



## Research Article

Volume-04|Issue-05|2023

# The Effect of the Hidden Defect in the Lease Contract "Comparative Study"

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### Article History

Received: 24.04.2023

Accepted: 28.04.2023

Published:01.05.2023

### Citation

Akkar, Z. S., & Mahmoud, F. B. (2023). The Effect of the Hidden Defect in the Lease Contract "Comparative Study". *Indiana Journal of Humanities and Social Sciences*, 4(5), 1-4.

**Abstract:** That the hidden defect is the underlying defect that affects the tenant's housing and as his name suggests escapes the knowledge of the parties at the time of signing the lease contract, and in order for the lessor to be responsible for it, this defect must be a source of great inconvenience to the tenant to the extent of preventing him from enjoying housing and the lease contract may include the lessor's innocence of every hidden defect found in the leased property and be aware of it, so if the tenant proves that the lessor has hidden The defect is fraudulent from him, so he is a guarantor even if he requires innocence.

**Keywords:** Contract – Hidden defect – Lease Contract

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## INTRODUCTION

### The Importance of Research

The importance of research appears in the results of the hidden defect in the leased property of the effects in terms of what the lessor bears in the event of a defect in the leased property that violates its benefit or decreases it and the tenant can resort to him to fulfill his right in the event that he cannot obtain the benefit of the leased property and the effects of the existence of a defect that prejudices the use of the leased property, including the implementation in kind and the termination of the lease contract and the reduction of rent with compensation.

Although the Iraqi legislator and some Arab and Western legislation have included the effects of the existence of the hidden defect in the wage, but the studies that dealt with this subject in detail and accurately are few, although its aspects require highlighting and discussing it for what it may need from the explanation and clarification of the ambiguity surrounding it, which formed a strong motivation for choosing it for its importance in practice.

### The Problem of Research

The problem of research here is raised in the subject of implementation in kind as an effect of the hidden defect that affects the leased property and whether the Iraqi legislator took it and did he single it out with a special legal text in the civil law or not?

### Research Objectives

The research aims mainly to address the effects of the existence of the hidden defect in the leased property and then the statement of the legal texts that

dealt with in detail in each of the Iraqi, French and Egyptian civil law.

## RESEARCH METHODOLOGY

In this research, we adopted the comparative analytical approach by analyzing the effects of the hidden defect in the lease contract in the Iraqi civil law and comparative laws and detailing them to find out them accurately.

## RESEARCH STRUCTURE

We dealt with the subject of the effects of the hidden defect in the lease contract in two requirements as follows:

- The first requirement: the nature of the hidden defect in the lease contract
- The second requirement: the effects of the hidden defect in the lease contract

### The First Requirement: The Nature of the Hidden Defect in the Lease Contract

That the goal of the lessee of the establishment of the lease contract is to obtain the benefit of the leased thing and in order to reach that benefit, the lessor is committed to providing a leased fit for use and use and in light of this, the lessor is a guarantor of the defects that appear in the leased property that would cause a defect in the benefit and that his commitment to this guarantee for what may result from these defects of the problem caused by the hidden defect in the leased property, which the tenant is ignorant of and its impact on the benefit significantly, We will address this requirement in two sections:

### **Definition of Hidden Defect**

The contractor cannot fulfill the intended benefit of the contracted party as long as it involves a hidden defect that is required for the guarantee, and this is what we will address by addressing the meaning of the hidden defect by defining it in a language, according to it and legally as follows:

### **Language Defect**

A defect is defined as: a defect and a defect. Stigma, and the shame of the thing: it has become defective (Al-Arab, n.d.).

The defect comes in the sense of deficiency, mediocrity or defect that is devoid of proper manners or proper manufacture (Al-Wajeez Dictionary, 1994).

### **Defect legally**

The Iraqi Civil Law defined the defect in Article (558), second paragraph, by saying that it is (what decreases the sale price for merchants and experts or what misses a valid purpose if it is predominantly in the likes of the sale or not).

The defect is a characteristic in the thing that is usually devoid of it and its presence decreases its value or usefulness (Taha, 1969).

