

Study on the Validity of the Contract of Affordable Housing Purchased by Borrowing Name

-- Two Point Exploration from Empirical Evidence

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Abstract. Due to the rapid rise of housing prices and other reasons, many people borrow other's name to buy houses, this paper is to explore the validity of contract of affordable housing purchased by borrowing name. The theory circle has different understanding about the quality and validity of the affordable housing purchased by borrowing name. Because it is a simultaneous contract, it should be divided into the conclusion of housing contract and borrowing name for registration. Based on the data statistics of the judgment documents from the three aspects of basic facts, the reasons and the results of the judgment, it is concluded that the theory of consensus respect is adopted in judicial practice. Based on the theory and practice, two issues concerning the validity judgment of contract are found after analysis: the application of item 52 (5) of the contract law and the explanation of "meeting the listing conditions". With regard to the former, the validity of the contract should be confirmed from the perspective of normative content. The "public interest" in this occasion should be presented as a matter of preparation. In principle, we should not negate the validity of the contract of affordable housing purchased by borrowing name. As for the latter, "meeting the transaction conditions" should be interpreted as an effective condition for the consideration of logic and results. In the light of these two points to form a way to judge the validity of the contract of affordable housing purchased by borrowing name, attention should also be paid to the interest balance of both parties.

Keywords: purchase house by borrowing name; affordable housing; validity of the contract; effective condition.

1. Introduction

With the rapid rise of housing prices in recent years, there has been a large number of people buying houses by borrowing other's name. Borrowing name to purchase house, also known as implied house purchase [1], is defined as the act of the property sponsor (borrower) signing a house purchase contract in the name of others and registering in the name of others for a specific purpose after obtaining the consent of others. [2] The reasons that borrowing name to buy house can be divided as follows : to buy affordable housing and housing-reform house, to evade tax burden, failing in making mortgage loan, and housing restriction policy. According to different types of houses, [3] it can be divided into borrowing name to purchase policy housing [4] and borrowing name to purchase general commercial housing [5].

However, in real life, due to the rapid rise of housing price and other reasons, many borrowers are reluctant to deliver their houses to the lenders, resulting in more disputes of this kind, and no unified view has been formed in judicial practice. The following article will discuss this question from the perspective of the validity of the contract of borrowing name to purchase house.

2. The Nature and Validity of Contract of Affordable Housing Purchased by Borrowing Name

2.1 The Nature of Contract of Affordable Housing Purchased by Borrowing Name

The two parties involved in borrowing name to buy affordable housing should sign the contract of borrowing name to buy house first, and academic circles also have each opinion to this. The practice and theory of Taiwan area of our country experienced from "trust behavior" to "nameless contract" evolution process. Mainland scholar [6] professor Yang daixiong believed that borrowing name behavior is borrowing name to carry out legal acts. [7] Professor Ran keping believed that borrowing

name behavior could be divided into internal borrowing name agreement and external borrowing name behavior in terms of legal structure, and it could be divided into direct borrowing name behavior and indirect borrowing name behavior. [8] The internal borrowing name agreement states that borrowers are executed in their own name and that the legal consequences are borne by lenders. The external borrowing name behavior is the legal relationship between the borrower and the third person, and the legal consequences are borne by the borrower.

Professor Ma yide believed that the borrowing name to buy house agreement can be divided into two parts, that is, the house-purchase contract concluded by borrowing name and the house-registration by borrowing name. [9] There are three parties in it, that is the two parties that conclude the sale contract, and the two parties that register the house by borrowing name. [10]

The author agrees with professor Ma yide's point of view, that is to the nature of the contract of affordable housing purchased by borrowing name should be based on the actual situation in the mainland. Then, it makes a comprehensive analysis of [11] by combining research ideas and methods in Taiwan. The borrowing name to purchase house contract does not apply to the previous contract, which is an atypical contract [12]. According to the traditional civil law theory, the atypical contract can be divided into three types: nameless contract, simultaneous contract and mixed contract.[13] According to the analysis, the borrowing name to purchase house contract should be simultaneous contract. As for the judgment of the legal consequences of simultaneous contract, it is necessary to combine the subjective intention of the parties, the interests of the contract and the whole transaction link through the method of interpretation theory. [14]

2.2 The Validity of Contract of Purchasing Affordable Housing

The purchase of affordable housing contract can be divided the house-purchase contract concluded by borrowing name and the house-registration by borrowing name. This article will discuss the house-purchase contract concluded by borrowing name and the house-registration by borrowing name respectively.

