SENTENCE
ORDINARY COURT CASE NUMBER 709/08

Estepona, 25th February 2010

The Highness substitute Judge of the First Instance Court number number one of Estepona and judicial district, Mrs. Maria Virtudes Molina Palma, has seen the current ordinary case number 709/08 which has been dealt by this Court following the Court Agent, Mr ……(Court Agent's name)……. having submitted the lawsuit on behalf of ……(client's name)…… assisted by the lawyer **Mr. Luis Fernando Gonzalez Ordoñez**, against the company MANILVA COSTA S.A., which was represented by the Court Agent Mrs…. (Court Agent's name) assisted by the lawyer Mrs…… (lawyer's name).

FINDINGS OF FACTS

FIRST. The plaintiff's Court Agent, representing the plaintiffs, submitted a lawsuit for Ordinary case on the 16th June 2008 against the above mentioned defendant, and this lawsuit was given leave to proceed on the 6th October 2008.

In the lawsuit, the plaintiff requests the cancellation of the purchase contract of the properties, which was signed between the plaintiff and Manilva Costa S.A. as per the article 1.124 of the Civil Code, in relation to the article 1.506 of the same Code, due to a breach of contract of the defendant, based on the following:

a) lack of delivery of the original copy of the singed contract
b) Delay in the completion of the property, which was meant to take place before December 2007
c) The club house hasn't been built
d) Changes between what had been agreed in the contract and what had been built

Therefore, it is requested that Manilva Costa S.A. is condemned to the reimbursement of the amounts paid by the plaintiffs, which are as follows:

To Mr. …. (client's name) the total amount of 96.200€
To Mr. …. (client's name) the total amount of 196.000€
To Mr. …. (client's name) the total amount of 85.100€

Plus legal interests and those interests accrued until everything has been paid, plus proceedings costs.

SECOND. The defendant, Manilva Costa was summoned and entered an appearance through the above mentioned Court Agent, and firstly submitted a motion to contest jurisdiction in favor to a similar Courts located in Sevilla, which was not accepted, following the legal proceedings, by the Court Order dated 30th October 2009, and later, replied to the lawsuit, claiming the lack of passive legal standing to be a party involved in the proceeding , as it was alleged that the defendant was

never involved in the mentioned legal act or signed any purchase contract with the plaintiffs, and as well claiming the lack of necessary joinder of defendants with regards to the company Ocean View Properties Ltd., as this last was the company which received the amount paid by the plaintiffs; this argument was not accepted at the Preliminary Hearing of the case following the article 420 of the Civil Procedure Law, with regards to the articles 1.254, 1.261, 1.262, 1.271 and 1.278 of the Civil Code, as we understand that the litigation relation is well established, since Ocean View Properties Ltd, was only a mere intermediary in the contract, as the action was based in a previously signed contract among both parties, without prejudice of the right of the plaintiffs to submit a claim against whoever they deem appropriate and on the grounds of the contractual relationships with any other parties (including Ocean View Properties Ltd)

The reply to the lawsuit finished requesting that the lawsuit is rejected condemning the plaintiffs to pay the procedure costs. The defendant also explains that they never received the amounts paid by the plaintiffs.

THIRD. The Preliminary Hearing was fixed for the 11th February 2010.

The hearing having been called to order, and in the presence of both parties, after trying that both parties reached an agreement without success, and having analyzed the exceptions above mentioned, the phase of evidences proposal started, in which both parties proposed what they deemed appropriate, and being that the appropriate was accepted , which was only the documentary part, therefore, and following the article 429.8 of the Civil Procedure Law, the case was ready to issue the sentence.

FOURTH. In the procedure of the current case, the following legal prescriptions have been observed:

LEGAL BASIS

FIRST. Of the legal actions and the applicable articles to the type of contact.

Firstly, we would like to point out the following articles of the Civil Code regarding this.

Article 1124

The right to resolve the obligation is considered as implied in reciprocal ones, in the cases in which one of the obligated persons does not comply with his duties.

The injured party may choose between requesting the compliance with the obligation or its resolution, with a compensation for the damages and the payment of interests in both cases. He may also request the solution, even after having asked fro compliance, when the latter may be impossible.

The court shall decree the requested resolution, unless there are justified evidences which authorize to fix a term.