As for the loss of the right purpose, it is also an objective criterion and is represented by the failure of the correct benefits that are considered in the law (Nasser, n.d.).

As for the Egyptian Civil Law, it did not provide a special definition of the hidden defect, but it was stipulated in Article (447) of the Civil Law on the sale by saying (the seller is bound by the guarantee if the sale does not have at the time of delivery the qualities that the buyer guaranteed its presence in it, or if the sale has a defect that reduces its value or benefit according to the intended purpose of what is stated in the contract or what is apparent from the nature of the thing or the purpose for which it was prepared. The seller guarantees this defect even if he is not aware of its existence).

The French legislator did not address the definition of defect explicitly in any text of the Civil Law and the judiciary in turn defined the defect as (deficiency that affects the thing incidentally and does not necessarily exist in all similar things) (Nasser, n.d.).

### **Conditions of the Hidden Defect That Is Required For the Guarantee**

Article (756) of the Iraqi Civil Law states that (1- The lessor guarantees the lessee all the defects in the leased property that prevent the use of it or reduce this use significantly, but it does not guarantee the defects that have been customarily tolerated. 2- He is responsible for the absence of the eye from the qualities of an explicit pledge of its availability or for its absence of the qualities required by the use of all this unless the agreement

provides otherwise) and Article (757) of the same law states that (no The lessor guarantees the defect if the lessee has been notified of it or was aware of it at the time of contracting, and the lessor does not guarantee the defect if it is easy for the lessee to verify its existence).

It follows from the aforementioned article that in order for the lessor's guarantee of the hidden defect to be achieved, the following conditions must be met:

### **The Defect Should Be Effective**

This is intended to prevent the defect from benefiting from the leased property or reduce this use significantly so that the lessee would have paid a lower rent if he knew of the defect and therefore if the existence of the defect did not result in a lack of use or the shortage was small in what was customarily tolerated, the defect is not effective and therefore not guaranteed by the lessor (Nayel, 2000).

The influential defect may be in the leased thing itself and may be in its accessories or accessories such as the garden, ladder or yard and takes the rule of the defect affecting the absence of the eye from the status of the lessor's pledge expressly availability or a capacity required by the intended use of the eye (Nayel, 2000) and leaves the trial judge the authority to estimate the gravity of the defect in the light of reality, taking into account the nature of the leased thing and the purpose allocated to it (Mansour, n.d.).

### **The Defect Must Be Hidden**

This condition is fulfilled, so the defect is considered hidden if the lessee cannot discover it even if he exerts the care of the common man in the examination of the leased property, but if the defect is what the lessee can discern if he exerts in the examination of the leased property the care exerted by the common man, the lessor is not a guarantor because the defect is not considered hidden (Al-Wandawi, 1974).

It is noted that the measure of due diligence in the examination of the thing is a measure of material not personal, which is the care of the usual man, any care exerted by both people in examining the thing that they want to rent, if the tenant is inexperienced for his own circumstances and led him to not identify a defect that seems apparent to other people as he could return to ensure the hidden defect, although in fact it has been hidden from him (Baqi, n.d.).

### **The Tenant Should Not Be Aware of the Defect**

Al-Sanhoury (n.d) That the defect may be influential and hidden, however, it is not a positive defect of the guarantee if it is proven that the lessee was already aware of the time of delivery of the leased property despite its concealment, the knowledge of the tenant defect and silence on it is considered his consent to it and down from his right to recourse to the guarantee (Article (150-1) of the Iraqi).

As for the Egyptian Civil Law, it has expressly stated that the lessor does not guarantee the defect in the leased property if the lessee had knowledge of it at the time of contracting or had been notified of it, and this is what is stipulated in the second paragraph of Article (576) of the Egyptian Civil Law by saying (However, the lessor does not guarantee the defect if the lessee was notified of it or was aware of it at the time of contracting).

As for the French Civil Law, in Article (1721) thereof, which states (the guarantee shall be required for the lessee against all defects and deficiencies in the leased property that prevent its use, even if the lessor was not aware of them at the time of the conclusion of the lease contract).