2.2.1 Validity of House-purchase Contract Concluded by Borrowing Name

House-purchase contract concluded by borrowing name, is to establish the affordable housing contract relationship between the borrower and the lender and analyze the validity of the contract.

2.2.1.1 One Party Enters Into a Contract by Fraudulent Means, Thus Harming National Interests

There are three views on the connotation definition of national interests: one is the national interest in the sense of public law; the other is the interest of state-owned enterprises; the third is the public interest of society [15].

①For national interests in the sense of public law, the scope should be defined in the sense of public law, not private law.

②Obviously, it should not be the interest of state - owned enterprises in the house-purchase contract concluded by borrowing name

③Neither should it include the public interest of society, as article 52 (4) of the "contract law" already includes "harming the public interest of society".

2.2.1.2 Maliciously Collude to Harm the Interests of the State, the Collective or a Third Party

Borrower does not collude with the seller maliciously. When entering into a sales contract with the lender, the seller is an uninformed party, and there is no subjective malice in collusion with lender. Therefore, item (2) of the contract law does not belong to the invalidity of this type of contract.

2.2.1.3 Cover up the Illegal Purpose in Legal Form

There are different views on the interpretation of "illegal purpose" in this article. The author will expound the structure of illegal purpose and meaning expression. The formation of meaning and the process of expression can be described as the formation stage of effect meaning, effect meaning, expression meaning and expression behavior [16].

2.2.1.4 Violate the Mandatory Provisions of Laws and Administrative Regulations

The provisions in this paragraph are limited to laws and administrative regulations, which can only be based on laws enacted by the NPC and its standing committee and administrative regulations enacted by the state council. In addition, the "mandatory provisions" stipulated in article 52(5) of the "contract law" shall be the mandatory provisions of validity. Therefore, it is not the reason for the invalidity of the contract.

2.2.1.5 Harming Social Public Interest

The social public interest is generally regarded as the public order and custom which the overseas legislative example and its theory refer. Professor [17] Ran keping believed that affordable housing is established by the state for the public interest [18]. Affordable housing has three features: affordable, practical and economical. It can be seen from the analysis that if the contract of affordable housing is to be concluded by borrowing name, the provisions that should be applied are article 52 (4) of the "contract law".

2.2.2 Validity of Contract of House Registration by Borrowing Name

The contract of purchasing affordable housing by borrowing name is a simultaneous contract, which includes the contract of purchasing affordable housing by borrowing name and the contract of affordable housing registration by borrowing name. To judge whether it is effective or not, it should be judged according to the validity of the contract of purchasing affordable housing by borrowing name.[19]

3. The Status of the Validity of the Contract of Affordable Housing Purchased by Borrowing Name in Judicial Practice

The author will demonstrate and analyze from the perspective of case demonstration, and observe how to apply laws and regulations in judicial practice to identify the validity of the contract of purchasing affordable housing by borrowing name.

In this paper, the analysis of judicial application will be conducted in three steps: 1 sample selection; 2 thoughts of court judgment; and 3 problem induction

3.1 Sample Selection

In order to control the focus of the judgment documents selected, this paper selects "borrowing name to purchase house ", "affordable housing", "case cause: contract dispute" as the key words. A total of 256 refereeing documents are found on the "no litigation: website. [20] In relevant judgment documents in Beijing, because almost all the documents made by the retrial court are "adjudication", the content has little correlation with the subject matter and the quantity is not large, so it excludes retrial documents. [21] A total of 81 search results, 76 judgements and five adjudications are searched in the "no litigation" website. First, in terms of basic facts, it includes the relationship involved and specific types of affordable housing. Second, in the judgment reason, it includes the formation of contract, the validity of contract validity, property ownership. Third, in terms of the judgment result, it includes the comparison of the two trial results, the formation of the contract, the validity of the contract and the ownership of property.

