

RULING

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 Mr..... (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) The original copy of the signed contract was not handed over
- 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.

FORTH. 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 for 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 understood 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 contracts 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 be 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 users 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 force 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 be 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 of 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 mention 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 to be 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.

As **agency contract** we must understand, according to the article 1 of the Law 12/1997, of 27th May, regarding agency contracts, which defines it as, any contract in which a legal person,

(FOR THE PURPOSE OF SIMPLIFYING WE HAVE JUMPED DIRECTLY TO POINT C) of NUMBER 2 of the JURIDICAL REASONINGS, which is most relevant for the Corvera Golf and Country Club Case, although a fully translated ruling will soon be available)

c) Inexistence of leisure and social club offered

Together with the property it was offered and was object of the publicity and marketing of the development installations such as high quality restaurants, shops, a health and leisure club, tennis courts, Turkish baths, sauna, Jacuzzi, fully equipped gymnasium, heated pool and kindergarten service.

From the documents submitted by the plaintiff it has been perfectly proved that the publicizing of these **facilities was a fundamental element in the consent for the purchase for the development was located in a relatively isolated development and distant from similar facilities and therefore it is logical to infer that there is a clear need to have all of the facilities offered.** That the mentioned leisure club has not even started to be built because the Town Hall in Manilva has not given the license is known given that identical rulings (968/08 and 781/08) have been reached by this Tribunal on cases affecting buyers in this urbanization. We do not know the basis on which the developer was hoping to receive the licenses as the administrative concession over this land was not an obligation of the town hall and therefore what the developer was offering was a future hypothesis, which was nonetheless sold as part of the communal elements of the properties.

(FOR THE PURPOSE OF SYMPLIFYING WE HAVE JUMPED DIRECTLY TO THE JUDGEMENT OR RULING although a fully translated copy will soon be available).

RULING

That I reject the procedural exception opposed by the defendant of lack of capacity to be part of this Court case and lack of mandatory defendants' joinder and **I judge in favour of claimants XX,XX,XX,XX, represented by Luis Fernando González Ordoñez against Manilva Costa S.A.,** represented by Inmaculada Santa Cruz Alvarez and I therefore declare **I accept CONTRACTUAL RESCISSION of the purchase sale contracts** signed between the clients Xx Xx Xx and impose on the defendant Manilva Costa the obligation to pay the claimants the following sums, plus legal interest from the time date of filing the complaint:

- a. Xx and Xx, **NINETY SIX THOUSAND TWO HUNDRED EUROS (96.200 Euros)**
- b. Xx and Xx, **ONE HUNDRED AND NINETY SIX THOUSAND EUROS (196.000 Euros)**
- c. Xx and Xx, **EIGHTY FIVE THOUSAND ONE HUNDRED EUROS (85.100 Euros)**