This is understand without prejudice to the rights of third acquirers, in accordance with arts. 1295 and 1298 and with the provisions of the Mortgage Law.

Article 1256

The validity and fulfillment of contacts cannot be left to the will of one of the parties involved.

Article 1445

By the contract of purchase and sale, one of the contracting parties binds himself to deliver a specific thing and the other party binds himself to pay a certain price for it, either in cash or other means of payment

As we are dealing with a case now before a contract which clauses couldn't been negotiated by the purchaser, the article 10 bis of the **General Law 26/1984, of 19th July, to protect the consumers and users,** as well as the First Additional Disposition, in the written ROYAL DECREE 1/2007, of 16th November, that passes the General Law to protect the consumers and uses and other laws, Official State Magazine, number 287, of 30th November 2007, which incorporates the previous applicable laws in this area and which adapts it to the EU guidelines. According to the Second final disposition, the royal decree and the redraft law which states that it will come into for the day after it has been published on the Official State Magazine, this is, on the 31st November 2007.

Article 82. *Concept of abusive clause*

1. *Abusive clauses will be all those which have not been individually negotiated and those practices which have not been expressly agreed and, against the bona fide, which to the detriment of the consumer and user, cause a significant imbalance between the rights and obligations of the two parties involved in the contract.*
2. *The fact that some elements of a clause or that an isolated clause has been negotiated individually, will not exclude the application of the laws regarding abusive clauses to the rest of the contract.*
   That developer, who affirms that a specific clause has been negotiated individually, will assume the burden of evidence.
3. *The abusive character of a clause will appreciated taking into account the nature of the goods or services established in the contract, and taking into account all the circumstances involved when the contract was signed, and the rest of the clauses of the contract or of any other which it may be linked at.*
4. *Regardless what explained above, in any case will be considered as abusive clauses according to the articles 85 to 90, both inclusive, those clauses which:*
   a) *Link the contract to the will of the developer*
   b) *Restrict the rights of the consumers and users*
   c) *Determine the lack of reciprocity of the contract*
   d) *Impose to the consumer or user disproportionate guarantees or impose improperly the burden of evidence*
   e) *Are disproportionate with regards to the execution to the contract*
   f) *Infringe the rules on competence and applicable law*

Article 85. *Abusive clauses for linking the contract to the will of the developer*

The clauses which link any aspect of the contract to the will of the developer will be considered as abusive, and in any case, the followings:

1. *Those clauses which allow the developer which signs the contract with the consumer and user, an excessively long or insufficient term to accept or refuse the offer or to satisfy the agreed services.*

2. *The clauses which foreseen the automatic extension of the contract of a determined contract should the consumer or user not express his opposition to it, fixing a expiry date which does not allow the consumer or user to express his will of not extending it.*
3. *The clauses which reserve the developer the faculty of unilateral interpretation or alteration of the contract, unless, in the last case, concur valid reasons established in the contract.*
5. *The clauses which state that the consumer and user is bound to the contract unconditionally even though the developer does not fulfill with his obligations*
7. *The clauses which mean the subordination to a condition whose execution is linked to the will of the developer, whereas the consumer and user have been requested to a firm commitment.*
8. *The clauses which establish a completion date merely indicative linked to the will of the developer*
9. *The clauses which state the exclusion or limitation of the obligation of the developer to respect the agreements or commitments acquired by his representatives or which subordinate his commitments to the fulfillment of some formalities*
11. *The clauses which mean the granting to the developer of the right to determine whether the good or service complies what agreed in the contract.*

Article 86. *Abusive clauses for limiting the basic rights of consumers and users*
In any case, abusive clauses will be all those which limit or deprive the rights of users and consumers, which have been acknowledge by general law, and specially, those stipulations which state as follows:

1. *The exclusion or limitation in a inappropriate way the legal rights of the consumer and user, for partial or total breach of contract or faulty fulfillment of the obligations of the developer.*
   In particular, those clauses which modify, in detriment of the consumer and user, the legal rules regarding the approval of the contract of goods and services, or establish limits to the right of the consumer and user to seek compensation for damages.