3.2 Thoughts of Court Judgement

To sum up, relevant data are statistically analyzed and the results are as follows:

Table 1. Basic facts

The relation of the involved parties	Relatives(42)	Friends or introduction(29)	Other relation(3)	Unknown(7)
Housing type restriction	Regular affordable housing (45)	Unit housing(8)	Demolition indicator(28)	
The party's behavior time point	Before the purchase restriction(60)	The party is still not qualified(6)	Resell to a third party(5)	Other(10)
Influence of prior judgement	Influence prosecution(8)	Influence validity(10)	Other(2)	

As shown in table 1, a large proportion of the parties involved in the purchase of affordable housing by borrowing name are relatives or friends, which makes many lenders mistakenly think that the risk decreases, resulting in the failure to keep relevant evidence such as the purchase contract of the borrowed name in time. Among the housing restriction types, most of them are temporary restrictions on free circulation, which some courts even call "restricted circulation". However, there is also a less mobile "unit housing source [22]". In the reasons for the court's judgment, the parties' special behavior time point has a significant impact on the validity or performance of the contract. In this kind of cases, the parties usually request to confirm the validity or invalidity of the contract in the latter case because the earlier case rejected the request of confirming the real right.

Table 2. Judgement reasons

Contract nature		Validity basis[23]		Performance or attribution	
Borrowing name contract	73	Policy[24]	6	Listing conditions	8
House purchase contract[26]	2	Article 52(2)[27]	2	Support discretionary value-added compensation	12
Right to expect[29]	2	Article 52(3)[30]	2		
Loan contract[31]	1	Article 52(4)[32]	5	Object value-added compensation	4
Purchase "lease right" by borrowing name [34]	2	Article 52(5)[35]	10		
House buy and sell indicator[36]	1	Multiple combination[37]	7		
		Uncertain[38]	29		
		Listing conditions[39]	18		

As shown in table 2, most of the judges of the second instance defined the contract as "borrowing name to buy house". Only a few courts have characterized it as a contract to buy a house or a contract to borrow money. In terms of value-added compensation, individuals lenders request repayment and value-added compensation for reasons such as the prior judge confirming that the house is owned by borrowers. In the judgment, the majority of the court's opinion supports the distribution of the value added benefits at the discretion of both parties, and the individual court does not support this request.

Table 3. Judgment results

Validity of contract		Invalid reason		Contrast of two instances	
Valid	56	Prior judgement[40]	7	Maintain	76
Invalid[41]	16	Breach of policy[42]	2	Maintain partially [43]	4
Other[44] false, etc)	9	Mix[45]	3	Revise judgement	0
		Malicious collusion [46]	1		

As shown in table 3, most contracts are valid judged by the court. The reasons for the invalidation of the contract include the effectiveness of the previous judgment, violation of relevant policies, malicious collusion and mixed reasons. [47]

To sum up, after analyzing "table 1 - basic facts", "table 2 - judgment reasons" and "table 3 - judgment results", the following dimensions can be used to feed back the existing research.

Consistent with the research findings: first, most of the participants are not strangers, but have a certain emotional foundation. Second, "the purchase of house by borrowing name takes place before the restriction policy", and "the listing transaction conditions have been met or qualified before the conclusion of the debate" are a strong reason for the validity of the contract, the court tends to determine the validity of the contract. Third, the validity of the contract and the performance of the contract are distinguished. Fourth, the reasons for the invalidation of the contract in the judgment are various, directly or indirectly based on the policy. In the judgment, most of the behaviors are defined as "borrowing the name to purchase the affordable housing contract, while the minority are defined as remaining behaviors, and the majority of the court hold the" consensus respect theory [48] ".