### **The Second Requirement: The Effects of the Legal Guarantee of the Hidden Defect**

Article (758) of the Iraqi Civil Law stipulates that (1. If there is a defect in the leased property with which the guarantee is realized, the lessee may request the termination of the contract or the reduction of the rent. 2. If the lessee suffers damage from the defect, the lessor is obliged to compensate him unless it is proven that he was unaware of the existence of the defect) It is clear from the aforementioned text that in the event that the lessor's guarantee of the hidden defect in the leased property is realized, the lessee may request either specific performance or termination of the contract or reduction of the rent with compensation In all cases, if necessary, and this requirement, we have allocated three branches to it:

#### **Specific Performance**

The effect of the obligation is its implementation and the origin that the implementation is optional, this is what is required by the principle of good faith and the debtor (lessor) may refrain from implementing his obligation, in this case the creditor (tenant) resorts to the judiciary to force the debtor to perform his obligation in kind, unless the implementation in kind is not possible and not useful to the creditor, so compensation is awarded.

The principle in the implementation of obligations is to implement them in kind, as specific performance is a right of the creditor that the debtor cannot reverse if it is possible, and it is not required that it be carried out by the debtor himself, unless the agreement requires it or the nature of the transaction stipulates that the debtor himself performs the implementation, and that this implementation is subject to the principle of good faith and therefore must be carried out in accordance with the requirements of honesty and mutual trust between the parties.

#### **Termination of the Lease Contract**

That the tenant in the event of a hidden defect in the leased property may not choose to claim the repair

of the defect or on the other hand may be the expenses of this repair burdensome for the lessor in this case he is entitled to request the termination of the lease contract and this is what was stipulated by Article (758) of the Iraqi Civil Law by saying (if there is a defect in the leased with which the guarantee is achieved, the tenant may request the termination of the contract) and that the court has the power to estimate the request for rescission may answer it or only reduce the rent It may also give the lessor a period of time through which he can repair the defect if requested and the defect in the leased property that led to depriving the tenant of the use of it may not be of a degree of gravity justifies the request for annulment, here emerges the authority of the court in the assessment of the request for annulment, it has the right to approve or reject it.

### **Reduction of Rent with Compensation**

The way to reduce the rent with compensation is one of the legal guarantees granted to the lessee in the event that he reveals a hidden defect in the leased property that violates or reduces the desired use of the same eye, so he may resort to reducing the rent or compensating him for every loss of benefit that he had suffered as a result of the defect in the leased property without resorting to specific implementation or annulment, meaning that he accepts the existence of the defect in the leased property, but with the consent of the lessor to the condition of reducing the rent including Offset by the loss of benefit from the property as a result of the defect in it to compensate him for the existence of the defect appropriately and corresponds to this defect and the fact that the reduction of the rent with the request for compensation can be requested at the same time by the tenant in the event that he reveals a defect in the major, i.e. he can ask the lessor to reduce the rent of the property while compensating him at the same time for the damage caused by the defect in the leased property, The lessee shall take the initiative to inform the lessor of the defect in the leased property and shall not be lax in doing so and shall not forfeit his right to request a reduction in the rent or compensation for the defect in the property.

## **CONCLUSION**

Through our research on the subject of the impact of the hidden defect in the lease contract, we reached some results and suggestions, which are as follows:

#### **Results**

- By addressing the meaning of the hidden defect in the lease contract, we found that the Iraqi legislator did not address the definition of the defect that affects the lease contract as is the case in the sale contract.
- We have found out through our talk about the hidden defect that in order for this defect to be considered

hidden, it must be effective and hidden and that the tenant does not know it when renting the eye.

- Through the statement of the effects that result from the existence of the hidden defect in the leased property, we found that the Iraqi legislator did not address the implementation in kind as an effect of these effects in an explicit legal text, but rather due to the general rules in the implementation of commitment.

#### Proposals

- We suggest to the Iraqi legislator to develop a specific definition of the hidden defect that affects the leased property, similar to the contract of sale.
- Develop a special text on the case of specific performance as one of the effects of the hidden defect that affects the leased property.

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