5. *The limitation or exclusion of the faculty of the consumer and user to cancel the contract for the developer's breach of contract.*
6. *The imposition of renounce to receive a document which supports the operation*
7. *The imposition of any other renounce or limitation to the rights of the consumers and users*

Article 87. *Abusive clauses for lack of reciprocity*
Those clauses which establish the lack of reciprocity in the contract, against the bona fide, in detriment of the consumer and user will be considered abusive, and in particular the following:

1. *The imposition of obligations to the consumer and user to fulfill his obligations and considerations, even though the developer has not fulfill his*
2. *The retention of amounts paid by the consumer and user for renounce, without taking into consideration the compensation for an equivalent amount, should the developer be the one who renounces.*
3. *The authorization to the developer to cancel the contract at his discretion when the consumer or user does not have the same faculty*
4. *The possibility that the developer retains the amounts paid when it is himself who cancels the contract.*

Article 89. *Abusive clauses which affect to the execution of the contract*
In any case, the following will be considered as abusive clauses:

1. *The declaration of reception or approval on fictitious facts, and the declaration of adhesion of the consumer and user to clauses which they have not been made aware of before signing the contract.*
2. *The transmission to the consumer or user of the economic consequences of administrative or formalities errors which are not imputable to them.*

Among others, we can mentioned High Court of Barcelona, section 16, Sentence 15th October 2003, number 669/2002, rec .453/2002, President Seguir Puntas, Jordi; High Court of Santa Cruz, section 1, sentence 7th October 2002, number 453/2002, rec. 222/2002, President Blanco Fernández del Viso, Modesto; High Court, Sentence 27th June 2000, number C-240/1998 C -241-1998 C 242/1998 C-244/1998, as a string of rulings regarding the interpretation of the guideline 93/13/CEE of the Counsel, with regards to the abusive clauses in the contracts signed with consumers, establishing that the national Judge can appreciate by his own authority the abusive character of a clause of the contract which has been signed when he examines the admissibility of a lawsuit submitted to the national courts.

SECOND. The relation between Manilva Costa S.A. and Ocean View Properties Ltd.

At the dossier assembled as the result of the proceedings, we can find as document 1 submitted by the defendant Manilva Costa S.A. the contract with Ocean View Properties Ltd, which is name itself as Contract of Management of sale in Exclusive, where it is stated that Manilva Costa S.A. dedicates itself to develop properties and Ocean View Properties Ltd to manage the sale of the properties mentioned in the contract, this is in Sector UO-AL-U-r, residential complex "Jardines de Manilva". Specifically, Ocean View Properties commits to commercialize, proceed with the sales management and act as agent in exclusive of those properties, it is mentioned (3) that the agent will subscribe the reservation contracts with the prospective purchasers, and also (4) the amounts that Ocean View Properties must request for each type of apartment, and that Manilva Costa S.A. will pay a commission to Ocean View Properties Ltd after the latter issues an invoice, it is also established a guarantee (5) that Ocean View Properties has to pay to Manilva Costa S.A. as a deposit/bond, for a total amount of 7.731.821€, this is 32.215,92e per each property; guarantee, which Manilva Costa S.A., through his legal representative, acknowledges to have received, and which as agreed (6) will be refunded to Ocean View Properties once the purchase contract of each property has been signed. Manilva Costa S.A. authorizes the agent (7) to advertise and market the properties by all the means and channels, with the only exception to what related to materials, measures, qualities, installations and other conditions of the properties, which will have be to previously authorized by Manilva Costa S.A., who also holds the intellectual property of the marketing material of Ocean View Properties. The marketing material will have to be returned to the developer once the agency contract is finished.

In the stipulation 11, it is expressly mentioned that the Developer *"will sign the title deeds for the properties""…with the constructions and buildings duly registered so that the purchaser can register the title deed at the Land Registry Office",* releasing (13) the Agent of "*any responsibility derived from the lack of work or building licenses, and in general, of any other responsibility with the purchasers or third parties which are not attributable to the Agent"* as well as (14) *"any responsibility, of any nature, derived as a consequence of the non fulfillment of the obligations of any document signed between the purchaser and the Developer"*

The properties were only advertised by Ocean View Properties and/or the person authorized by it, according to the model of private purchase contract which is attached as Annex 7.

With regards to signing the contracts, two alternative ways are proposed (17), and Ocean View Properties Ltd can choose to do the following:
1) collect from the office of Manilva Costa S.A. two copies already filled in and signed by Manilva Costa S.A., ask the purchaser to sign them, give one copy to the purchaser and forward the other one to the developer and
2) fill in the two copies of the contract, ask the purchaser to sign both copies, forward the contracts to the developer so that they can sign them and return one of the to the purchaser.