Existing problems are: first, borrowing name to buy "unit housing" contract is invalid. Second, the pre-judgment and the judgment of first instance have important influence on the judgment of second instance. If the first instance deemed it as valid or invalid, and the court of second instance will not overturn it. Third, the judgment of second instance is not very sufficient, mainly in the judgment documents of first instance. Fourth, there is no clear distinction in the judgment whether "meeting the listed transaction conditions" is the condition for validity or performance of the contract. Among the above questions, the first problem seems to be without dispute, the second and third are related to the fourth problem and the validity determination of the contract.

3.3 Problem Induction

Through the above analysis, combined with the existing research in the academic world and the data analysis in this paper, the problem can be concluded as two points.

3.3.1 Application of Section 52 (5) of the "Contract Law"

3.3.1.1 Regulation Restrictions Conflict with the Purpose of Control

Article 4 of the "interpretation of contract law (I)" and article 14 of the interpretation of contract law (II)" respectively give a limited interpretation of article 52 (5) of the "contract law" by virtue of its effective rank and normative nature. According to this standard path, the policy about the affordable housing should not be the basis for determining the validity of the contract. The substantive reasons can be divided into two points: first, respect for the parties' autonomy of will; second, this gives the borrowers the opportunities and tools to default, which may cause moral hazard.

In the event of full compliance with the consensus respect theory, the relevant regulations cannot have a material impact on the conduct of the contract. Under the background of the rising trend of China's real estate, the real ownership of house is the key.

3.3.1.2 The Mixing of Article 52(4)

"Not violating the mandatory provisions of laws and administrative regulations", "not harming public interests" and "not violating relevant policies" all appear separately or in combination in the judgment documents. There is also a lot of criticism about the mixed use of relevant laws in judging the validity of a contract. [49]

From the perspective of normative content, in the case of purchasing affordable housing by borrowing name, all three reasons can be concluded as "no harm to public interests". "Public interest" is very abstract, even after the "general principles of civil law" has changed it into "public order and good custom". This kind of abstract concept needs to be applied in practice to be typed. [50]

3.3.2 Interpretation of "Meeting the Listed Transaction Conditions"

The judges' interpretation of the issue is inconsistent. It can be seen from the analysis: first, whether "meeting the listing conditions" restriction have substantial impact on the interests of the parties? Second, should "meeting the listing conditions" be interpreted as "validity conditions" or "performance conditions"?

If the borrower has resold the house to a bona fide third party, "meeting the listing conditions" is meaningless at this time, so this part of the discussion excludes situations involving third party interests. If the time of affordable housing purchase is "5 years", whether it has "met the validity condition" or "met the performance condition", there is no difference in the actual effect. When the contract is actually performed, the restriction of "before the listing conditions are met", and "meeting the listing conditions" will have an impact on the interests of lenders.

4. The Judgment Path of the Validity of the Contract of Affordable Housing Purchased by Borrowing Name

After the analysis of theoretical definition and application status, based on the observation of judgment documents, this paper selects the application of article 52 (5) and article 52 (4) of the "contract law" and "meeting the listing conditions" for theoretical induction. The following will propose the judgment path of the validity of the contract of affordable housing purchased by borrowing name from the level of interpretation theory.

Since the state council issued the "notice on promoting the steady and healthy development of the real estate market", a number of documents have been issued by the central and local governments to highlight and regulate the "purchase and loan restriction". "No matter the relevant documents issued by the state council, or the implementation rules issued by local governments, it does not formally belong to the laws or administrative regulations [51]."

Because the contract can be divided into affordable housing sales contract and registration contract by borrowing name, and it is mixed contract. Therefore, we should first judge the affordable housing sales contract, and this should be combined with the specific case to judge.

Article 52(4) of the "contract law" damages the public interest. In some cases, due to policies or other reasons, the buyer fails to own purchase indicator, thus making the purchase by borrowing name, which may not necessarily harm the public interest. Therefore, the analysis of this article should be combined with the specific case analysis.

Article 52 (5) of the "contract law" violates the mandatory provisions of laws and administrative regulations. In this case, the method of explanation is applied.

