 뒤, 등기협력의무는 법적 구조 및 형사정책상 타인사무가 될 수 없고 매도인 자신의 사무가 되기 때문에 부동산의 이중매도인도 동산의 이중매도인처럼 배임죄의 주체가 될 수 없다는 주장을 전개하였다.

한편, 여러 논문들이 부동산 이중매도인에 대한 배임죄의 적용에 대하여 비판적인 논의를 시도하고 있지만, 이러한 논문들은 부동산 이중매매의 민사법적 법리보다는 형사법적 논의에 치중하고 있다는 한계가 있었다. 본 논문은 이러한 한계를 극복하여 부동산 이중매매가 가지는 민사법적 본질에 주목하여 등기협력의무를 타인사무로 보는 것은 민법과의 체계적 합성에 어긋난다는 것을 밝혔다. 그 주장의 근거로서 본 논문은 주로 2008도10479 판결의 다수의견 및 소수의견이 내세우는 근거를 이용하거나 그 주장의 논리적 모순을 지적하는 방식을 채택하였다.

마지막으로, 본 논문은 대한민국의 국격 상승에 따라 대한민국 법에 대한 관심이 높아지고 있는 현실적 요구에 부응하여 우리나라 법조인뿐만 아니라 외국 법조인들을 대상으로 쓰였다. 우리나라에서는 빈번하게 등장하고 있는 부동산 이중매매에 대한 본 논문의 심도 깊은 논의가 해외 투자자 및 우리나라 법을 공부하는 해외 연구자 등에게 긴요하게 쓰임으로써 대한민국의 경제 부흥 및 법률 수출에 기여할 수 있기를 바란다.

주제어 : 등기협력의무, 부동산 이중매매, 동산 이중매매, 배임죄, 타인사무