In the document number 2 of the reply of Manilva Costa S.A. to the lawsuit, it is mentioned that the length of the Agency Contract will be from the 1st September 2005 until the granting of the First Occupation License, therefore, as no resolution of the contract has been provided, the contract is still valid, being that the contract with the plaintiffs was signed during this period. In this modification of the agency contract, the only thing that has been modified is the guarantee paid by Ocean View Properties (that in both cases is mentioned as S.L.), as well as it is established, as a general criteria (as it can't be of any other way), that the title deeds will be signed once the First Occupation License has been granted, and Ocean View Properties will keep the properties that have not been sold at the date of the granting of the above mentioned license.

an **agency contract**, according to the terms contained in the article 1 of the Law 12/1992, of 27th May regarding Agency contract, is defined as that contract in which a legal entity, named Agent, is bound to another one in a continuous or stable way in exchange of a remuneration, to promote market acts or operations as freelance, or promote and conclude them as freelance and in the name of others, as an independent intermediary, without assuming, unless previously agreed, the risk or result of those operations, being the fact of indecency and freelance what differences the representative of the business and the commercial business as per the sentence of the High Court of Barcelona of 30th January 1995.

This, apart from reinforcing the dismiss of the lack of necessary joinder of defendants which occurred at the Preliminary hearing, as it was evident that the risk and result of the operations carried out by Ocean View Properties is responsibility only of the developer Manilva Costa S.A. in respect of the marketing and sale of the properties, among which are the properties of the plaintiffs, being Ocean View Properties authorized to receive the money from the purchases. Therefore, we must dismiss the lack of necessary joinder of defendants of Manilva Costa S.A. as well as the allegation that the latter is not committed by the

purchasers as the defendant hasn't signed the contract, as according to the stipulation 17 of the mentioned contract, it is valid the chosen procedure (the purchaser signs first, but Manilva Costa S.A. could have been the first in signing it), it can be understood from this stipulation that Manilva Costa S.A. subscribes with its consent (through the Agency contract) the contractual offer by Ocean View Properties, and therefore must assume the business operations (consent and reception of monies paid) made by its Agent, and as well has been proven that this was done later, the purchasers have not been made aware, neither has been requested that the contract is considered null and void, quite the contrary, Manilva Costa S.A. , through its staff, has submitted a copy of the contract signed by both parties, without exposing that the contract has any sort of vices (please see the document submitted to the courts trough the write of 20th November 2009), to sum up, Manilva Costa S.A. contacted the purchasers to sign the title deeds, requested them to pay the outstanding amounts (not the amounts already paid to Ocean View Properties) when signing the title deeds, this is, requested them to fulfill with that agreed in the contract (page 9 of the reply).

Furthermore, there are evidences that the defendant ratified the contracts, among others: document 17 of the lawsuit, signed by Vera Mates in April 2008, confirming the purchase contracts, the amounts paid on account and, definitely, giving full validity to what Ocean View Properties had made; document submitted at the Preliminary hearing which consists of an email dated 23th December 2008,in which the defendant makes a breakdown of the amounts paid against the apartment 11, Bajo F, the outstanding amount and requesting that the title deeds are signed.

With regards to the model of contract used, it is not enough to allege that the contract doesn't fit to the model agreed between the developer and the Agent, this must be proven as a per the article 217 of the Civil Procedure Rule, and this hasn't been done by the defendant.

From the above mentioned, we deduce that **the purchase contract of an apartment signed by the defendant is valid**, has Manilva Costa already express its consent firstly through the agent, and secondly on his own name, as the amounts paid by the plaintiffs have been fully acknowledge through the documents submitted by them, we have to confirm the full binding and contractual capacity of Manilva Costa S.A.

All the above, must be understood without prejudice of the right of Manilva Costa S.A. to claim to Ocean View Properties what it deems to be in its interest in virtue of the agency contract which bounds only both parties, as there are no records of a criminal complaint regarding this, in spite of the comments of a possible fraud. We would like to add, only to reply some of the allegations made, that Manilva Costa S.A. has received before all the amounts that the purchasers paid to Ocean Vie Properties, in full or in part, regardless whether Manilva Costa S.A. considers them as bonds, amounts paid on account or any other.