On the premise that "there is no third party involved" and "the purchased house by borrowing name has been implemented and the listing conditions have not been met", and "meeting the listing conditions" shall be interpreted as the validity conditions. Logically, the borrower can claim that the contract is "not yet in effect" and return the house to the lender. As a result, borrowers will not be caught in a dilemma. If the lenders have the indicator, they can apply for the house by themselves. If not, the cost of finding an alternative should be less than the disadvantage the borrower faces.

5. Conclusion

The validity of the contract of affordable housing purchased by borrowing name is still debated in the theoretical circle. Through data capture, induction, collation and analysis of judgment documents, three conclusions can be drawn: basic facts, judgement reasons and judgement results. Finally, this paper selects two perspectives to analyze the validity of the contract of affordable housing purchased by borrowing name: the application of article 52 (5) of the "contract law" and the interpretation of "meeting the listing conditions". For the former, the conflict between normative restrictions and regulatory purposes, and the mixing of article 52 (4), is the "old question" of article 52 (5). For the latter, based on the position of not damaging the current institutional framework, for how to explain the "listing conditions" for the parties involved in the special occasion, the interest difference is more significant.

After the analysis, the author thinks about the appropriate measures to solve the two problems at the level of interpretation. Article 52(4) of the "contract law" shall be applied first. In the case that there is no third party involved and the listing conditions have not been met, "meeting the listing conditions" is interpreted as the validity conditions. Lenders should bear the risk of losing possession of their houses, and borrowers should make reasonable compensation to avoid the imbalance of interests.

There is far more than just to buy affordable housing by borrowing name in life. This paper analyzes the legal nature and the validity of the contract from the small angle of this special "borrowing name behavior". The opinions presented in this paper need to be further tested and analyzed. If it can give feedback to theory and practice through limited analysis, draw attention to relevant issues, and have some benefits to judicial practice and theoretical research, the preliminary purpose of the research has been achieved.

References

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- [4]. That is, policy-supported housing, including affordable housing and price-fixing housing.
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- [19]. Ma yide: "The application of law on borrowing name to purchase house", *Jurist*, 6th issue, 2014, page 143.
- [20]. The remaining keywords are unchanged. The number of searches for "borrowing name to buy house " is 196, while the number of searches for "borrowing name to purchase" is 60, that of " buying house with hidden name" is 0 and that of " purchasing house with hidden name" is 0.
- [21]. According to article 200 of "the law of civil procedure", the reasons for retrial include evidence, application of law, procedure and illegal judgment of the judge, etc. Through reading the retrial order of the sample selected in this paper, it is found that the substantive issues of contract validity determination are not fully reflected in the retrial procedure.
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- [23]. The validity reference referred to herein is reflected in the judgment of the second instance. It refers only to the validity of the contract, not to the basis of the final judgment.
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- [26]. Relevant document number, See (2016) Beijing03civil final7332, (2016) Beijing01civil final4189.
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- [31]. Relevant document number, See (2016) Beijing01civil final4179.
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- [33]. Relevant document number, See (2015) Second middle civil final character09736, (2014) First middle civil final character9530.
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- [37]. Relevant document number, See (2016) Beijing02Civil final2, (2015) First middle civil final character8476, (2015) First middle civil final character05875, (2015) Third middle civil final character00879, (2014) First middle civil final character07245, (2015) First middle civil final character05875, (2015) Third middle civil final character01683.
- [38]. In the second instance documents without clearly stating the reasons for the judgment, the reasons for the first instance are mostly maintained, but not specified in the second instance reasons.
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- [45]. Relevant document number, See (2016) Beijing02civil final2, (2015) Third middle Civil final character00879, (2014) Third middle civil final character14004.
- [46]. Relevant document number, See (2015) First middle civil final character01535.
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- [48]. This view holds that there is no essential difference between the purchase of ordinary commercial housing by borrowing name and the purchase of affordable housing by borrowing name if behavior effect is the basis of the judgment.
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