SECOND. The plaintiffs have fulfilled with the obligations mentioned in the contract, even though Manilva Costa hasn't refused that the amounts have been paid, even though there were paid to Oven View Properties, we now must consider whether we should or not **cancel the contract for the breach of contract**

exposed by the plaintiffs, which will be analyzed following the order in which they were alleged:

a) lack of delivery of the original copy of the singed contract. This has been made clear as what submitted to the proceedings is not the original one

b) delay in the completion of the property, which was meant to take place after the month of December 2007. This is what agreed in the clause number 4 of the contract. Manilva Costa S.A. explains that the term for completion was 33 months counting from the 15th October 2005, this is July 2008, however, the First Occupation License has not been granted yet for the above mentioned property (among other reasons for not having paid the bound of 1.000.000€ requested by the Town Hall), there is only a certificate of end of works dated 9th September 2008.

The defendant can't claim now that the contract has been fulfilled as according to the clause 4th of the contract, the completion of the properties will take place once the First Occupation License has been granted.

In this type of legal cases, like in this one, it is normally alleged (by the party responsible to complete the property on due time, as established in the article 5.5 of the Royal Decree 515/1998), that the property was ready before the First Occupation License had been granted, and that the date of when the works were finished is the one of the Certificate of end works.

Regarding the above, is should be noted that firstly, the Certificate of End of Works is not expressly mentioned in the contract as the date of the completion of the property, as in fact it isn't, it can't be and this is in conflict to the current law, and even though, this is considered as null as the acts in conflict with the current law will be considered as null and void, except in those cases were a different effect is established for the cases of infringement.

The article 178 of the Royal Decree 1346/1976, of 9th April, in which it is approved the amended text of the Law on Residential Land Use Plan, says that:

"The acts of …. the first occupation of the buildings will be subject to a previous license, for the purposes of this Law…"

3. the procedure of granting of licenses will be adjusted to what established at the Local Rules. In no cases will be granted by administrative silence…"

And the article 179 adds that

"1. The Town Hall will be ones which will have the authority to grant the licenses, with the exceptions covered by the current Law"

From the above mentioned, it is clear that the First Occupation License is a must to be able to live in a property, and therefore, from the date it as been granted, and not before, the property corresponds to what mentioned in the project and to the purpose why it was built, and therefore the property can be inhabited without any risks, and the above cannot be certified by an architect. Therefore, unless the property has the First Occupation License, the purchaser cannot be compelled to occupy it or sign the title deeds of it, as already explained in many sentences, like the one issued by the Section 5 of the High Court of Malaga of 29 April 2005.

Furthermore, the above is also mentioned in the sentences of the Supreme Court of 30th November 1984, 30th September 1987 and 11th December 1995 as well as the one of the High Court of Malaga of 7th October 2009, where on the 5th point of the Legal basis it is said that: *"As already said by the Supreme Court on the sentence of the 30th November 1984, one thing is the end of the works, which is credited by issue of the corresponding certificate*

and a different thing is the First Occupation License, which certifies the habitability and security of the property and allows to apply for the water and electricity supplies…"

On the other side, and as we have already mentioned, the article 89.2 of the General Law to protect the consumers and users, it is considered abusive the transmission to the consumer and user of the consequences of administrative mistakes which cannot be imputable to him, and therefore, the delay of the Administration of granting the First Occupation License, is not an excuse for the delay, as this delay is in any case, foreseeable, or at least is common in the building business, all this, without prejudice of the right of the claimant to claim the Town Hall for the delay in granting the First Occupation License, if it deems appropriate, as in any case the Town Hall signed any contract with the plaintiffs.

Therefore, we are now dealing with a delay for a breach of contract caused only and exclusively by the seller party, which determines itself a restorative obligation due to the damage suffered by the purchaser, which consists of a frustration in its economy, and also on his material or moral interests. Otherwise, as per the Sentence of the High Court of Malaga, Section 5, of 28 June 2007, "*it will mean to say that the contract will be in a legal loophole, specifically in the infringements of the parties"* which will have then no consequences, as the purpose of the defendant is to have the purchaser waiting indefinitely, and this is contrary to the binding forces and the consequences established in the articles 1.258 and following of the Civil Code *"as it is not fair that the situations derived from the decision of one of the parties are unpunished and without any compensation, as that is an injury itself"*. To conclude, the contrary would be to allow and protect the mala fide and would protect the enrichment of the stronger party which imposes its criteria on its own benefit, in this case the maximum term for completion.

c) <u>The club house has not been built</u>

Together with the properties, it was offered in the contract (situation plan) and it was marketed installations such as high quality restaurants, shops, club house, tennis courts, Turkish bath and sauna, fully equipped gym and interior pool with hydromassage Jacuzzi, bar with nursery service and outside children's play area.

From the documents submitted by the plaintiffs, it is perfectly documented that these installations were advertised as a basic element to buy the properties, as the complex is in a remote and isolated area in the middle of the country, it is logical to think that there is a clear need to have all these offered services handy. The works for the above mentioned club house haven't even started, this is a reason why the Manilva Town Hall hasn't granted the license, and this court is aware of this for sentences issued for similar cases for purchasers in the same development, as well as in the Ordinary Proceedings 968/08 and 781/08. We don't know under which basis the developer expected to receive the license, as the Town Hall doesn't have to grant any license on its plots of land, therefore it has been offered something which the developer had not capacity to decide on, as it was only a future hypothesis, which was sold as communal equipment of the properties. This has been documented by the documents submitted at the Preliminary Hearing (email dated 23th December 2008 in which Manilva Costa S.A. addresses to the clients)

d) Changes between what had been agreed in the contract and what had been built

With the documentation submitted at the Preliminary Hearing (email dated 23th December 2008 in which Manilva Costa S.A. addresses to the clients), it has been documented that there is a variation at the location of the pool and the community garden areas, as well has the execution of the works in the different buildings has been modified, by building a bathroom and a toilet instead of two bathrooms as agreed, there is a reduction of square meters at the terraces and changing the nomenclature of the plot, which can provoke a double sale. All the above was made without the consent of the purchasers. This fact hasn't been refused by the defendant on the reply to the lawsuit; however it wasn't expressly alleged in the lawsuit.

THIRD. From the above mentioned, we have to conclude with the issue of a sentence in favour of the plaintiff, as per the articles mentioned, concluding that the contractual interpretation made by the defendant, and in which the defendant explains that it is not bound to complete the property on a fixed term, it would imply to leave to the will of the one parties the main obligation, and therefore this will result in an abusive clause, as the creditor cannot be force to wait indefinitely, as it seems to be the aim of the defendant. The seller party hasn't fulfilled with the agreed requirements as there has been a huge delay in completion and also intends to complete the properties in a different state of what agreed, therefore breaching the contract. To be free of its obligations, the developer should have proven that, with regards to the delay, there was a force majeure, which as per the sentence of 14th April of 200, is the existence of an obstacle that, is totally unpredictable or unavoidable, however it will not be considered the suspension of works derived from the developer breaching the rules as the works are not adjusted to the project based on which the First Occupation License was granted.

In this sense, it is enlightening the sentence of the Supreme Court of 3rd February 2006, "in the opposite sense" which says as follows:

"As per the sentence of 9th March 2005: the jurisdictional doctrine has suffered a progressive evolutionary change in the sense of abandoning the requirement of the deliberately rebel will (…) as it is enough that the aim of the economic relation is frustrated, when due to causes attributable to the purchasers which are bound, they don't pay the agreed price for the transmission. This doctrine is up to date to the present day for the situations of breach of contract, as when the seller fulfill his obligations and the purchaser does not fulfill his, there is an imbalance of the contractual relationship due to a voluntary nonpayment.

There are sentences in the same sense as per the sentences of the Supreme Court, among others, of 4th October 1983, 24th January 2001 and 4th March 1986 (decade in which takes place the change of criteria) and of 5th June 1989, 10th October 1993 and 22th June 1995; as well as in other lower courts: High court of Alicante of 28th December 1993 or High Court of Baleares of 16th January 2003, in the sense that to cancel the contract it is not required now a fraudulent attitude of the person who Doesn't fulfill his obligations, but it is enough that the aim of the contract and the legitimate aspirations of the other party are frustrated, that there is an objective and unequivocal breach of contract.

The above mentioned is also shared by the doctrine. Among others, Diez-Picazo maintains that it is unfair to soften what mentioned in the article 1.091 of the Civil Code, whereas the purchaser is imposed the threaten of the cancellation of the contract, should he not pay in advance the agreed price.

In light of the aforementioned, the lawsuit must be considered in its entirety, ordering that Manilva Costa S.A. reimburses the amounts paid by each of the plaintiffs, whose payment to the agent hasn't been refused and acknowledged by subsequent facts.

To Mr…… & Mrs …. The total amount of 96.200€
To Mr…… & Mrs …. The total amount of 196.000€
To Mr…… & Mrs …. The total amount of 85.100€

FOURTH. In the reciprocal obligations, the **delay on payment** emerges when the other party involved in the contract fulfill with his obligations, without the need of a requirement, provoking a compensation for the rental costs that the plaintiffs might have incurred in, (Sentence of High Court of Baleares, section 3, of 31th May 2005, number 256/2006, proceedings 245/2005, President Rigo Roselló, Rosa) although the delay in completion generates itself a minimum damage which has to be compensated.

The sentence of the High Court of Cordoba of 15th October 2004, proceeding number 210/04, resolved, in an identical case as ours, the merits of the compensation for damages, regardless the existence or non-existence of a penal clause:

"But this doesn't mean that when there is no penal clause the debtor can't file a claim, as done in this case, under the general rule content in the article 1.101 of the Civil Code, which specifically deals with the "default on payment" as a justification to pay the compensation for damages; the only requirement is that the above mentioned damages are proven and derived from the breach of contract, however, it is possible to establish them by presumption if the link is logic (SS of 22th July 1995 and 13th July 1989) being the legal doctrine that the obligation to compensate emerges not only from the basic contractual clauses but as well of any other alteration to what previously agreed (sentence 17th July 1989).

(…)The first of those questions is that the plaintiffs (as duly proven) were paying amounts on account with regards to the schedule agreed and with the agreed date of completion in mind, amounts which the developer received making therefore, profit of them, in detriment of the economy of whoever paid them, therefore as there was a delay in completion, it is clear that the developer should pay the interests of those amounts which produced benefits in detriment of the purchasers who were unable to take possession of those goods. In the same line, several resolutions of this High Court have been issued."

In light of the aforementioned, we have to declare the cancellation of the contract, this resolution will be considered as having been made as of today. However, the legal **interests** (a yearly interest equal to the legal interest of the money) will be accrued since the date of the lawsuit, increased in two points since the date of this sentence and until the full payment as per the article 576 of the Civil Procedure Law.

FIFTH. The defendants will be condemned to pay joint and severally the costs of the procedure as per the article 394 of the Civil Procedure Law.

Based upon the foregoing, and in conformity with the above mentioned principles of law, as well as relevant others of general applicability

ADJUDGED

That after having dismissing the lack of necessary joinder of defendants which introduces the lawsuit, I have to consider and I CONSIDER ENTIRELY the lawsuit

submitted b the Court Agent Mr. Julio Cabello Menendez on behalf of MR……, MRS…., MR…..., MRS…..MRS… and MRS….. assisted by the lawyer **Mr. Luis Fernando González Ordoñez** against the company MANILVA COSTA S.A. represented by the court Agent Mrs. Rocío Barbadillo Gálvez assisted by the lawyer Mrs. Inmauclada Santa Cruz Álvarez, and therefore **I DECLARE AS CANCEL THE CONTRACTS OF PURCHASE AGREEMENTS** signed by the defendant with the plaintiffs (with Mr… and Mrs… regarding the property in block 2, Penthouse E; with Mr…. and Mrs…. regarding the property in block 9, Penthouses E and F; and with Mr… and Mrs… regarding the property in block 4, ground floor C) attached to the lawsuit as documents number 1 to 4, for a breach of contract of the seller and CONDEMN the defendant to reimburse to the plaintiffs the following amounts:

To Mr…. and Mrs…. the total amount of NINETY SIX THOUSAND AND TWO HUNDRED EUROS (96.200€)

To Mr…. and Mrs…. the total amount of ONE HUNDRE AND NINETY SIX THOUSAND EUROS (196.000€)

To Mr… and Mrs… the total amount of EIGHTY FIVE THOUSAND AND ONE HUNDRED THOUSAND EUROS (85.100€)

Plus interests mentioned in the fourth section of the legal basis of this sentences, and the costs of this legal proceedings.